Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

City of New York, Plaintiff, - against -	Index Number: 3005/12
	Motion Date: 12/21/12
Kris Gounden,	Motion Cal. Number: 21
Defendant.	Motion Seq. No.: 2

The following papers numbered 1 to 10 read on this motion by plaintiff for summary judgment and cross-motion by defendant to compel discovery.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law in Support.....	5
Memorandum of Law in Opposition and motion to compel-Exhibits.....	6-7
Reply-Exhibits.....	8-10

As a preliminary matter, defendant's "memorandum of law in opposition to plaintiff's motion for summary judgment and motion to compel documents possessed by plaintiff" is deemed an affidavit in opposition to the motion and a cross-motion to compel discovery.

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by the City for summary judgment on its complaint brought pursuant to Real Property Actions and Proceedings Law (RPAPL) §871 for an injunction directing the removal of a fence encroaching upon a public easement and for dismissal of defendant's counterclaims, and for the imposition of civil penalties pursuant to §19-150 of the New York City Administrative Code in the sum of $5,000 for violation of §19-102 and $5,000 for violation of §19-107 of the Administrative Code is granted solely to the extent that defendant's counterclaims interposed in his answer are dismissed.

In all other respects the motion is denied. In addition, although defendant has not cross-moved for summary judgment, this Court, in searching the record, dismisses the complaint.

Cross-motion by defendant to compel document discovery is also denied.

Defendant is the owner, inter alia, of Lots 161 and 162, Block 14228, in Queens County. Said Lots are located on Broadway in Howard Beach and were purchased by defendant in 2006. Broadway begins at 102nd Street by the Lenihan Bridge, runs south-east to the center of a small peninsula and then runs south to the southern tip of the peninsula ending in a cul-de-sac. The southern section of the peninsula is surrounded by a navigable water canal and there are houses bordering the peninsula along its banks. The southern segment of Broadway runs roughly down the middle of the peninsula and is the only means of vehicular ingress to and egress from the homes on either side of this street and the property at the southern tip of the peninsula. It is undisputed that Broadway crosses a segment of Lots 161 and 162. Defendant's neighbors have driven on this roadway to and from their respective properties and have parked their vehicles on that portion of the roadway that is on Lots 161 and 162.

It is undisputed that there are no easements of record on these Lots and that the roadway is not shown on any maps. Indeed, the topographical and property line map prepared by the New York City Department of Design and Construction (DDC) based upon a survey performed in February 2004 as updated on January 10, 2012, which map is annexed to the moving papers, depicts no roadway. It only depicts a single "edge of pavement" line taken from a DDC "Metes and Bounds of Approximate Asphalt Pavement" map dated September 1, 2005 (said map is not annexed to the moving papers) which does not reflect the dimensions or morphology of any roadway. The only indication of any easement on the map is a 5-foot-wide right of way along the eastern border of defendant's Lots. Defendant, in his complaint in an action in Federal District Court for the Eastern District of New York (Kris Gounden v City of New York, et al,10 cv- 3438), alleged that prior to his purchase of the Lots, he was advised by the title closer for his title insurance company that the roadway was part of his property not subject to any easements or encumbrances and that he could fence off that area, and that in reliance upon said representations, he went ahead with the purchase of the Lots. After purchasing the subject Lots, defendant constructed a fence on Broadway within the borders of these Lots. The fence is depicted on the DDC map and appears on an aerial photograph taken on September 17, 2012, which photograph is annexed to the moving papers. The photograph has a graphic overlay of Lot 162.

The fence is in two sections and follows the curve of the

roadway. The northern section of fence, which is a wooden fence, is on Lot 162 and the southern segment of fence, made of what appears to be white vinyl or PVC, is on Lot 161. This fence bisects the roadway lengthwise from north to south.

According to the undisputed facts presented on the record in the District Court Action, shortly after purchasing Lots 161 and 162, defendant, considering his neighbors' use of the roadway that traverses his property as a trespass, blocked their access to it and had vehicles parked on it towed away. This prompted his neighbors to complain about his measures to prevent their use of the roadway, resulting in a visit to the disputed area by a New York City Council Member who purportedly informed him that he did not own the roadway and had no right to block access over it.

