SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

CITY OF NEW ROCHELLE

Index No. 54190/2016

Plaintiff,

- against -

FLAVIO LA ROCCA, MARIA LA ROCCA, FLAVIO LA ROCCA & SONS, INC. a.k.a. F. LAROCCA & SONS, INC. and FMLR REALTY MANAGEMENT LLC.,

Defendants.

----------x

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorneys for the City of New Rochelle
1133 Westchester Avenue
White Plains, New York 10604
(914) 323-7000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Introduction

This reply memorandum of law is submitted on behalf of Plaintiff, City of New Rochelle, in further support of the City's motion for summary judgment.

In its motion for summary judgment, the City established its prima facie entitlement to summary judgment on its claims for trespass, negligence, nuisance, and encroachment (its first, second, third, and sixth causes of action, respectively), as well as its entitlement to summary judgment dismissing the Defendants' counterclaims. In opposition, Defendants fail to identify any triable issue of fact. Instead, Defendants focus on irrelevant, strawman issues, while criticizing and insulting a local journalist and City public servants.

The undisputed evidence establishes that: the City owns East Street and Defendants' contractor's yard encroaches 10 feet into East Street; and on May 16, 2015, Defendant Flavio LaRocca instructed his employees to perform substantial work on the "Parcel" to facilitate its use as a private parking lot, even though Mr. LaRocca knew the Parcel was part of City-owned Flowers Park and he did not have permission from the City to perform the work. These undisputed facts establish encroachment, trespass, negligence, and nuisance. It is irrelevant whether East Street was also accepted as a public street or whether Defendants removed trees from the Parcel during the course of their work on May 16, 2015. These alleged disputes do not rebut any of the underlying elements of the City's claims, nor does Mr. LaRocca's apparent belief that, as a local business owner, he should have free reign to use public property near his business for his private use.

Defendants also do not address the legal arguments raised in the City's motion for summary judgment on their counterclaims. With respect to Defendants' first counterclaim for $40,000 for alleged theft of concrete barriers by a third-party contractor almost 20 years ago, Defendants fail to address, let alone rebut, the City's arguments regarding failure to file a notice of claim, statute

of limitations, laches, and abandonment. Defendants also fail to identify any case law supporting their second counterclaim, which contends that the City should be liable to an individual who unilaterally decides to make purported "improvements" to City-owned property. Rather, the case law holds that a municipality is not required to maintain its property to a subjective standard of neighboring property owners. Thus, the City is also entitled to summary judgment dismissing Defendants' counterclaims.

Argument

I. The City Is Entitled to Summary Judgment on Its Sixth Cause of Action for Encroachment on East Street

A. Defendants Fail to Rebut that East Street Is Public Property

Defendants argue that East Street is a private street because it was not accepted as a public street in a 1914 resolution that accepted other streets conveyed to the City in the same deed that conveyed East Street. Defendants' argument is wholly lacking in legal and factual support.

As noted in its opposition to Defendants' motion for summary judgment, it is not necessary for East Street to be a public street to maintain an action for encroachment, only that it be public property, and the evidence conclusively establishes that East Street is City-owned property. *See* Doc. No. 170 (City Opp.) at 10-16; *see also* New Rochelle City Code § 111-38 (entitled "Encroachments onto public *property* restricted") (emphasis added).

In its opening motion papers, the City submitted a certified copy of the recorded deed for East Street, showing the City is the owner, and multiple title reports providing that the City has owned East Street since 1914. Ex. 39 (Certified Deed), 4 (2022 Title Report), 5 (2015 Title Report). These documents firmly establish that the City is the owner of East Street. *See Kernan v. Williams*, 125 A.D.3d 1440, 1441 (4th Dep't 2015); RPAPL § 321; *Ridgway v. Hawkins*, 123 A.D. 15 (2d Dep't 1907); CPLR 4522 ("ancient" official record of real property, on file for more

