To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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MICHAEL J. GIAMBRA and GUIOMAR GIAMBRA,

Plaintiffs,

-against-

NICHOLAS D'AMBROSIO, JR. and NOREEN D'AMBORSIO,

Defendants.
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DECISION AND ORDER
Index No.: 033370/2020

Mot. Seq. No. 1

ZUGIBE, J.

In connection with Defendants' motion for summary judgment pursuant to N.Y. CIV. PRAC. L&R ("CPLR") 3212, the Court has read and considered the papers designated by NYSCEF as document numbers 25 through 87, and hereby grants the Defendants' motion in its entirety, as set forth more fully below:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This case presents as a neighbor dispute. NICHOLAS D. D'AMBROSIO, JR. and NOREEN D'AMBROSIO ("Defendants") reside at 7 Soluri Lane in Tomkins Cove, New York. They have owned their home which is located at this address since 2005. MICHAEL J. GIAMBRA and GUIOMAR GIAMBRA ("Plaintiffs") purchased 5 Soluri Lane in Tomkins Cove on February 18, 2020.

By Summons and Complaint filed on July 30, 2020, Plaintiffs commenced the instant action alleging that Defendants erected a shed that blocked their view of the Hudson River. *See*, NYSCEF Doc. 1. While the shed was being built, Plaintiffs allege that the Defendants' property was riddled with piles of dirt, which they allege Defendants were purposely dumping to raise the grade of their property to be level. *Id.* at ¶20-27. The Plaintiffs allege that they complained about

the dumping to the Town of Stony Point Building Department ("Building Department"). *Id*. at ¶28. As per Plaintiffs, Defendants ultimately moved the shed because the Building Department would not permit them to place it where Defendants initially wanted it. *Id.* at ¶33. In addition, the Building Department apparently advised Plaintiffs that Defendants had not submitted a complete fill permit to the Town. *Id.* at ¶34. Notwithstanding the failure to obtain permission from the Town, it is alleged that Defendants continued dumping soil on their property. *Id.* at ¶35. Plaintiffs also allege that Defendants (possibly by reason of Defendants' excavation on their property) damaged a drainage pipe that had previously been installed along the property line in order to address surface water issues on Plaintiff's property. *Id.* at ¶37-39. Plaintiffs also contend that the excavation work and Defendants' failure to install a silt fence between the dirt piles and Plaintiffs' in-ground pool resulted in damage to the pool filter. *Id*. at ¶40, 44-45. Finally, Plaintiffs allege Defendants intentionally moved garbage and debris from the side of their home and placed it directly in the line of sight between Plaintiffs' property and the Hudson River. *Id.* at ¶ 46-47.

Based on these alleged facts, Plaintiffs asserted four causes of action as against Defendants: private nuisance, trespass, negligence, and a request for a permanent injunction. *Id.* Since the filing of the Complaint, the Defendants filed their Answer (NYSCEF Doc. 14) and discovery proceeded. Discovery was completed, and a Note of Issue filed on December 15, 2021 (NYSCEF Doc. 23). Subsequently, Defendants filed the instant motion for summary judgment. The Court shall address each of the arguments raised in the motion separately herein.

CONTENTIONS OF THE PARTIES

Defendants move for summary judgment and seek dismissal of the Complaint in its entirety. Defendants assert that New York State does not recognize an easement for light or view without express agreement, which, they contend, did not exist here. Thus, Plaintiffs' causes of action for private nuisance and a permanent injunction cannot survive as a matter of law. In addition, Defendants contend that since the complained-about soil, shed and landscaping equipment have all been relocated, the instant lawsuit is moot. In terms of damages to Plaintiffs' pool filter, Defendants aver that Plaintiffs have failed to establish either causation or damages. Finally, with respect to the claims regarding the damaged drainage pipe, Defendants point out that the pipe is no pipe at all, but rather leftover tube from deck footing, and that it is situated

entirely on Defendants' property. In fact, Defendants contend MICHAEL J. GIAMBRA admitted at his deposition that this "drainage pipe" was not even part of the instant lawsuit.