Defendant subsequently placed a boulder on the roadway to prevent vehicular access. This action resulted in a visit by a New York City Police officer who ordered defendant to remove the boulder or be arrested. Defendant complied. After an unfruitful meeting with the Queens Borough President and after additional complaints about continuing trespass on his property, defendant again placed the boulder on the roadway as a barrier to vehicular access. This prompted a response by the West Hamilton Beach Fire Department which demanded that he remove the boulder. When defendant refused to do so, NYPD officers came and removed the boulder, allegedly damaging defendant's fence in the process, and informing defendant that the boulder prevented emergency vehicles from reaching his neighbors' properties. The NYPD has not returned the boulder to defendant despite his demands that they do so.

Defendant thereafter commenced the aforementioned action in District Court asserting causes of action under the Fifth, Fourth and Fourteenth Amendments, civil rights claims under 42 U.S.C. §1981, 1983 and 1985, and claims under state law for trespass, conversion and taking without due process of law in violation of the New York State Constitution. Pursuant to the memorandum decision and order of District Court Judge Brian M. Cogan issued on April 22, 2011, defendant's causes of action under federal law were dismissed. Judge Cogan declined to exercise supplemental jurisdiction over defendant's state law claims. Pursuant to the memorandum decision and order issued by Judge Cogan on August 17, 2011, defendant's motion to vacate the judgment dismissing the complaint was denied. Pursuant to the order of the United States Court of Appeals for the Second Circuit (11-2061) issued on July 9, 2012, the order of the District Court issued on April 22, 2011 was affirmed.

After Judge Cogan dismissed defendant's District Court action, the New York City Department of Transportation (DOT) served upon defendant two notices of violation on August 11, 2011 for an unauthorized encroachment, to wit, a fence installed on a public

easement on Lots 162 and 161, in violation of §19-133 of the Administrative Code, and ordering him to remove the fence or face a fine of $250 -$1,000. The City thereafter commenced the present action on February 10, 2012. Defendant interposed an answer in which he contends that the fence is not on a public street or walkway and thus does not interfere with any public right of way, that his neighbors do not have the right to use his private property as a driveway to their landlocked homes, that the City has no easement over his property, that this Court is without jurisdiction to entertain this action because the City has not complied with, and is thus in violation of, the provisions of the Eminent Domain Procedure Law (EDPL) and therefore may not seek to acquire an easement, that Highway Law §189 is inapplicable to the City of New York but is only applicable to towns and that the City's selective application of RPAPL 871 is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Defendant also interposes counterclaims seeking compensatory and punitive damages for fraud, "affirmative acts of falsity", "exercising authority on a pretense", and violation of the United States Constitution and the New York State Constitution for the taking of his boulder.

The City's action brought pursuant to RPAPL 871 is based upon its contention that the disputed roadway passing through defendant's property became a highway pursuant to §189 of the Highway Law by virtue of its use and maintenance as a public highway for over 10 years prior to defendant's purchase of the property and, therefore, the City acquired an easement. That section provides, "All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to the width of at least three rods."

Highway Law §189 is grounded upon either the common law doctrine of dedication to the public by a presumptive grant which becomes conclusive by acquiescence on the part of the landowner to public use as a highway coupled with improvement and maintenance by the municipality for a period analogous to the period of limitation applicable to private persons claiming title by adverse possession or upon the theory of prescription (see Heyert v Orange and Rockland Utilities, Inc., 17 NY 2d 352 [1966]; De Haan v Broad Hollow Estates, 3 AD 2d 848 2nd Dept 1957]). Unlike the acquisition of title by adverse possession, however, the creation of a public highway by "user" (as the courts have termed it) "does not involve the conveyance of a fee but the transference of an easement to the public for the purpose of a highway" (Heyert v Orange and Rockland Utilities, Inc., supra at 357).

However, this Court agrees with defendant that the segment of Broadway at issue cannot become a public highway pursuant to §189

since that section only applies to towns.

Section 189 is part of Article 8 of the Highway Law entitled "Town Highways". Highway Law §3(5) defines "town highways" as "those constructed, improved or maintained by the town with the aid of the state or county, under the provisions of this chapter, including all highways in towns, outside of incorporated villages constituting separate road districts which do not belong to either of the two preceding classes." The two preceding classes referred to are state thruways and country roads.