than 10 years, is prima facie evidence of its contents). The City also submitted multiple surveys showing that Defendants' contractor's yard encroaches over 10 feet into East Street. *See* Exs. 6 (2014 Survey), 10 (2000 Survey), 14 (2016 Survey); *see also* Defs. Response at ¶¶16-18, 30-34, 41-43.[1] The surveyor hired by Defendants in 2009 testified that he performed a stake-out and marked Defendants' property, showing the 10-foot encroachment, Defs. Response at ¶¶31-37, he reconfirmed the 10-foot encroachment in correspondence to Defendants in 2016, *id*. at ¶¶41-44. The City also established that East Street is used as a public right of way. Exs. 17, 39, 40. Defendants' do not dispute that their contractor's yard extends 10 feet over their property line into East Street.[2] *See e.g.*, Defs. Response at ¶¶41-44. Thus, the City established its prima facie burden of proving encroachment.

In opposition, Defendants do not cite any evidence to rebut the City's ownership of East Street. Instead, Defendants assert a legal argument that East Street is a private street because it was not accepted as a public street in 1914. *See* Defs. Response at ¶15. This argument is baseless.

The decision not to turn East Street into a public street had no effect on the transfer of title in East Street to the City by deed. *See e.g., Bayer v. Pugsley*, 13 Misc.2d 610 (Sup. Ct. Monroe Cnty. July 16, 1958) *aff'd* 7 A.D.2d 828 (4th Dep't 1958) (street was not a public highway because Highway Superintendent refused to lay it out as one, but it remained town-owned property where fee in the street had been transferred to the town); *see also No-Dent Props., Inc. v. Commissioner of Town of Hempstead Dept. of Hwys.*, 138 A.D.3d 702 (2d Dep't 2016) (no abandonment of unpaved dirt road by town where town had acquired a fee to the land in question, even if it was

[1] Citations to "Defs. Response" are to Defendants' Response to the City's Statement of Material Facts (Doc. No. 171).
[2] Defendants only dispute when they understood that the encroachment was 10-feet wide – they argue they did not know the encroachment was 10-feet wide until their surveyor reiterated his 2009 findings in a 2016 email. Def. Responses at ¶¶41-43. The date of Defendants' knowledge of the full width of the encroachment is immaterial.

not put to public highway use); *Romanoff v. Village of Scarsdale*, 50 A.D.3d 763 (2d Dep't 2008) (village owned unimproved portion of roadway where village owned fee interest in road based on conveyance by deed); *Clarkstown v. Brent*, 400 N.Y.S.2d 165, 166 (2d Dep't 1977), *lv. denied* 44 N.Y.2d 645 (1978) (Town could not "abandon" highway where fee in land in question had been conveyed to town by deed).

The cases cited by Defendants do not support their argument. The City is not contending that East Street was officially accepted as a public street, nor is status as a public street an element of the City's encroachment claim. Rather, the City contends—and has proven—that it is the owner of the property known as East Street. None of the "public street" cases cited by Defendants hold that property conveyed to a municipality becomes private property if it is not also accepted as a "public street."

Additionally, General City Law § 34, cited by Defendants, is inapplicable because it concerns streets which are solely laid out on subdivision plats, not streets which are conveyed to a municipality by deed. While East Street may have appeared on a subdivision map in 1907, the property owner, Hadert Realty, also transferred title in East Street and (six other streets) to the City via the 1914 deed, which was recorded in 1919.

Finally, it is notable that, while Defendants assert that East Street is "private," they do not identify who the purported private owner of East Street is. Hadert Realty, the grantor of title in East Street to the City, did not attempt to revoke the deed upon the City's decision not to accept East Street as a public street in June 1914. Rather, the deed including East Street was recorded in 1919. Ex. 39. Other property owners abutting East Street have disclaimed ownership of East Street and instead acknowledge that the City owns East Street. *See* Doc. No. 162 (City Opp. Ex. 1 Bongo Dep.) at 40:16-19; Doc. No. 163 (City Opp. Ex. 2 -1998 Resolution granting easement

over East Street from City to PAB); *see also* Doc. No. 168 (City Opp. Ex. 7 shows East Street is not included in the City DPW's list of "private streets").

