

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

JOSE ALVAREZ and ROSA ALVAREZ, X

Plaintiffs,

-against-

DEBORAH A. FUENTES-GILL and CHRISTOPHER
GILL,

Defendants.

MALONE, J. X

Index No. 69465/2022

DECISION AND ORDER

Motion Sequence Number 1

Plaintiffs Jose L. Alvarez and Rosa Alvarez (“Plaintiffs”) filed this pre-discovery motion on May 23, 2023, seeking an order, pursuant to CPLR R. 3212, granting them summary judgment on the causes of action of trespass and conversion. Plaintiffs’ motion is supported by the Affirmation of Robert F. Zerilli, Esq., the Affirmation of both Plaintiffs in Support and Reply Affirmation in Further Support (NYSCEF Doc. Nos. 7, 8, 9 and 36). Defendants Deborah A. Fuentes-Gill and Christopher Gill (“Defendants”) oppose the motion upon the Affidavit of Defendant Deborah A. Fuentes-Gill and Memorandum of Law in Opposition, (NYSCEF Doc. Nos. 25 and 33). Upon review and consideration of the foregoing papers Plaintiff’s motion for summary judgment is denied as set forth herein.

Background

Plaintiffs have resided at 27 Hamilton Avenue in Ossining, Westchester County, New York, (“Plaintiffs’ Property”) since April 1, 2000 and became the owners on April 18, 2006. In 2016, Plaintiffs relocated to another home and began renting 27 Hamilton Avenue to tenants.¹ Defendants own and reside at 29 Hamilton Avenue, in Ossining, Westchester County, New York (“Defendants’ Property”) since August 31, 1998.

¹ Plaintiffs claim that they usually visit their rental property at 27 Hamilton Avenue approximately once per month.

Plaintiffs allege the following: (1) that prior to 2022, there was a wooden fence located on Plaintiffs' Property near the border with Defendants' Property; (2) that in May of 2022, Plaintiffs discovered that Defendants removed the wooden border fence and installed a plastic fence, which was constructed more than one foot onto Plaintiffs' Property, denying them access to a portion of their property; (3) that Plaintiffs installed stakes on their property delineating the borders of Plaintiffs' property, but that after the stakes were installed, Defendants removed one of the stakes; (4) and that on November 19, 2022, Plaintiffs sent a letter to Defendants demanding the removal of the plastic fence and return of the wooden fence, but Defendants have not responded (*see* Verified Complaint, NYSCEF Doc. No. 1 at ¶ 29.)

Defendants answered the Complaint on February 8, 2023 with general denials and the following defenses: Plaintiffs fail to state a cause of action upon which relief can be granted; Plaintiffs' claims are barred by the doctrines of waiver, estoppel, laches and unclean hands; Plaintiffs lack standing to bring their claims; the encroachment, if any, is de minimis; Plaintiffs incurred no damages; and Plaintiffs' claims are barred by the doctrine of adverse possession. (*see* Verified Answer, NYSCEF Doc. No. 5).

Party Contentions

Plaintiffs claim entitlement to summary judgment as a matter of law, arguing that the evidence clearly establishes trespass wherein Defendants intentionally entered their property without justification or permission, or if entry was permitted, that Defendants refused to leave after permission had been withdrawn, the fence Defendants constructed encroached on Plaintiffs' Property, Defendants knew the correct location of the property line by asking Plaintiffs' permission to cross the original fence to trim a tree in the past, and when Plaintiffs demanded in writing that Defendants remove the fence, Defendants failed to do so.

Defendants contend that there are triable material issues of fact for the following reasons: summary judgment is premature as discovery is not complete and may uncover additional triable issues of fact; whether or not Defendants entered on Plaintiffs' land intentionally and without justification or possession, or refused to leave after permission was granted but thereafter withdrawn is a question of fact; the assertion that Plaintiffs' claims are barred by adverse possession is a question of fact; whether or not the encroachment is de minimis is a question of fact; whether or not Plaintiffs' claims are barred by waiver, the doctrine of laches or that they have "unclean hands" is a question of fact; and the issue of conversion is a question of fact, as there is

a dispute as to whether Defendants exercised an unauthorized dominion over Plaintiffs' Property, and as to ownership of the original fence.

Analysis

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact, but "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978). The function of the Court on a summary judgment motion "is not to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" *Martinez v 281 Broadway Holdings, LLC*, 183 A.D.3d 716, 719 (2d Dept. 2020); *Charlery v Allied Tr. Corp.*, 163 A.D.3d 914, 915, (2d Dept. 2018); see *Chimbo v Bolivar*, 142 A.D.3d 944, 945 (2d Dept. 2016). The court should construe the facts in a way most favorable to the non-moving party (*Yerry v. Whole Food Market. Group, Inc.*, 208 A.D.3d 733, 734 (2d Dept. 2022), and draw all reasonable inferences in favor of that party. *Abdenbi v. Walgreen Co.*, 197 A.D.3d 1140 (2d Dept. 2021).