Plaintiffs oppose the motion and contend Defendants have not met their burden on the instant summary judgment motion and/or that in response to same they have raised triable issues of fact. Plaintiffs acknowledge the absence of an express agreement for any light or view easement, however, their position is that this is irrelevant in an action for private nuisance. Plaintiffs further argue that their action is not mooted by reason of the relocation of the soil, shed and landscaping equipment, as this does not detract from the fact that they all previously were present, and without the grant of a permanent injunction, can all be moved back. Plaintiffs dispute the lack of proof as to causation and damages concerning the damage caused to their in-ground pool filter. Finally, Plaintiffs do not accept Defendants' contention that the drainage pipe damage is no longer an issue in this litigation. Plaintiffs request that this motion be denied in its entirety, and that the matter proceed to a trial.

LEGAL STANDARD

The remedy of summary judgment is a drastic one and it should only be granted when it is clear no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez*, *supra.*

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dept. 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dept. 2012). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact

is even "arugable", the motion *must* be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); *Andre, supra*.

A. Private Nuisance Claim

The basis of Plaintiffs' nuisance claim is, as per their Complaint, the interference of the Defendants' shed, vehicles and other encumbrances with their use and enjoyment of the Hudson River view. NYSCEF Doc. 1, ¶53. Further, Plaintiffs assert that the Defendants' dumping of dirt hinders and interferes with their use and enjoyment of their inground pool.

In order to state a claim for private nuisance, a plaintiff must allege an interference (1) substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with a persons' property right to use and enjoy their land; and (5) caused by another's conduct in acting or failing to act. *Taggart v. Costabile*, 131 A.D.3d 243, 14 N.Y.S.3d 388 (2d Dept. 2015). Private nuisance claims can be premised on conduct that is either intentional or negligent in nature. *Lichtman v. Nadler*, 74 A.D.2d 66, 426 N.Y.S.2d 628 (4th Dept. 1980).

One can be liable for private nuisance if their conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land, and such invasion is either intentional and unreasonable, negligent or reckless, or actionable under the rules governing liability for abnormally dangerous conditions or activities. *See, e.g., Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 394 N.Y.S.2d 169 (1977). Further, "[t]he interference 'must not be fanciful, slight, or theoretical, but certain and substantial, and must interfere with the physical comfort of an ordinarily reasonable person'" *Cangemi v. Yeager*, 185 A.D.3d 1397, 1399, 128 N.Y.S.3d 708 (4th Dept. 2020) (internal citation omitted). The violation of an ordinance does not, in and of itself, create a private nuisance. *See, 765 East 166th St. Corp. v. Boysland Realty Corp.*, 16 Misc.2d 566, 184 N.Y.S.2d 722 (Sup. Ct. Bronx Cnty. 1959).

1. <u>The "View"</u>

In their moving papers, Defendants point to the well-established body of New York State case law that expressly rejects anyone's right to an easement for light or air (or an unobstructed view) without a written agreement that states otherwise. *See*, NYSCEF Doc. 43, Defendants' Memorandum of Law in Support, Point II, pp. 4-7. Absent an allegation that there was express easement in existence pursuant to which Defendants were prohibited from obstructing Plaintiffs'

light, air or view of the river, no private nuisance action can exist as a matter of law. *Schaefer v. Dehauski*, 71 A.D.3d 157, 1572, 898 N.Y.S.2d 750, 751-52 (4th Dept. 2010) *referencing Chatsworth Realty 344 v. Hudson Waterfront Co. A*, 309 A.D.2d 567, 568, 765 N.Y.S.2d 39 (1st Dept. 2003). In opposition to this prong of the motion, counsel for Plaintiffs does not cite any caselaw that disputes or distinguishes these holdings from the facts present before the Court.

In addition, Defendants point out that the mere presence of certain hideous, displeasing, or unsightly items (including sheds, dumpsters, etc…) on a neighbor's property is insufficient to establish a private nuisance claim. *See, e.g., Ruscito v. Swaine, Inc.*, 17 A.D.3d 560, 793 N.Y.S.2d 475 (2d Dept. 2005); *Golub v. Simon, et al*., 28 A.D.3d 359, 814 N.Y.S.2d 61 (1st Dept. 2006).