B. Defendants' Procedural Arguments Fail

The City Court does not have exclusive jurisdiction over claims for violations of City Code; rather, this Court has unlimited civil jurisdiction and "has the power to hear a case regardless of whether it could have been brought in a different court." *238-240 7th Ave. Corp. v. Lizcano*, 70 Misc.3d 1219(A) (Sup. Ct. N.Y. Cnty. Mar. 1, 2021). Also, the City's encroachment claim is not based solely on City Code § 111-38, but also on common law, the court's inherent authority, and the City's duty to keep public property free of encroachments. *See* City Memo. at 6 (citing *County of Erie* and *Incorporated Village of Bayville*).

Defendants' argument that the City lacks standing is meritless given that the City is the fee owner of East Street. *See Moore v. Jackson*, 1875 N.Y. Misc. LEXIS 16, *4 (Sup. Ct. 1875) (recognizing cause of action for encroachment even if public has enough room on sidewalk to avoid the encroachment).

II. The City Is Entitled to Summary Judgment on Its First, Second, and Third Causes of Action Related to the Unauthorized Work on the Flowers Park Parcel

Defendants argue the City is not entitled to summary judgment on its first through third causes of action because there are disputes of fact as to whether Defendants (1) removed trees from the Parcel, (2) placed contaminated materials on the Parcel, and (3) created a new parking lot on the Parcel. Defendants' argument fails because none of these purported disputes is material to the City's claims for trespass, negligence, or nuisance based on Defendants' May 16, 2015 work on the Parcel.[3]

[3] Whether Mr. LaRocca removed trees from the Parcel is relevant to the City's fourth and fifth causes of action; however, the City did not move for summary judgment on these claims. *See* City Mem. at 2, n.1.

By Flavio LaRocca's own admission, on May 16, 2015, he instructed his employees to perform work on the Parcel, including leveling the ground and spreading gravel (or a similar granular material) and compacting it with a steamroller to create a smooth, flat surface for parking. Defs. Response at ¶¶54, 57, 64-65, 68-69. Mr. LaRocca testified that he did this, even though he knew the Parcel was part of Flowers Park which was owned by the City, and that he did not have permission from the City to perform work on the Parcel. *See* Defs. Response at ¶47; Ex. 7 (Flavio Dep.) at 110:21-111:10. This is sufficient to establish trespass, negligence, and nuisance.

"The elements of a cause of action for trespass are an intentional entry onto the land of another without justification or permission." *Johnstone v. Babad*, 170 A.D.3d 692, 694 (2d Dep't 2019) (citation omitted). Here, Defendants conceded that (1) Flavio LaRocca directed his employees to enter the Parcel on May 16, 2015 and perform a "rake out" of the property, including the leveling of the terrain and steamrolling the Parcel to prepare it for use as a parking lot; (2) he knew the Parcel was part of city-owned Flowers Park; and (3) the City did not give Mr. LaRocca permission to perform any kind of work on the Parcel.[4] This evidence is sufficient to establish trespass.

Whether Defendants were creating a new private parking lot on the Parcel or were preparing the Parcel for continued use as a private parking lot is immaterial to the City's claims. Whether others parked on or near the Parcel in the past does not negate Defendants' admissions that they entered and performed work on the Parcel on May 16, 2015, even though Mr. LaRocca knew the Parcel was owned by the City, and knew he did not have permission to perform work on

[4] Defendants' assertions that there is no curb between East Street and the Parcel does not create a dispute of fact as to whether Defendants' entered the Parcel intentionally. Flavio LaRocca identified the Parcel as the property he entered, testified that it was off of East Street, and that he knew it was part of Flowers Park. Defs. Response at ¶47-48; Ex. 7 at 110:21-111:10. "Intent is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or inevitable consequence of that act. 'Liability may attach regardless of defendant's mistaken belief that he or she had a right to enter.'" *Volunteer Fire Assn. of Tappan, Inc. v. County of Rockland*, 101 A.D.3d 853, 855 (2d Dep't 2012) (internal citation omitted).

the Parcel. *See generally Parkview Assocs. v. New York*, 71 N.Y.2d 274, 282 (1988) ("[a] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches") (citation omitted).

