

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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NERY ROJAS-KHAN,
Plaintiff,

Index No.: 14993/06

Motion Date: 1/2/08

Motion Cal. No.: 20

-against-

WOLF PROPERTIES ASSOCIATES, L.P.
CASTLE RESTORATION INC.
Defendants.

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The following papers numbered 1 to 16 read on this motion by plaintiff for an order pursuant to CPLR 3025 granting plaintiff leave to amend her complaint by setting forth additional or subsequent transactions, or occurrences and cross-motion by defendants for an order pursuant to CPLR 3211 (a) (1) and (a) (7) for an order dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmations-Exhibits.....	1-4
Notice of Cross-Motion-Affirmations-Exhibits.....	5-8
Memorandum of Law.....	9
Affirmation.....	10-12
Reply Affirmation-Exhibits.....	13-16

Upon the foregoing papers it is ordered that this motion by plaintiff for an order pursuant to CPLR 3025 granting plaintiff leave to amend her complaint by setting forth additional or subsequent transactions, or occurrences and cross-motion by defendants for an order pursuant to CPLR 3211 (a) (1) for an order dismissing the complaint are decided as follows:

This is an action by plaintiff seeking a declaratory judgment of easement rights. Plaintiff is the owner of the premises known as 32-33 Greenpoint Avenue, Long Island City, New York. She claims to have had an ownership interest in this property since July 1993. Plaintiff alleges that defendants own the adjacent property known as 32-35 Greenpoint Avenue, Long Island City, New York. According to plaintiff for a period of more than ten consecutive years she has used, enjoyed, repaired and maintained a right of way on the defendants' property. Specifically, this right of way is over the driveway on defendants' property that leads to plaintiff's driveway. Plaintiff claims that on or about April 2006,

defendants blocked plaintiff's access to the driveway on defendants' property.

Plaintiff has brought the instant motion seeking to add causes of action pursuant to Article 15 of the RPAPL to quiet title and to determine the rights, title and interest of the parties to the right of way on defendants' property. Under the first cause of action, plaintiff seeks an injunction prohibiting defendants from further interfering with plaintiff's use of the right of way and a declaratory judgment that plaintiff is the owner of the right of way. The second cause of action seeks damages for defendants' intentional tort of interfering with plaintiff's rights and threatening the plaintiff and preventing the use of the right of way. The third cause of action claims plaintiff has used and possessed the right of way for a continuous period of ten years in an open manner visible to defendant. Based on this, plaintiff seeks a prescriptive easement to continue use and enjoyment of the right of way. The fourth cause of action claims plaintiff has obtained rights of adverse possession over the right of way based upon using it for a continuous period of ten years in an open manner visible to defendant. The fifth cause of action seeks damages for defendants' trespass upon plaintiff's right of way.

Defendant has opposed plaintiff's motion by seeking to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) & (7). The court shall first examine defendants' claims pursuant to CPLR 3211 (a) (1), to dismiss on the grounds that the documentary evidence establishes that plaintiff's claims are unsustainable as a matter of law since the alleged easement has not been open and notorious and continuous and uninterrupted. According to defendants, all of plaintiff's claims stem from her claim that she has obtained an easement by prescription or by adverse possession over defendant Wolf Properties Associates, L.P. property. Defendants' have submitted photographs that they claim show a fence has always obstructed the alleged easement; thereby rendering defendants claim without merit and this documentary evidence necessitates dismissal of the claim. They have also submitted an affidavit of Robert Castaldi, general partner of Wolf Properties Associates, L.P., stating that the fence depicted in the photographs has been in existence since 1982 and it runs across the alleged easement.