The crux of Plaintiffs' private nuisance claim is that the shed (which has since been relocated) and the piles of dirt and/or other encumbrances were "placed in the line of sight between [their] Property and the Hudson River" and that same interferes with their enjoyment of their home, which they admit in their pleading and in the depositions was the primary purpose for which they brought the home. NYSCEF Doc. 1. The Court can relate to Plaintiffs' natural frustration caused by this situation. They purchased a home with gorgeous views of the Hudson River, only to learn shortly thereafter that they would have to grapple with their neighboring property owners' intended improvements to their own property. In addition, it seems the relationship between these neighbors has deteriorated rapidly.

However, Plaintiffs' displeasure with the situation does not detract from the fact that they are unable, in opposition to the instant motion raise a triable issue of fact with respect to their nuisance claim. Though the N.Y. Pattern Jury Instructions ("PJI") applicable to private nuisance claim may seem on point with these facts, as same are relied upon heavily by counsel for Plaintiffs in his Memorandum of Law, it is ultimately of no moment considering the nature of the nuisance alleged here. Simply put, Plaintiffs cannot, as a matter of law, premise their private nuisance claim on the alleged obstruction of their view.

2. <u>The Pool</u>

Plaintiffs contend that the piles of dirt on the Defendants' property ultimately resulted in a clogging of their pool filter, thus preventing them from use and enjoyment of their pool. Defendants argue that Plaintiffs have not established that the clogging was actually caused

(intentionally or negligently) by the dirt from the Defendants' property. In fact, as pointed out by Defendants in their motion, at Plaintiff Michael Giambra's deposition, he testified that he did not in fact know that it was the dirt from Defendants' dirt piles that clogged his pool filter. *See*, NYSCEF Doc. 32, p. 45, lines 22-24.

Further, although Plaintiffs have produced an estimate (that post-dated the commencement of the litigation) reflecting the cost of certain repairs to their pool, that estimate does not give any indication that the filter was actually clogged, nor does it set forth the cause of the damage that was included in the estimate. *See*, Affidavit of Michael Giambra in Opposition to the Motion, NYSCEF Docs. 47, 64, Ex. Q. Pool filters are regularly subject to replacement from wear and tear, as indeed, it is the function of the filter to prevent dirt from lingering in the pool. In addition, the estimate provide by Plaintiffs actually indicates it pertains to pool system "updrades" [sic][1] and not repairs at all. *Id.* Absent some evidence that broken or clogged filter was caused (intentionally or negligently) by Defendants and that same resulted in loss of use and enjoyment of the pool, a private nuisance action cannot succeed.

Simply put, the allegations that Plaintiffs were unable to enjoy the use of their inground pool by reason of the piles of dirt that were present on the property are unsupported by the evidence, and thus insufficient to raise any triable issue of fact in response to the motion. Although a summary judgment motion is to be scrutinized in a light most favorable to the non-moving party, it is well established that conclusory statements and allegations will not suffice at this stage of the litigation. *See, Zuckerman, supra*; *see also*, *Mascoli v. Mascoli*, 129 A.D.2d 778, 779, 514 N.Y.S.2d 521 (2d Dept. 1987).

B. Trespass Claim

Plaintiffs contend that the dirt blowing from Defendants' property onto their own constitutes an act of trespass.

The elements of a cause of action sounding in trespass are "'an intentional entry onto land of another without justification or permission[.]'" *Sultan v. King*, 73 Misc.3d 338, 152 N.Y.S.3d 777, 787 (Sup. Ct. Suffolk Cnty. 2021) (internal citation omitted). "Intent is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or

[1] The word was supposed to read "upgrades".

inevitable consequence of that act." *Id.* Therefore, a trespass cause of action is properly dismissed when a plaintiff cannot demonstrate that the plaintiff actually performed an affirmative act that resulted in an intentional intrusion upon their property. *Lisa Goldberg Qualified Personal Residence Trust v. Board of Managers of the Madison Square Condominium, et al*., 181 A.D.3d 274, 276, 122 N.Y.S.3d 274 (1st Dept. 2020).

Here, the Court agrees with Defendants that Plaintiffs have failed to demonstrate that the clog in their pool's filter was caused by piles of dirt that existed on Defendants' property, much less that there was any affirmative act leading to any intrusion of dirt onto their property.

C. Negligence

Plaintiffs allege that Defendants' negligence caused damage to their drainage system. Specifically, Plaintiffs set forth that by "covering and chopping up the drainage pipe which extended from [their] grate to the catch basin at the edge of [their] Property…[their] Property was damaged and such damage was progressive and continuous and requires extensive repairs…" (NYSCEF Doc. 1, ¶66-68).

In their motion, Defendants contend that the evidence reflects that the drainage pipe is really no drainage pipe at all, but rather a leftover sonotube that Defendants had used for deck footing in their yard that they planned to keep and use for a flagpole holder. Further, Defendants contend the sonotube is not on the property line at all, but rather falls solely on their property. Defendants additionally point to the deposition transcript of Mr. Giambra wherein he states that he is not seeking any damages with respect to the "drainpipe". *See*, NYSCEF Doc. 32, p. 44, lines 16-18. Finally, Defendants refer to the Mr. Giambra's deposition testimony wherein he admits that he has no knowledge as to how the "drainpipe" was broken in the first place. *Id.* at p. 43, lines 13-21.

In opposition to the motion, Plaintiffs' counsel avers that this is the exact type of issue that should go to trial. Counsel sets forth that Defendants have not proven that the drainpipe is a sonotube and proffers the question to the Court "[w]hat was the drainage pipe, I mean the flagpole holder, doing in the middle of a dirt pile that was excavated nowhere near the Defendant's decking?" NYSCEF Doc. 82, p. 4. Plaintiffs' only apparent "evidence" of the existence of (now apparently broken) drainage pipe comes from a statement that the previous owner of the property, Kenneth Stadt, previously told him that there was a drainage pipe in the

area from a French drain system he had installed. *See*, Affidavit of Michael Giambra, NYSCEF Doc. 47, ¶29.

In reply to this assertion, counsel for Defendants submit an Affidavit from Mr. Stadt wherein Mr. Stadt expressly denies that the pipe at issue is a drainage pipe, and affirms that it is not a part of any French drainage system he ever installed on the property before the Plaintiffs became the record owners. NYSCEF Doc. 86, ¶2.

In the case before the Court, Plaintiffs can only offer conjecture and speculation as to the cause of the damage to the subject pipe, to the extent the pipe even is what Plaintiffs contend it is. Defendants motion points out that in a negligence action, proximate cause cannot be established by mere speculation. *Padilla v. CVS Pharmacy*, 175 A.D.3d 584, 585, 107 N.Y.S.3d 428 (2d Dept. 2019).

Though circumstantial evidence can indeed be considered by the Court in determining whether proximate causation has been established (*see, id*.), the Court in this instance, after having reviewed the evidence submitted in support of and in opposition to the instant motion, cannot even identify what that circumstantial evidence is. Moreover, one of the Plaintiffs testified under oath that he did not have any knowledge as to how the pipe was broken. *See*, NYSCEF Doc. 32, p. 44, lines 13-21. The Defendants have produced a non-party Affidavit in reply to Plaintiffs' opposition that totally undermines their belief. And, most significantly of all, Mr. Giambra denies that he is seeking damages as a result of this broken pipe. *Id.* at 44, lines 16-18.

In sum, Plaintiffs' opposition is insufficient to raise triable issues of fact in response to the Defendants' summary judgment motion.

D. Permanent Injunction

As a result of Defendant' action as alleged in the Complaint, despite the fact many of them admittedly are no longer taking place, Plaintiffs request this Court Order a mandatory injunction requiring Defendants to refrain from erecting any structure or using any portion of their property in such a manner that would interfere with Plaintiffs' use and enjoyment of their property.

Based on the Court's decision granting summary judgment with respect to the first three causes of action, as set forth *supra*, the Court declines to issue any injunction.

CONCLUSION

Now, therefore, based on the foregoing, it is hereby

ORDERED, that Defendants' motion for summary judgment is granted in all respects and the Complaint is dismissed in its entirety.

Dated: New City, New York
August 4, 2022

Hon. Thomas P. Zugibe, J.S.C.

To: *All counsel of record with NYSCEF*