With respect to the City's claim for negligence, Defendants argue that if they did not violate laws regarding removal of trees or the placement of impervious material on the ground, they could not have been negligent. This is incorrect – an individual's duty with respect to public property, and park property, extends beyond simply not removing trees or spreading impervious materials. It is well established that park property is held in trust for the public use and that one has a duty not to misappropriate public property for private use. Accordingly, Chapter 224 of the New Rochelle City Code, regarding Parks, provides in § 224-1, that "no person shall modify, alter or in any manner interfere with the line or grades of any public park or park street, nor take up, move or disturb any . . . tree, . . . sod, soil or gravel thereof, except by direction of the Commissioner of Parks and Recreation or under the Commissioner's permit." Flavio LaRocca admits that, at the very least, he instructed his employees to move or disturb the gravel and terrain on the Parcel without permission of the Commissioner.

Defendants' actions also violated their common law duty. However Defendants seek to characterize the work depicted on the May 16, 2015 video, no reasonable person would believe that they could enter the property of another and perform such work without permission. *See* Ex. 30 (video).[5] Accordingly, Defendants' work on the Parcel on May 16, 2015, also constituted negligence, even if it did not involve removal of trees or the spreading of impervious/contaminated materials.

[5] The video also conclusively rebuts Defendants' concocted assertion that they were merely smoothing pre-existing gravel that became displaced from plowing East Street. *See Ezzi v. Domino's Pizza LLC*, 74 N.Y.S.3d 812, 815-816 (Sup. Ct. Richmond Cnty. Dec. 17, 2021) (granting summary judgment for defendant where video established defendants' version of accident despite non-movant's testimony contradicting video).

With respect to the City's third cause of action, it is well established that interference with the public's use of public property constitutes a public nuisance.

> A public nuisance exists for conduct that amounts of a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority.

532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, 96 N.Y.2d 280, 292 (2001); *see also Volunteer Fire Assn. of Tappan, Inc*, 101 A.D.3d at 856 (where a party has entered upon the property of another, "causing physical damage to, and depriving the plaintiff of the use and enjoyment of its property," that party may be liable for trespass and nuisance).

Here, it is undisputed that Defendants entered upon park property belonging to the City to level and compact an area for a parking lot for the private businesses on East Street without the permission of the City. Defs. Response at ¶¶47, 54, 57, 64-65, 68-70; Ex. 19 (Def. Response to Interrog. at p.5) (entered and worked on Parcel on May 16, 2015 "to allow for continued parking of vehicles by the employees of Benny Tree Service and PAB Paving"). Whether the neighboring contractors previously parked their vehicles on or near the Parcel, or whether Defendants were simply facilitating greater and easier parking use of the Parcel is irrelevant. Creation or continued use of park property for the private abutting landowners interferes with the public's use of the property, and caused damage which required the City to take steps to preserve the property.

III. Defendants Fail to Rebut the City's Entitlement to Summary Judgment on Defendants' First Counterclaim for Conversion of Jersey Barriers in 2003

In its motion for summary judgment, the City argued that Defendants' first counterclaim must be dismissed because (1) Defendants failed to serve a notice of claim, (2) it is barred by the statute of limitations, (3) it is barred by laches, and (4) Defendants had no ownership interest in the jersey barriers at the time they were allegedly taken by the third-party contractor because they

had abandoned them. City Mem. at 16. In opposition, Defendants do not address the merits of any of these arguments, instead Defendants address only the City's motion to amend its reply to assert the statute of limitations and laches defenses. Accordingly, the City is entitled to summary judgment on this claim, as the failure to serve a notice of claim and abandonment of the jersey barriers are independently fatal to the counterclaim.[6]

