SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

MELISSA G. CISCO & SHANNON CISCO-MIDGETTE,

Plaintiffs,

-against-

VERIZON NEW YORK INC.,
and VERIZON COMMUNICATIONS, INC.,

Defendants.

DECISION / ORDER

Index No. 510538/2019
Motion Seq. No. 4 & 5

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment and plaintiffs' cross motion for leave to amend the complaint

Papers	NYSCEF Doc.
Notice of Motion, Affirmations and Exhibits Annexed.....	85-96
Notice of Cross-Motion, Affirmations and Exhibits Annexed.....	99-138
Reply Affirmations.....	139-144

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Plaintiffs are the co-owners of 493 Madison Street, Brooklyn, NY. The property is a multiple dwelling. They have been co-owners since 2003. In 1998, a Certificate of Occupancy was issued by the NYC Department of Buildings which states that the premises has four apartments. The complaint was filed on May 11, 2019. The Note of Issue is due to be filed in a few weeks.

The gravamen of the complaint is that on or about March 7, 2015, defendants replaced a telephone pole in the backyard of plaintiffs' property without permission. Plaintiff Melissa Cisco avers in her affidavit in opposition to defendants' motion that "Verizon does not possess and never obtained an Easement, Right-of-Way or License to use the back-

yard-pole located at 493 Madison Street to provide Verizon service to Verizon customers in the vicinity of 493 Madison Street" [Doc 100 ¶13]. The complaint was prepared as a *pro se* complaint, although co-plaintiff Melissa Cisco is an attorney. It asserts fifteen causes of action, for, inter alia, a violation of GBL §349, for inverse condemnation, fraud, unjust enrichment, for a permanent injunction, and for continuing trespass. Plaintiffs seek monetary damages as well as punitive damages.

In motion sequence #4, defendants seek summary judgment dismissing the complaint in its entirety. With regard to defendant Verizon Communications, Inc., counsel provides an affidavit from an attorney familiar with the structure of the company, who avers that "Verizon Communications Inc. is a holding company which does not offer goods or services to the public and does not own or lease real property. Verizon Communications Inc. does not enter into operating contracts. . . . Verizon Communications Inc. is a parent holding company to a number of direct and indirect subsidiaries, including Verizon New York Inc., all of which are separate legal entities. Verizon Communications Inc. does not perform installation, repairs, or maintenance of any utility poles, or any other telecommunications facilities, in the State of New York. As a holding company, Verizon Communications Inc. does not own, operate, or maintain any type of facilities, poles, telephone equipment, or telephone service in the State of New York and did not do so in 2015" [Doc 95]. Counsel provides copies of requests for plaintiffs to discontinue the action as against this entity, which plaintiffs refused to agree to. The opposition provided by plaintiffs [Doc 100] does not address this branch of the motion. Accordingly, this branch of defendants' motion is granted without opposition, and the action is dismissed as against Verizon Communications Inc.

With regard to the claims asserted against Verizon New York Inc., defendants' counsel avers that "Verizon did not unlawfully take or trespass upon plaintiff's property, and (all of the plaintiffs' other claims) . . . are time barred by the statute of limitations" [Doc 86 ¶2]. Counsel summarizes the deposition testimony of Verizon's witness in his affirmation. He avers that the testimony was that the pole had been initially installed in 1936. It was damaged during Superstorm Sandy. Plaintiffs called Verizon and asked them to fix the pole. Plaintiff Melissa Cisco testified that she did call Verizon to repair the pole [Doc 89 Page 55]. Defendants' counsel avers that the pole was replaced with a new one in March of 2015, with plaintiffs' permission and in plaintiffs' presence. Photos are provided at Doc 91, which indicate at least five Verizon workers with hardhats were working on this task. As it is a fenced backyard, someone had to have granted them access to the backyard. Plaintiff Melissa Cisco acknowledges in her testimony that she signed the consent form, but claims she did not read it before signing it [Doc 89 Page 65]. She is an attorney who is admitted to practice in the State of New York. She should have read the document. It [Doc 88 Page 9] states:

> "Received from Verizon . . . in consideration of which the undersigned hereby grants unto said Company, its successors and assigns, the permanent right, privilege and authority to construct, reconstruct, relocate, replace, operate, repair, maintain and at its pleasure remove from the following facilities: [space for writing, which says in handwriting "replaced cracked pole with cable and terminal thereon in rear yard"] upon the property which the undersigned owns or in which the undersigned has an interest situated [handwritten 493 Madison Street"] in the borough of Brooklyn… . It is dated 3/7/15 and signed by Melissa Cisco.