Moreover, a town "is a municipal corporation comprising the inhabitants within its boundaries" (Town Law §2). "Historically, there has been a distinction in New York State between counties and towns on the one hand and cities and villages on the other. Towns and counties are involuntary subdivisions of the State created for the most part for convenience and for more expeditious State administration. Villages and cities are corporations organized by the voluntary action of local inhabitants and limited by statute or charter" (Curtis v Eide, 19 AD 2d 507, 508 [1st Dept 1963]). Howard Beach is not a town but part of the City of New York.

On January 1, 1898, one municipality under the corporate name of the City of New York was formed by the consolidation of the city and county of New York, the city of Brooklyn, the county of Kings, the county of Richmond and the county of Queens and the towns therein (except for the towns of Oyster Bay, North Hempstead and all but the Rockaway peninsula portion of Hempstead in Queens County)(see L 1897, ch 378). The five counties comprising the City of New York were thereafter denominated boroughs. With respect to Queens County, its towns, to wit, the Rockaway peninsula portion of the town of Hempstead and the towns of Flushing, Jamaica and Newtown, which had been created pursuant to Chapter 64 of the Laws of 1788, ceased to exist as separate towns. The city of Long Island City (which had separated from Newtown in 1870) also ceased to exist as a separate city, although it maintained its name of Long Island City as a neighborhood name. There are dozens of neighborhoods in Queens County, none of which is or ever has been a town, such as Howard Beach.

There is no basis to interpret Article 8 of the Highway Law, "Town Highways", as having any applicability to the streets of the City of New York. There is no reference in §189 to a city, which is significant since the "Legislature has always been careful to delineate the terms 'city', 'village' and 'town' when drafting statutes" (Curtis v Eide, supra at 508).

Moreover, not only is Howard Beach not a town and, therefore, the location of the portion of Broadway in question is not a town highway, but said roadway is not a highway. It is long established that streets in cities are not highways within the meaning of the

Highway Law (see Matter of Burns, 155 N.Y. 23 [1898]; Matter of Woolsey, 95 N.Y. 135 [1884]). Therefore, §189 of the Highway Law is inapplicable to streets in the City of New York and, thus, may not form the basis for the City's action under RPAPL §871.

Counsel for the City erroneously contends that the Court of Appeals has determined that §189 applies to all municipalities, including the City of New York, citing People v Brooklyn and Queens Transit Corp, (273 N.Y. 394 [1937]). The Court of Appeals made no such determination. That case involved a criminal prosecution of the defendant trolley company for public nuisance for obstructing a public street with trolley tracks and parked trolley cars. The People contended that the street in question was a public street upon, inter alia, the theory that it acquired a prescriptive right under §189 of the Highway Law solely by virtue of public use for the requisite period of time. The Court of Appeals summarily held, in this regard, that the road must not only be traveled upon by the public but also kept in repair and taken charge of by the public authorities in order to satisfy the provisions of that section, and that it was the burden of the People to establish that the road had been taken charge of by the City. This Court cannot conclude that the Court of Appeals, merely by discussing §189 must have found it to be applicable. The specific issue was never raised, and thus the Court of Appeals did not determine whether or not §189 of the Highway Law applies to the City of New York. It merely held that under that section relied upon by the People, mere public use was not sufficient. Indeed, the City cites no other case law, and this Court is unaware of any, interpreting §189 of the Highway Law as applying to streets in the City of New York.

The City annexes to its moving papers as Appendix "C" to Exhibit "B" a copy of an opinion of dedication issued by the Law Department of the City of New York on September 17, 1996. In said opinion letter, the Corporation Counsel opines that the disputed section of Broadway has been dedicated to public use as a public street in accordance with §36(2) of the General City Law. The Court notes that the Corporation Counsel does not opine that the disputed southern segment of Broadway became a public street by virtue of §189 of the Highway Law.