Plaintiff opposes this cross-motion claiming that she has been using the defendants' driveway for over ten years. During this time, there were not two fences on the defendants' driveway, and the one that existed did not separate her driveway from the defendants' driveway. In any event, plaintiff claims it was never locked and she had control over this fence. She also claims that the defendants' driveway goes directly to her garage and this is the only manner she can access her garage.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . ." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves

all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

Here, the photographs submitted by the defendant on this motion qualify as "documentary evidence" within the meaning of CPLR 3211(a)(1). However, the affidavit of Robert Castaldi does not constitute documentary evidence and will not be considered by this Court on the motion to dismiss. Fleming v Kamden Properties, LLC, 41 AD3d 781 (2d Dept 2007.) Berger v Temple Beth-El of Great Neck, 303 AD2d 346 (2d Dept. 2003.) Consequently, the only documentary evidence this Court will consider on this motion are the photographs. These photos merely show a locked fence on a driveway with a truck behind the fence. There is neither an indication of the address at which this fence is located, nor the duration of time this fence has been in place. As such, contrary to defendants' claim, the documentary evidence regarding the plaintiff's causes of action is not sufficient to resolve plaintiff's claim. It is clear that these documents do not resolve the issue regarding whether or not plaintiff can establish the elements of a prescriptive easement for the alleged right of way or those for adverse possession. Furthermore, defendants have not submitted sufficient documentary evidence to establish that defendant Castle Restoration is not an owner of the subject property. Any information regarding the ownership of the property that has been submitted in defendant's reply affirmation in further support of defendants' cross-motion has not been considered since such was not submitted in the original cross-motion. Rubens v Rodney Fund, 23 AD3d 636 (2d Dept 2005.) Accordingly, the motion to dismiss the plaintiff's action based upon CPLR 3211 (a) (1) is denied in its entirety.

The branch of the motion seeking to dismiss the amended complaint pursuant to CPLR 3211 (a) (7) is granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a

motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, *supra*, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

The plaintiff's first cause of action for injunctive relief, second cause of action for an intentional tort, and fifth cause of action for trespass are based upon the existence of an easement by prescription or adverse possession over defendant Wolf Properties Associates, L.P. As such, they are dependent upon the third and fourth causes of action.

The third cause of action seeks a prescriptive easement to continue use and enjoyment of the right of way. An easement by prescription requires proof of the adverse, open, notorious and continuous use of another's land for the prescriptive period. Borruso v. Morreale, 129 A.D.2d 604 (2d Dept 1987.) Under ordinary circumstances an open, notorious, uninterrupted and undisputed use of a right-of-way is presumed to be adverse or hostile, under claim of right, and casts the burden upon the owner of the servient tenement to show that the use was by license. Burcon Properties, Inc. v. Dalto, 155 A.D.2d 501 (2d Dept 1989.) However, "awareness that others own the property upon entry on the property or within the 10 year statutory period will defeat any claim of right" Morales v. Riley, 28 A.D.3d 623 (2d Dept 2006) quoting Oak Ponds v Willumsen, 295 A.D.2d 587, 588 (2d Dept 2002.) Here, the plaintiff has not set forth sufficient allegations of a prescriptive easement since within the amended complaint, plaintiff has acknowledged that during the period of time she has used the right of way, she knew that this portion of property was on defendant's property. This rebuts the presumption of adversity or hostility and renders her cause of action for prescriptive easement devoid of a necessary element. Thus, the third cause of action in the amended complaint is dismissed for failing to set forth a cause of action.

The fourth cause of action seeks to obtain title to the right of way based upon adverse possession of the right of way. To state a cause of action to obtain title to real property by adverse possession, a party must allege that the possession of the property was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period. If any of these elements is lacking, the alleged possession will not effect a change in legal title. Gerlach v. Russo Realty Corp., 264 A.D.2d 756 (2d Dept 1999.) Here, plaintiff's amended cause of action for adverse possession must be dismissed because the plaintiff failed to allege that she possessed the property under a claim of right, or that such possession was exclusive.

Based upon the above, the plaintiff's amended causes of action seeking a prescriptive easement and adverse possession are dismissed. Consequently, the first, second and fifth

causes of action are also dismissed because they are dependent upon plaintiff's having a title to the right of way by either a prescriptive easement or adverse possession. Accordingly, the motion to dismiss all of the causes of action in the amended complaint pursuant to CPLR 3211 (a) (7) is granted.

The motion by plaintiff for an order pursuant to CPLR 3025 granting plaintiff leave to amend her complaint by setting forth additional or subsequent transactions, or occurrences is denied. As apparent from the above discussion, the complaint fails to set forth sufficient allegations supporting the causes of action. As such, plaintiff should not be allowed to make the requested amendments.

Dated: January 7, 2008

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ORIN R. KITZES, J.S.C.