In opposition to the motion and in support of her cross motion (Doc 100], her affidavit does not address the statute of limitations or the timeliness of her action. Therefore, the court must determine whether the defendants make a prima facie case for summary

judgment dismissing the complaint, based on, *inter alia,* the statute of limitations. "To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*Jacobson Dev. Group, LLC v Yews, Inc.*, 174 AD3d 868, 869 [2d Dept 2019]).

The statute of limitations for violations of GBL §349 and the remainder of the claims asserted other than fraud, to the extent they constitute actionable causes of action, is three years. Thus, as the pole was installed in March of 2015, and this action was commenced in May of 2019, all of the plaintiffs' claims other than fraud are time barred. The statute of limitations for violations of GBL §349 is also three years. See *Fownes Bros & Co v JP Morgan Chase*, 92 AD3d 582 [1st Dept 2012].

Unjust enrichment lies as a quasi-contract claim and "contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. Unjust enrichment claims are rooted in the equitable principle that a person shall not be allowed to enrich themselves unjustly at the expense of another, and the essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. To recover under a theory of unjust enrichment, a litigant must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Columbia Mem. Hosp. v Hinds*, 38 NY3d 253, 266 [2022]). A three-year statute of limitations governs causes of action alleging unjust enrichment when the plaintiff is seeking monetary relief (*Siegler v Lippe*, 189 AD3d 903, 903 [2d Dept 2020]). Thus, this claim is also barred by the statute

of limitations.

The trespass cause of action must also be dismissed. The statute of limitations applicable to this case is three years, per CPLR 214 (4), and it began to run from the date that the telephone pole was installed. Plaintiffs' argument that the "continuing wrong" doctrine applies is inapposite. Here, the defendant did not do anything that can be construed to be a "continuing" tort resulting in successive causes of action. To prevail on a claim for trespass, a plaintiff must establish the "intentional entry onto the property of another without justification or permission" (*Schwartz v Hotel Carlyle Owners Corp.*, 132 AD3d 541, 542, 20 NYS3d 341 [1st Dept 2015]; *Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 855, 956 NYS2d 102 [2d Dept 2012]), or "a refusal to leave after permission has been granted but thereafter withdrawn." (*Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d at 855.) As plaintiff called Verizon and asked them to come and fix the broken telephone pole, then signed a consent form which specifically authorized them to replace the pole with a new one, there was no trespass.

Plaintiffs also claim that defendant's conduct constitutes an "inverse condemnation" and claim that defendant invaded plaintiffs' exclusive possession of their real property by locating on their land a telecommunications pole that serves other premises in addition to plaintiffs' premises, intentionally, and without legal justification or plaintiffs' permission. Plaintiff acknowledges, however, that she signed the form permitting the work, and that she let the workers in to remove the damaged pole and replace it with another pole. She claims, however, that the form was "filled in" after she signed it. Defendant claims plaintiffs granted them permission to install the pole, which constitutes a license. Counsel for defendant avers [Doc 86 Page 6] that "a utility pole had already existed in plaintiffs' rear

yard since 1936, permitting all parties to maintain status quo, and plaintiffs consented to replacing the damaged pole. Plaintiffs gave their consent for Verizon to replace the damaged pole in their backyard by a) contacting Verizon to request repair; b) signing a written right of way permitting Verizon to replace the cracked pole; and c) observing and acquiescing to the repair while the repair was taking place. The right of way granted Verizon license to construct, reconstruct, relocate, replace, operate, repair and maintain the cracked pole, cable and terminal in plaintiffs' rear yard. Plaintiffs never revoked Verizon's license to maintain the pole in their rear yard at any point in time prior to filing the complaint. Due to receiving a license from plaintiffs to maintain its pole in their rear yard, Verizon did not need to exercise its statutory right to take plaintiffs' property under Transportation Corporations Law." Counsel claims that defendant's status as a licensee prevents plaintiffs from maintaining a claim for trespass, as plaintiffs granted defendant a license to perform the acts complained of (*See Leavitt Enter. Inc. v Two Fulton Sq. LLC,* 181 AD3d 662 [2d Dept 2020]).