Reference is made to this opinion letter by John Cicciariello, employed by the Office of the Queens Borough President as Division Head of the House Numbers, Reports and Records Room Division, in his affidavit annexed as Exhibit "B". He avers that he oversees requests for opinions of dedication, which City agencies require prior to performing capital work on an unmapped street. He explained that opinions of dedication are issued by the New York City Law Department opining whether the street at issue complies with the requirements set forth in §36(2) of the General City Law. He also averred that upon the issuance of an opinion of dedication, his office files the opinion letter and adds the street to the

borough's Sectional Map. The Sectional Map, he explains further, is for internal administrative purposes only. He explained that due to an oversight, Broadway was not added to the Sectional Map in 1996 but that the Sectional Map was amended in 2010 to add it when the oversight was brought to his attention.

Section 36(2) of the General City Law provides, in relevant portion, "No public municipal street utility or improvement shall be constructed by any city having a population of one million or more in any street or highway until it has become a public street or highway and is duly placed on the official map or plan, with the exception that a city may construct improvements and provide services to any public way (mapped or unmapped) if the public way has been open and in use to the public for a minimum of ten years. The existence of the public way must be attested to by documents satisfactory to the municipality, such as reports of city agencies providing municipal services."

This section clearly is also reflective of the common law principle of dedication and acceptance and, thus, utilizes language similar to §189 of the Highway Law but, in addition, also explicitly codifies the rule established in case law that the road must not only be used by the public but must have been adopted by the public authorities through maintenance or improvement to be a public street. However, unlike §189 of the Highway Law, §36(2) of the General City Law does not contain the additional language that a roadway that has been so used for the prescriptive period shall be a highway (or in this case, a street) with the same force and effect as if it had been duly laid out and recorded as such. Indeed, §36(2) merely enjoins City agencies from making improvements to a street until it has become a public street, or until it has been used as such and the municipality has in fact been providing services to the street for the requisite period of time. Thus it merely provides that City funds cannot be utilized to make improvements or provide services to a street until it has become a public street. It does not provide a statutory basis for making a piece of land a public street. Indeed, counsel for the City, in his reply, states that the City is not relying upon the opinion of dedication to establish the public character of the southern segment of Broadway (and, by implication, §36[2] of the General City Law) but solely upon §189 of the Highway Law.

However, as heretofore noted, §189 of the Highway Law is inapplicable to the City of New York. Moreover, there is no statutory provision analogous to §189 of the Highway Law applicable to the City of New York whereby a parcel of land is deemed to be a public street merely by virtue of public use and municipal improvement for ten years. Rather, in the City of New York, "[a] declaratory judgment is the proper procedural vehicle to determine whether the road is or has become a public street" (Matter of Lauria v Hess, 305 AD 2d 511, 512 [2nd Dept 2003]).

Thus, since the nature of the disputed roadway has not been determined by way of a proper declaratory judgment action, those branches of the motion for injunctive relief and for the imposition of civil penalties pursuant to §19-150 of the New York City Administrative Code for violation of §19-102 and §19-107 of the Administrative Code must be denied. Moreover, since the present action is based solely upon the erroneous assumption that the road in question became a public highway pursuant to §189 of the Highway Law, the Court sua sponte grants summary judgment to defendant and dismisses the complaint. The Court has the inherent power to search the record and grant summary judgment where appropriate, even in favor of a non-moving party, with respect to a cause of action or issue that is the subject of motions before the Court (see Geoffrey S. Matherson & Assocs., Ltd. v. Siegler, 305 AD 2d 457 [2nd Dept 2003]).

That branch of the motion for summary judgment dismissing defendant's counterclaims interposed in his answer is granted.

Defendant's First Cause of Action fails to state a cause of action in that it seeks no relief. It merely asks the Court to take judicial notice of various sections of the Eminent Domain Procedure Law (EDPL) and contends that the City has failed to comply with the EDPL in depriving defendant of dominion over the disputed area and that the City is not authorized to take private land by way of an opinion of dedication. Moreover, the City is not seeking to take defendant's property by eminent domain and therefore, the EDPL is irrelevant. Eminent domain is the inherent sovereign right of the State to take private property for public use upon making just compensation (see West 41st Street Realty LLC v New York State Urban Development Corp, 298 AD 2d 1 [1st Dept 2002]). It has nothing to do with the establishment of a public easement under the theories of implied dedication or prescription. Moreover, the City has not based this action upon the opinion of dedication, but upon §189 of the Highway Law.