As the proponent a summary judgment motion, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); see also CPLR R. 3212. However, when the submissions of the moving party are insufficient to demonstrate entitlement to judgment as a matter of law, the motion for summary judgment should be denied, without regard to the sufficiency of the opposing papers. *Rentz v. Modell*, 262 A.D.2d 545 (2d Dept. 1999) citing *Winegrad, supra*; see also *Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012). Plaintiffs submitted photographic evidence of the fence and surrounding areas of their property. As summary judgment motions must contain proof in an admissible form, photographs must include an affidavit that lays the foundation that the photographs are a true and accurate representation of what the photo represents. *Lakhan v. Singh*, 269 AD.2d 427 (2d Dept. 2000). Here, as Plaintiffs submitted no such affidavit, the Court will not consider them in its determination.

In a claim of civil trespass, the trier of fact must consider whether the person, without justification or permission, either intentionally entered upon another's property, or, if entry was

permitted, that the person refused to leave after permission to remain had been withdrawn. The threat of continuing trespass entitles a property owner to injunctive relief where irreparable injury may result. *Long Is. Gynecological Servs., PC v. Murphy*, 298 A.D.2d 504 (2d Dept. 2002), see also *Marone v Kally*, 109 A.D.3d 880, 882 (2d Dept. 2013). Here, questions of fact exist as to whether the Defendants trespassed onto Plaintiffs' property, as well as the issue of the Defendants' above-mentioned defenses.

For a cause of action for conversion to be established, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right." *National Ctr. for Crisis Mgt., Inc. v. Lerner*, 91 A.D.3d 920 (2d Dept. 2012) (citing *Cusack v. American Defense Sys., Inc.*, 86 A.D.3d 586 (2d Dept. 2011)). Defendants' claim of ownership of the fence and title to the area between the fence and the property requires a factual determination on the merits by a trier of fact.

To establish adverse possession, the possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period of ten years. NY Real Property Actions and Proceedings Law ("RPAPL") §501², *Walling v. Przybylo*, 7 N.Y.3d 228, 231 (2006). The following triable issues of fact exist: (1) Defendant's claim that for over twenty years they believed that the original fence belonged to them and they have continuously maintained the area near the fence for that period of time; (2) whether or not the vinyl fence actually encroached on Plaintiffs' property and (3) whether or not the vinyl fence was erected in the exact same position as the prior fence. Plaintiffs' argument that the Defendants "did not maintain the original fence and that adverse possession is limited to land actually occupied and no others" (see Plaintiff's Reply Affirmation, NYSCEF Doc. No. 36 at ¶ 22) is a triable issue of material fact.

Another triable issue of fact is whether the encroachment on the Plaintiffs' property is *de minimis*, and therefore not actionable in trespass. See *Averaimo v. Tavares*, 93 A.D.3d 745, 746 (2d Dept. 2012) (encroachment of a fence one foot onto plaintiff's property was *de minimis*). Plaintiffs' reliance on *Arcamone-Makinano v. Britton Prop., Inc.*, 156 AD3d 669 (2d Dept. 2017)

² A 2008 amendment to the RPAPL states that "the existence of *de minimis* [sic] non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse and that "the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse." RPAPL §543. Defendants' claim that the 2008 amendment does not retroactively apply to them is also a triable issue of fact.

to show that even a *de minimis* encroachment is trespass is misplaced, as in that case, the encroachment was 25 feet, as opposed to the one-foot encroachment alleged herein. Plaintiffs' reliance on *Van Valkenburgh v. Lutz*, 304 N.Y. 95 (1952) is also misplaced, as in that case, the defendant failed to establish actual occupancy after a full hearing. The Court also finds the remaining defenses of lack of standing, waiver, laches and unclean hands also raise triable factual issues.

As the Court finds that both parties' claims raise triable factual issues, summary judgment is denied. Regarding Defendant's assertion that summary judgment is premature due to lack of discovery, the Court grants Plaintiffs leave to file a successive summary judgment motion once discovery is complete.

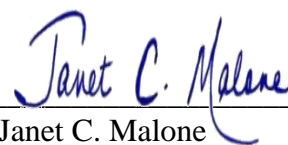
Accordingly, it is hereby

ORDERED that Plaintiffs Jose L. Alvarez's and Rosa Alvarez's motion for summary judgment is denied; and it is further

ORDERED that parties are directed to file a preliminary conference form stipulation which can located at [West-General-Civil-Preliminary-Conf-Stip-Form.pdf \(nycourts.gov\)](#) **no later than February 16, 2024** or appear for a virtual preliminary conference at **2:30pm on February 22, 2024**. [Click here to join the videoconference](#)

This constitutes the Decision and Order of the Court.

Dated: December 21, 2023
White Plains, New York



Hon. Janet C. Malone
Justice of the Supreme Court

To: *Counsel of Record via NYSCEF*