Finally, the fraud cause of action must be dismissed, to the extent it is actually asserted as an independent cause of action, as it is not properly pled in the complaint or the proposed amended complaint. While the statute of limitations for fraud is six years [CPLR 213(8)], plaintiffs do not set forth a cause of action for fraud. "To make out a cause of action for fraud, . . . a party must allege representation of a material existing fact, falsity, scienter, deception and injury." *Megaris Furs v Gimbel Bros*., 172 AD2d 209, 209, 568 N.Y.S.2d 581 (1st Dept 1991) (citation and internal quotation marks omitted). Moreover, "each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that

the circumstances constituting the wrong shall be stated in detail." *Id*. at 209-10. Here, plaintiff fails to state that any false and material allegations were made to her or by whom. Plaintiff Melissa Cisco avers that she was given a form to sign, which she signed but did not read, and that "by virtue of having the Plaintiff Melissa G. Cisco sign documents in blank and representing them to be mere Work Orders, Verizon engaged in Fraud" and "this Fraud caused the Plaintiffs damage" [Doc 1 ¶49]. This is insufficient to state a cause of action for fraud. The fraud cause of action in plaintiffs' complaint is not pled with the requisite specificity. Nor are there sufficient facts alleged in the complaint which might be able to be replead to state a fraud cause of action, and so the court declines to grant plaintiffs leave to replead the fraud cause of action.

In motion sequence #5, plaintiffs seek leave to amend their complaint to include a claim that Melissa Cisco did not sign the second document which Verizon claims she signed, which is dated a month later and relates to FIOS installation, and to further elaborate that Verizon replaced the pole without their consent. A proposed amended complaint is annexed to the motion [Doc 137]. It is not red-lined to highlight the proposed changes as is required by the CPLR. The events complained of all took place in 2015. Thus, to the extent the allegations are modified, they are still time-barred. All of the claims therein, to the extent the proposed amended complaint modifies the allegations in the complaint, have a three year statute of limitations other than the fraud claim. The fraud cause of action, which has a six-year statute of limitations, is not pled with sufficient specificity, and the facts do not provide the elements required for such a cause of action. Claiming "trickery" by a utility company is not sufficient to make out a claim of fraud. There must be a material misrepresentation by the defendant, which the plaintiff reasonably and

justifiably relied upon to her detriment. Here, there is no claim of a misrepresentation, nor of any detriment. Plaintiff is apparently of the opinion that Verizon needed to pay her a fee to install the equipment on the pole to the extent that it provides service to other customers. However, there is no evidence that the equipment in fact provides service to other customers, nor is there any statute, code, regulation or other evidence that a property owner is entitled to compensation for the granting of a license such as this (*see American Infertility of N.Y., P.C. v Verizon N.Y. Inc.*, 70 Misc3d 1001 [Sup Ct NY Co 2020]). Finally, plaintiffs have not claimed that defendant's equipment on the pole, to the extent it may be different than the equipment that was on the prior pole, has reduced the rental or usable value of their premises. The nature of plaintiffs' injury, nor the nature of plaintiffs' damages, is specified.

Conclusions of Law

Accordingly, it is

ORDERED that the defendants' motion (MS #4) for an order granting them summary judgment dismissing the complaint on the grounds that the claims are barred by the statute of limitations or fails to state a claim for which relief may be granted, is granted, and the complaint is dismissed; and it is further

ORDERED that the plaintiffs' motion (MS #5) for an order granting them leave to amend the complaint is denied.

This constitutes the decision and order of the court.

Dated: December 20, 2023

ENTER:

Hon. Debra Silber, J.S.C.