Defendants fail to show that they are prejudiced by amendment of the City's Reply to the Counterclaim to assert defenses of statute of limitations and laches. Prejudice that defeats a motion to amend "arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment." *Valdes v Marbrose Realty*, 289 A.D.2d 28, 29 (1st Dept 2001). Defendants make no such argument. Moreover, conclusory assertions of prejudice are inadequate to defeat a motion to amend. *Barrett v. N.Y.C. Dept. of Homeless Servs.*, 2010 N.Y. Misc. LEXIS 4191, *6 (Sup. Ct. Aug. 27, 2010). Instead, Defendants assert that the City is exhibiting "hypocrisy" by pursuing the separate encroachment action regarding Defendants' use of East Street for their private business. But, there is nothing "hypocritical" or inconsistent in the City's position. The City's obligation to maintain the integrity of public property and act for the public benefit is ongoing.[7] *See generally, Moore v. Jackson*, 1875 N.Y. Misc. LEXIS 16, *4 (Sup. Ct. 1875); *Id*. at *7 ("the courts have inflexibly adhered to the strict and only safe rule of the common law, that the public rights are to be jealously guarded and not infringed upon" lest "the public would eventually find that private enterprise had usurped the prerogative and rights which should never have been impaired"). There is not a statute

[6] Indeed, Defendants admitted all of the facts necessary to establish abandonment. *See* Defs. Response at ¶¶74-77.
[7] Defendants' assertions that the encroachment was reflected on permit applications for prior unrelated work at Defendants' property are irrelevant. *See Parkview Assocs*, 71 N.Y.2d at 282; *see e.g.* Defs. Response at ¶18.

of limitations on a municipality's obligation and right to remove a continuing trespass on public property and for good reason. *509 Sixth Ave. Corp. v. New York City Tr. Auth.*, 15 N.Y.2d 48 (1964) (encroaching structure is a continuing trespass giving rise to successive causes of action); *County of Erie v. Marjorie's Grove & Catering Service, Inc.*, 97 Misc. 2d at 331-332 (Sup. Ct. Erie Cnty. 1978); *People v. Scudder*, 21 Misc. 2d 614, 620-621 (Police Ct. Village of Lloyd Harbor 1959).

Second, as noted above, Defendants do not dispute that their conversion counterclaim is barred by the statute of limitations. Nor do Defendants dispute that the City is prejudiced by the 16-year delay in Defendants' assertion of the claim given that the City is only required to retain documents related to such issues for 6 years. 8 N.Y.C.R.R. 185.15 Appendix L.

Accordingly, the City is entitled to summary judgment on Defendants' claim for conversion.

IV. Defendants Fail to Rebut the City's Entitlement to Summary Judgment on Defendants' Second Counterclaim for Maintenance Expenses

Defendants' second counterclaim seeks damages for amounts allegedly expended by Defendants for "maintaining, repairing, and improving East Street from 2002 to the present." Ex. 2 at ¶105. First, Defendants contend that their claim is premised on East Street being a public street. Def. Opp. Mem. at 16, but neither the City, nor Defendants, are arguing that East Street is a public street. Indeed, Defendants are vehemently arguing the opposite. The City has argued that East Street is public property, and that even if it were a "public street," Defendants' second counterclaim for purported maintenance costs would fail to state a claim. In its motion for summary judgment, the City argued, inter alia, that there was no legal basis for the claim, and that it is largely barred by the statute of limitations and laches. City Mem. at 18-19.

Defendants now assert, in their opposition to summary judgment, that this claim is based on a theory unjust enrichment, though unjust enrichment is not mentioned in the counterclaim. Ex. 2 at ¶¶104-109. To establish a claim for unjust enrichment, a plaintiff must show that "(1) the other party was enriched, (2) at [plaintiff'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." *Mandarin Trading Ltd. v Wildenstein*, 16 N.Y.3d 173, 182 (2011); *see also Wikked Entm't, Inc. v. Stolper*, 2019 NYLJ LEXIS 3149 (Sup. Ct. Aug 14, 2019) (vague assertion that defendant "made [plaintiff] handle thousands of hours of personal work for [defendant] without payment" was too vague and conclusory to state a claim for unjust enrichment).

Plaintiff cannot satisfy any of these elements as the City never requested or "forced" Defendants to perform any work on East Street. Any work performed on East Street was unilaterally and voluntarily undertaken by Defendants for their own benefit. Indeed, Defendant plowed East Street in order to access the Guglielmo property further down the street, where Defendants stored their equipment. Defs. Response at ¶66 ("Defendants admit that LaRocca Inc. only plowed the full length of East Street between 2012 and approximately 2016 or 2017 when it was storing vehicles at the Guglielmo property so it could access the Guglielmo site."). Other contractors on East Street testified that they did not use their property during the winter because their businesses are seasonal only. Doc. No. 162 (City Opp. Ex. 1 Bongo Dep. at 9:23-10:8). Permitting an individual City resident to unilaterally decide to undertake work on public property because he is dissatisfied with the City's maintenance thereof, and then forcing the City to incur the expense of the unrequested work is not just and would establish a poor, and fiscally disastrous precedent.

Defendants also do not adequately explain why their claim is not barred by the applicable statute of limitations or laches. Defendants contend that, when they bought their property in 2002, thought East Street was a private street, the City disputes this, but assuming *arguendo* that Defendants' held this misconception in 2002, any such belief could not reasonably be maintained after the City issued the June 2009 notice of encroachment, which would have put Defendants on notice that East Street was public property. Defs. Response at ¶29. If Defendants believed the City was not adequately maintaining East Street, it should have raised the issue then; not purportedly incurred costs for another 10 years before asserting a counterclaim as leverage when the City was forced to take legal action due to Defendants' repeated misappropriation of public property.[8] Thus, as a matter of law, Defendants have failed to raise a triable issue of fact as to their entitlement to purported costs they unilaterally expended to maintain and repair East Street.

Conclusion

For the reasons stated above, and in the City's opening motion papers, this Court should grant the City's motion for summary judgment.

Dated: White Plains, New York
September 9, 2022

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Attorneys for the City of New Rochelle

By: _____
Peter A. Meisels
Eliza M. Scheibel
1133 Westchester Avenue
White Plains, NY 10604
Tel. No. (914) 323-7000

[8] Notably, unlike Defendants' neighbors who have a license for their use of East Street, Defendants have never obtained a permit nor paid the City for their use of City property, *i.e.*, the 10 foot strip of East Street that they utilize for their contractor's yard, though they have now been doing so for 20 years. Instead, Defendants flatly refuse to seek a license, or remove the encroachment, instead forcing the City to pursue costly legal action to protect public property. Defs. Response at ¶44. The City has not been "unjustly enriched" by Defendants' conduct.

Our File No.: 07367.00101

CERTIFICATION OF

WORD COUNT SPECIFICATIONS

I hereby certify, pursuant to 22 NYCRR 202.8-b (a) (b) and (c), that the foregoing computer-generated reply memorandum of law was prepared using a proportionally spaced typeface as follows:

Specifications:

Name of typeface: Times New Roman

Point Size: 12 pts

Lines Spacing: Double

Word Count: The total number of words in this reply memorandum of law, inclusive of point headings and footnotes if applicable, and exclusive of the pages containing the caption and signature block is 4168 words, which is in compliance with the word count limit of 4200 words.

Dated: White Plains, New York
September 9, 2022

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ
EDELMAN & DICKER LLP
Attorneys for Plaintiff

Peter A. Meisels

1133 Westchester Avenue
White Plains, NY 10604
(914) 323-7000
Our File No. 07367.00101