Since this matter has nothing to do with the EDPL or the opinion of dedication, defendant's Second Cause of Action alleging an unlawful taking in violation of the EDPL must likewise be dismissed. His claim that the seizure of his boulder violated the due process clause of the Fourteenth Amendment to the U.S. Constitution as well as Article I, §§2 and 12 of the New York State Constitution "because it is not a fence, when both serve the similarly situated same function" does not state a cognizable claim under those provisions. In addition, with respect to Article I, §2 of the NY State Constitution, that provision relates only to the right to trial by jury and is completely irrelevant to this matter. Moreover, with respect to his claim of violation of his Constitutional rights under the U.S. Constitution, the only vehicle for an individual to seek a civil remedy for violations of

constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1st Dept 1991]). Defendant has not interposed a counterclaim pursuant to §1983.

Defendant's Third Cause of Action for monetary damages for violation of Article II, §2 of the Civil Rights Law for removal of his boulder upon a "pretense" that it blocked the entrance of fire trucks when no fire occurred and while his eastern neighbors were exempted from removal of their vehicles and private fence from a private path also fails to state a cause of action under that provision.

Defendant's Fourth Cause of Action seeking punitive damages for the exercise of authority "on a pretense" that his boulder blocked access to homes by emergency vehicles also fails to state a cause of action. No cognizable cause of action for "exercising authority on a pretense" exists. Moreover, punitive damages may not be awarded against a municipality (see Berg-Bakis Limited v City of Yonkers, 90 AD 2d 784 [2nd Dept 1982]).

Defendant's Fifth Cause of Action for monetary damages for fraud on the part of individual police and fire personnel for identifying defendant's "boulder for blocking emergency vehicular access, while refusing to identify the numerous personal vehicles in the Lots adjoining Gouden's properties' eastern side" fails to state a cause of action for fraud. In any event, these individuals are not parties. Defendant's addition of some of the individuals in the caption of his answer and counterclaim is improper and does not serve to acquire jurisdiction over the individuals named in his counterclaims.

Defendant's Sixth Cause of Action for $500,000 damages for the seizure of his boulder in violation of Article I, §2 of the NY State Constitution fails to state a cause of action. As heretofore mentioned, Article I, §2 of the NY State Constitution relates to the right to trial by jury and is completely irrelevant to this matter. For the same reason, defendant's Seventh Cause of Action for $500,000 in punitive damages for the seizure of his boulder in violation of Article I, §2 of the NY State Constitution fails to state a cause of action. Moreover, as heretofore noted, punitive damages may not be awarded against a municipality. Indeed, defendant's demand in his Sixth Cause of Action of $500,000 for the removal of a rock from the roadway is clearly punitive in nature and not compensatory.

Defendant's Eighth Cause of Action for $500,000 damages for the seizure of his boulder in violation of Article I, §12 of the NY State Constitution's protection against unreasonable searches and seizures must also be dismissed. In the first instance, as

heretofore noted, his monetary demand is clearly punitive in nature and not compensatory and, thus, may not be awarded against the City. Moreover, defendant has failed to demonstrate, on this record, that the removal of the boulder from the roadway which blocked vehicular access to other homes was unreasonable and not based upon a reasonable belief by responding police and fire personnel that the placement of the boulder in the road posed a hazard to public safety. For the same reasons, defendants Ninth Cause of Action seeking $500,000 in punitive damages for the seizure of his boulder in violation of Article I, §12 of the NY State Constitution's protection against unreasonable searches and seizures must also be dismissed.

Finally, as already noted, the aforementioned counterclaims, insofar as they are interposed against individual defendants, must also be dismissed since these individuals are not parties.

Defendant's cross-motion to compel the production of documents is denied as moot. Moreover, there is no showing that defendant ever served upon the City a notice for discovery and inspection and the record herein does not indicate that the production of the documents demanded was ordered either by a preliminary conference order or a compliance conference order.

Accordingly, the complaint and defendant's counterclaims are dismissed, and the cross-motion is denied.

Dated: January 22, 2013

KEVIN J. KERRIGAN, J.S.C.