

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CHILDREN'S MAGICAL GARDEN, INC.,
Plaintiff,

- v -

DAVID MAROM, individually, and DAVID MAROM, as
President of the Horizon Group,
Defendants.

INDEX NO. 654960/2019

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 94, 96, 98, 99, 100, 101, 102, 103, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 121, 138, 195, 196

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is

In motion sequence 002, plaintiff Children’s Magical Garden (Garden) moves pursuant to CPLR 3212(e) for summary judgment as to liability on plaintiff’s third cause of action for trespass. (NYSCEF Doc. No. [NYSCEF] 80, Complaint, ¶¶59-66.)

On August 28, 2019, plaintiffs filed this action alleging that, since 2013, defendants have allegedly maintained a fence that encroaches on Lots 16 and 18 without plaintiff’s permission or authority. (*Id.* ¶¶ 25-28.)

The Garden, located at 157 Norfolk Street in New York City, was founded in 1982. (*Id.* ¶13.) Prior to plaintiff’s intervention, the property was filled with debris, refuse, and overgrown vegetation. (*Id.* ¶15.) It remains an active garden today used for educational afterschool and summer camp programs for children in New York City. (*Id.*

¶ 2.) Katherine Gresley Fricke is the President and Director of the nonprofit organization that operates plaintiff. (NYSCEF 69, Fricke aff. ¶1.) She has been

involved in the Garden since 1997 and states that the Garden has operated continuously on Lots 16 and 18 since 1997. (*Id.* ¶¶ 1, 3.) In July 2013, plaintiff secured an agreement for the transfer of Lots 16 and 18 to the New York City Department of Parks and Recreation, preserving the lots. (*Id.* ¶ 4; NYSCEF 70, Green Thumb Community License and NYS Contract with Garden.) Pursuant to that agreement, plaintiff is responsible for planting flowers and trees, building structures, hosting events, and maintaining the property. (NYSCEF 70, Green Thumb Community License at 4, 5, of 13 pages;¹ NYSCEF 69, Fricke aff. ¶ 2.) Accordingly, plaintiff claims possession of Lots 16 and 18, which is the property at issue here. (NYSCEF 69, Fricke aff. ¶¶ 4-5.)

Defendants asserts ownership over Lot 19. (*Id.* ¶ 3.) Defendant David Marom testified to securing the fence around Lots 16, 18, and 19. (NYSCEF 86, Marom's 2018 depo. tr at 200:19-204:22.) Additionally, Marom admitted to entering Lot 19 to put the fence back up in August 2018. (*Id.* at 804:4-17 and 817:7-18.)

Fricke objects that defendants' fence is unauthorized and encroaches on Lots 16 and 18 up to five feet. (*Id.* ¶¶ 6-7.) According to Frank S. Ferrantello, a licensed Land Surveyor New York who performed a land survey, the fence that separates Lot 19 from Lots 16 and 18 was outside of defendants' property line and encroached on Lots 16 and 18. (NYSCEF 71, Ferrantello aff. ¶¶ 1, 10-12; NYSCEF 73, 74, 75, 76, 77, and 78, Ferrantello's surveys and maps.)

Finally, the Parks Department has demanded that defendants remove the fence and advised defendants to do so. (NYSCEF 83, 2016 Notice to Cure Encroachment; NYSCEF 84, 2019 Second Notice to Cure Encroachment.)

¹ Pages refer to NYSCEF page numbers.
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Motion No. 002

Under CPLR 3212, “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

“A person who, without justification or permission, intentionally (goes, causes a (person, thing) to go) upon the property of another person commits what is known in the law as a trespass and is liable for any damages caused by that trespass.” (PJI 3:8.) “The essence of trespass to real property is injury to the right of exclusive possession.” (*Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 66 [2009].) Plaintiff alleges defendants built and maintained a fence, physical barriers, and other encroachments on plaintiff’s property without permission. (NYSCEF 80, Complaint ¶¶ 60, 62.)

At oral argument on this motion for summary judgment, the court granted the motion. (NYSCEF 138, tr 37:22-25, 38:1-4.) Marom’s admissions establish that defendants are maintaining the fence at the root of the trespass. The court’s decision is confined to the timeframe that begins in the summer of 2018 based on the evidence presented on this motion, including Marom’s admission. (*Id.* at 43:2-15.) However, the court kept the record open to provide defendants an opportunity to support their argument that plaintiff lacked standing which is based on discovery supplied after the

motion was briefed. (*Id.* at 40:1-41:6.) Defendants' subsequent submission changes nothing. Plaintiff's evidence remains uncontroverted.

Defendant argues that plaintiff lacks standing to assert trespass because plaintiff has failed to establish actual possession of the property. Defendants contend that as a licensee, plaintiff has no possessory interest in the property. Further, defendants opine that, without actual possession, plaintiff does not have a superior property right over the defendants.

A trespass is an intentional entry onto the land of another without justification or permission. (*Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013] [citations omitted], *lv denied* 24 NY3d 911 [2014].) The trespasser must justify the encroachment with its own title, not by weakness in the possessor's title. (*Beardslee v New Berlin Light & Power Co.*, 207 NY 34, 40-41 [1912].) The possessor needs sufficient property rights, not title, to maintain a trespass claim. (*Bloomingdales, Inc.*, 13 NY3d at 66.) If plaintiff is in actual possession of the property, it can maintain a trespass claim against defendant. (*Gowanus Indus. Park, Inc. v Amerada Hess Corp.*, 01-CV-0902 (ILG), 2003 WL 22076651, *12 [EDNY Sept. 5, 2003] citing *Miller v Long Island Ry. Co.*, 71 NY 380, 383 [1877].)

Based on the evidence before the court on this motion, plaintiff has established that it has standing to bring this action for trespass to Lots 16 and 18 against defendants. Defendants are wrong on the law. Defendants also failed to provide any justification for the fence encroaching on Lots 16 and 18. Therefore, plaintiff's motion for summary judgment is granted as to trespass from the summer of 2018.

At the trial on damages for plaintiff’s loss of use and enjoyment of the property, the court will also address the applicable time periods of the trespass which is key to determining damages. (*Behar v Friedman*, 180 AD3d 671, 674-675 [2d Dep’t 2020].)

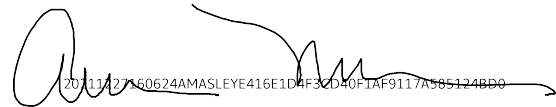
It appearing to the court that plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff’s motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that the motion is granted with regard to liability from the summer of 2018; and it is further

ORDERED that an immediate trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that the parties are directed to contact the Part 48 Clerk to select a trial date; and it is further

ORDERED that any other dispositive motion(s) shall be filed by the parties within 15 days of this decision entry on NYSCEF by the court.



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12/27/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
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APPLICATION:

CHECK IF APPROPRIATE: