Cited
As of: March 18, 2025 5:04 PM Z

Sultan v. King

County Court of New York, Suffolk County

August 19, 2021, Decided

615511/2018

Reporter
73 Misc. 3d 338 *; 152 N.Y.S.3d 777 **; 2021 N.Y. Misc. LEXIS 4575 ***; 2021 NY Slip Op 21227 ****

[**1]** Melinda Sultan et al., Plaintiffs, v Loren E. King, Jr., et al., Defendants.

Core Terms

bamboo, spread, plaintiffs', defendants', plant, encroachment, properties, mowing, root, eradicate, trespass, landscaper, barrier, install, excavate, private nuisance, underground, invasive, neighboring property, rental value, loss of use, clipping, nuisance, damages, removal, rear, prescriptive easement, effective means

Case Summary

Overview
HOLDINGS: [1]-In a suit between adjacent residential property owners, plaintiffs were entitled to prevail because the spread of defendants' bamboo field onto plaintiffs' property was a substantial interference with the use and enjoyment of that property and constituted a private nuisance; [2]-In particular, the bamboo on defendants' property spread onto plaintiffs' property and it was a substantial, intentional, unreasonable interference with plaintiffs' right to use and enjoy their property that was caused by defendants' failure to act to prevent the migration of the bamboo from their property onto plaintiffs' property; [3]-The bamboo encroachment also constituted a trespass because defendants intentionally planted the bamboo on their property and the intrusion of the bamboo upon plaintiffs' property was inevitable as defendants did nothing to prevent the spread of the bamboo.

Outcome
Judgment for plaintiffs.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Begins to Run > Actual Injury

HN1[] **Statute of Limitations, Time Limitations**

A negligence cause of action accrues at the time of the injury. The statute begins to run when the damages become apparent, not when subsequently discovered.

Evidence > Burdens of Proof > Clear & Convincing Proof

Real Property Law > ... > Easements > Easement Creation > Easement by Prescription

Real Property Law > Encumbrances > Adjoining Landowners > Easements

HN2[] **Burdens of Proof, Clear & Convincing Proof**

To establish a prescriptive easement, however, a party must prove by clear and convincing evidence that the use of another's real property was open, notorious and continuous for a period of at least ten years.

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

HN3 **Nuisance, Elements**

The elements of a private nuisance claim were established in Copart Industries v. Consolidated Edison Company of New York. It is recognized that one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities.

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

HN4 **Nuisance, Elements**

Any one of these three elements of intentional and unreasonable, or negligent, or reckless can form the basis for a nuisance claim. An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct.

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

HN5 **Nuisance, Elements**

The elements of a private nuisance cause of action are an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.

Real Property Law > Torts > Trespass to Real Property

Torts > Premises & Property Liability > Trespass to Real Property > Elements

HN6 **Torts, Trespass to Real Property**

The elements of a cause of action sounding in trespass are an intentional entry onto land of another without justification or permission, or a refusal to leave after permission has been granted but thereafter withdrawn. Intent is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or inevitable consequence of that act.

Torts > ... > Elements > Duty > Foreseeability of Harm

HN7 **Duty, Foreseeability of Harm**

Defendants owe plaintiffs a duty to exercise reasonable care in the maintenance and use of its property to prevent foreseeable injury that might occur on adjoining property.

Real Property Law > ... > Damages > Types of Damages > Compensatory Damages

Torts > ... > Types of Damages > Property Damages > Loss of Use

HN8 **Types of Damages, Compensatory Damages**

The measure of damages for loss of use resulting from temporary injury to real property is the decrease in rental value.

Headnotes/Summary

Headnotes

Limitation of Actions—When Cause of Action Accrues—Negligence—Encroachment of Bamboo Onto Neighboring Property—Burden of Proof

1. In an action to recover damages relating to the spread of bamboo from defendants' property to plaintiffs' property, there was insufficient proof to support defendants' request to dismiss the negligence claim on statute of limitations grounds. A negligence cause of action accrues at the time of the injury. The statute begins to run when the damages become apparent, not when subsequently discovered. Here, plaintiffs testified

to when they first became aware of the encroachment of bamboo growth spreading onto their property. Since the underground spread of the bamboo system, as testified by the bamboo experts for both sides, unquestionably preceded the sprouting of bamboo above the soil line, the encroachment of the bamboo must have occurred at an earlier time. However, there was no evidence adduced as to the specific growth in question. The experts testified in general terms as to the propensity of bamboo to spread. There was no testimony, opinion or otherwise, that established the time it took for the bamboo field to encroach upon plaintiffs' property. Having pleaded the statute of limitations as an affirmative defense, defendants bore the burden of proof, which was not satisfied.

Limitation of Actions—Defense or Counterclaim—Prescriptive Easement

2. In an action to recover damages relating to the spread of bamboo from defendants' property to plaintiffs' property, defendants failed to establish that plaintiffs' trespass claim was untimely on the basis that, unbeknownst to plaintiffs, the trespass of the bamboo created a prescriptive easement in defendants' favor. To establish a prescriptive easement a party must prove by clear and convincing evidence that the use of another's real property was open, notorious and continuous for a period of at least 10 years. Here, defendants claimed that they obtained a prescriptive easement based upon their conclusion that the spread of bamboo onto plaintiffs' property occurred more than 10 years prior to when plaintiffs first complained to defendants about the bamboo encroachment. However, defendants utterly failed to prove any of the elements of a prescriptive easement, much less by clear and convincing evidence. There was no evidence that any of the parties were aware of the encroachment of defendants' bamboo onto plaintiffs' property, with particular reference to the side of the house abutting defendants' property and the front yard, prior to when plaintiffs first complained about the encroachment. Further, encroachment of bamboo roots underground and not visible hardly amounted to a "use" of real property or "open and notorious."

Torts—Nuisance—What Constitutes—Encroachment of Bamboo Onto Neighboring Property

3. In an action to recover damages relating to the spread of bamboo from defendants' property to plaintiffs' property, defendants were responsible on the basis of private nuisance, among other things, for the eradication of the bamboo that had spread onto plaintiffs' property and the installation of a barrier to prevent the spread in the future. The elements of a private nuisance cause of action are an interference substantial in nature, intentional in origin, unreasonable in character, with a person's property right to use and enjoy land, caused by another's conduct in acting or failure to act. Here, the credible and uncontradicted evidence established that the bamboo spread onto plaintiffs' property was a substantial, intentional, unreasonable interference with plaintiffs' right to use and enjoy their property and that it was caused by the failure of defendants to act to prevent the migration of the bamboo from their property onto plaintiffs' property. The testimony supported the opinion of plaintiffs' expert that the only effective means to eradicate and contain the bamboo was to excavate and remove the existing bamboo growth and to install a barrier.

Torts—Trespass—What Constitutes—Encroachment of Bamboo Onto Neighboring Property

4. In an action to recover damages relating to the spread of bamboo from defendants' property to plaintiffs' property, defendants were responsible on the basis of trespass, among other things, for the eradication of the bamboo that had spread onto plaintiffs' property and the installation of a barrier to prevent the spread in the future. The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission, or a refusal to leave after permission has been granted but thereafter withdrawn. Intent is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or inevitable consequence of that act. Here, defendants intentionally planted the bamboo on their property. While not necessarily "immediate" there was no question that the intrusion upon plaintiffs' property was inevitable given the fact that defendants did nothing to prevent the spread of the bamboo. The nature of running bamboo was to spread in all directions unless action was taken to contain it, as testified by the experts for both sides.

Negligence—Maintenance of Premises—Failure to Prevent Spread of Bamboo

5. In an action to recover damages relating to the spread of bamboo from defendants' property to plaintiffs' property, defendants were responsible on the basis of negligence, among other things, for the eradication of the bamboo that had spread onto plaintiffs' property and

the installation of a barrier to prevent the spread in the future. Defendants owed plaintiffs a duty to exercise reasonable care in the maintenance and use of their property to prevent foreseeable injury that might occur on adjoining property. Here, defendants failed to exercise reasonable care in the maintenance of their property by failing to take actions to prevent the spread of the bamboo onto plaintiffs' property. They acknowledged that they had not installed a barrier or taken any measures whatsoever to contain the bamboo on their property. By the testimony of their own bamboo expert, it was inevitable that the bamboo would spread to adjoining properties, which it in fact did to plaintiffs' property and the adjoining property to the rear of defendants' property.

Counsel: **[***1]** *Law Offices of Paula A. Miller, P.C.*, Smithtown, for plaintiffs.

Smith, Finkelstein, Lundberg, Isler & Yakaboski, LLP, Riverhead, for defendants.

Judges: HON. JAMES F. MATTHEWS, A.J.C.C.

Opinion by: JAMES F. MATTHEWS

Opinion

[780]** **[*340]** James F. Matthews, J.

This matter came on for a non-jury trial before the undersigned on March 4, 8, 25 and 29, and April 6, 2021. Plaintiffs seek damages relating to the spread of bamboo from defendants' property to their property located on Shelter Island, New York. Specifically, plaintiffs seek to recover the cost to excavate and remove bamboo that has spread onto their property from defendants' property and for the installation of a barrier along the property line separating the two properties and along a portion of the rear property line to prevent the future spread of bamboo onto their property. Plaintiffs also seek damages for loss of use of their property. Plaintiffs' claims are based on a private nuisance claim, negligence and trespass. Defendants **[*341]** deny any legal responsibility to plaintiffs under either statutory or common law and, in any event, argue that all of the claims are untimely. Further, defendants argue that **[**781]** plaintiffs failed to mitigate any damages that they might be entitled **[***2]** to either for remediation or for loss of use.

At the outset, the court notes the sad passing of defendant Loren E. King, Jr., subsequent to the conclusion of the trial while this matter was sub judice. Defense counsel has opined that *CPLR 1015 (b)* permits the court to decide this case because the relief sought by plaintiffs survives only as against Mrs. King, the surviving spouse and codefendant, as represented by defense counsel. The court agrees. (*See Bon Temps Agency v Hickey, 5 AD3d 157, 773 NYS2d 56 [1st Dept 2004]*; *Bova v Vinciguerra, 139 AD2d 797, 526 NYS2d 671 [3rd Dept 1988]*.) Accordingly, the court will decide this matter on the merits.

The core facts are not in dispute. The Sultans and the Kings are adjacent residentially improved property owners on East Brander Parkway, Shelter Island, New York. Both parties utilize their respective properties as "vacation homes" and maintain their principal residence at another address. Sometime in the early 1990s, the Kings elected to plant a grove of running bamboo on their property to serve as privacy screening between their property and the Sultan property. At the time of the planting, it was lawful to plant running bamboo. In 2015, it became unlawful to plant running bamboo on any property in the State of New York. The maintenance and retention of existing bamboo groves, such **[***3]** as defendants', remained lawful and continues to be lawful in the Town of Shelter Island where the subject properties are located.

There is no dispute that running bamboo is an invasive species of plant that can be expected to spread in all directions. The invasive nature of running bamboo has spurred legislative action in many jurisdictions. As noted, in New York State it is unlawful to plant running bamboo due to its noxious nature. Many local jurisdictions on Long Island have adopted laws that either prohibit the maintenance of running bamboo or impose regulations on properties where running bamboo is located so as to prevent the spread to neighboring properties. (*See e.g.* Town of Huntington Code ch 156A; Town of Babylon Code ch 145; Town of Smithtown Code § 221-4; Town of Oyster Bay Code ch 135, art VIII; Town of North **[****2]** Hempstead Code ch 67; Town of Hempstead Code § 128-61 [B] [3].) The regulations vary from outright prohibition of growing or maintaining running **[*342]** bamboo, requiring the removal of existing bamboo, to prohibiting the spread to neighboring properties or within a certain distance of property lines. Some also require remediation of encroachments of running bamboo onto neighboring properties. Notably, the Town **[***4]** of Shelter Island where the subject properties are located has no laws

regarding bamboo.

The central question before the court, therefore, is whether in the absence of statutory or regulatory prohibitions or mandates, the defendants can be held liable to plaintiffs for the spread of their running bamboo on any theory of the common law and, if so, what is the appropriate remedy.

It is not in dispute that defendants' bamboo has in fact spread to the property directly to the rear of both the Sultans' and the Kings' properties as well as onto the Sultans' property. On the Kings' own property, the bamboo grove has not spread more than 10 feet or so, according to the estimates of the witnesses testifying. The Kings have continuously employed the same landscaper who mows and weeds the lawn area adjacent to their bamboo grove which defendants claim has been effective in limiting the above ground growth of **[**782]** bamboo further into their property. Defendants were not sure if their landscaper used chemicals. There is no evidence as to the extent of bamboo growth below ground. It also is undisputed that defendants have done nothing to prevent the spread of the bamboo onto plaintiffs' or any other adjoining **[***5]** properties, excepting only the removal by defendants' landscaper, Mr. Richards, of some of the bamboo that had spread to the rear of defendants' property. Nothing was ever done by Mr. Richards or defendants or anyone else acting on their behalf to prevent or stop the spread of bamboo onto the plaintiffs' property or to eradicate the bamboo that had spread. Mrs. Sultan, one of the plaintiffs, testified that they have consistently employed a gardener who regularly mows the lawn and maintains the landscaping on their property. In addition, the gardener was paid extra to clean bamboo leaves and debris that had fallen onto their property from overhanging bamboo towards the rear of their property, particularly in the pool area. Until 2017, plaintiffs both deny ever seeing bamboo growing in their yard.

All of the expert testimony received into evidence agreed that the running bamboo is an invasive species and that it tends to spread in all directions. Plaintiffs testified that they first became aware of the spread of the running bamboo onto their property in the spring of 2017. There are numerous **[*343]** photos in evidence showing the bamboo growth at various times from 2017 when it was first observed, **[***6]** according to plaintiffs, through 2020. Defendants claim one or both of the plaintiffs previously advised defendants that bamboo had spread onto their property from the King property and that they had expended sums to maintain their property. Plaintiffs dispute they had made any such communication. They claim that their only previous complaints related to bamboo leaves/debris from overhanging bamboo falling into their rear yard in the area of their pool.

Defendants argue that when the bamboo spread onto plaintiffs' property and/or when **[****3]** plaintiffs were aware of the spread is relevant to their statute of limitations defense to all claims. The court, however, finds that it is immaterial when plaintiffs first learned about the spread of bamboo onto their property from defendants' property. In the court's opinion, the statute of limitations defenses raised by defendants to the nuisance and trespass claims have no merit. Regarding the negligence claim, the court credits the testimony of plaintiffs and finds that this claim also is timely.

Plaintiffs' claims based upon nuisance and trespass are not barred by the statute of limitations because of the continuing nature of the condition. The Court **[***7]** of Appeals ruling in *Bloomingdales, Inc. v New York City Tr. Auth. (13 NY3d 61, 915 NE2d 608, 886 NYS2d 663 [2009]*) is, in the court's opinion, squarely on point. The municipal defendant had severed plaintiff's drain pipe while installing a concrete conduit. This occurred in 1999. The severing of the drain pipe caused periodic flooding. The Court rejected the statute of limitations defense as to the nuisance and trespass claims finding under the facts that the defendant's interference with plaintiff's property rights was an unlawful encroachment giving rise to successive causes of action, under claims based upon both trespass and nuisance. "There was a continuous interference with Bloomingdales' right to use and enjoy its property right." (*13 NY3d at 66*; *see also Lucchesi v Perfetto, 72 AD3d 909, 911-912, 899 NYS2d 341 [2nd Dept 2010]*.) The court in *Yager v Thompson (1 Misc 3d 902[A], 781 NYS2d 628, 2003 NY Slip Op 51482[U] [Nassau Dist Ct 2003]*, *affd* **[**783]** *8 Misc 3d 138[A], 806 NYS2d 449, 2005 NY Slip Op 51286[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2005]*) specifically ruled that running bamboo constituted a continuous trespass and therefore an action for costs to remediate was not subject to the statute of limitations defense, as alleged by defendants in the case at bar. The court ruled that plaintiffs' **[*344]** nuisance claim based on the encroachment of the neighbors' bamboo onto their property was not barred by the statute of limitations "in light of the continuing nature of the condition. *See*, *Scheg v Agway, 229 AD2d 963, 645 NYS2d 687 (4th Dep't 1996)*; *Kearney v Atlantic Cement Co., 33 AD2d 848, 849, 306 NYS2d 45 (3rd Dep't 1969)*." (*2003 NY Slip Op 51482, *6*; *Shatto v Hood, 6*

Pa D & C 4th 614, 1990 WL 300832 [Ct Common Pleas 1990]] [Defendant planted bamboo on his property in 1968. It eventually **[***8]** spread to plaintiff's property. Defendant did nothing to remove the bamboo from plaintiff's property. Action commenced in 1988 timely]; Norwood v City of New York, 95 Misc 2d 55, 406 NYS2d 256 [Civ Ct, Queens County 1978]] [action timely where tree planted 25 years earlier and tree roots eventually caused damage to plaintiff's sewer pipe].)

HN1[] **[1]** The negligence cause of action accrues at the time of the injury. (*See* Barrell v Glen Oaks Vil. Owners, Inc., 29 AD3d 612, 814 NYS2d 276 [2d Dept 2006].) The statute begins to run when the damages become apparent, not when subsequently discovered. (Cranesville Block Co. v Niagara Mohawk Power Corp., 175 AD2d 444, 445, 572 NYS2d 495 [3d Dept 1991].) Plaintiffs testified that the first time they became aware of the encroachment of bamboo growth spreading onto their property was in the spring of 2017. Since the underground spread of the bamboo system, as testified by the bamboo experts for both sides, unquestionably preceded the sprouting of bamboo above the soil line, the encroachment of the bamboo must have occurred at an earlier time. There was no evidence adduced as to the specific growth in question. The experts testified in general terms as to the propensity of bamboo to spread. There was no testimony, opinion or otherwise, that established the time it took for the bamboo field to encroach upon the plaintiffs' property. As a result there is insufficient proof to support defendants' request that the court dismiss **[***9]** the negligence claim on **[****4]** statute of limitations grounds. Having pleaded the statute of limitations as an affirmative defense, defendants bear the burden of proof, which is not satisfied here. Accordingly, the court finds that the negligence claim is timely. In any event, the court found the testimony of plaintiffs that they first became aware of the bamboo encroachment onto their property in 2017 to be credible. Defendants' landscaper as well as defendants testified that they did not observe any bamboo growing on plaintiffs' property until 2017.

[2] Defendants also contend that the trespass claim is untimely because they obtained a prescriptive easement based upon their conclusion that because it is universally accepted **[*345]** and the bamboo experts for both sides agreed that the nature of running bamboo is that it will spread in all directions, therefore, the spread of defendants' bamboo onto plaintiffs' property must have occurred more than 10 years prior to 2017 when plaintiffs complained to defendants about the bamboo encroachment. Defendants argue that, albeit unknowingly to plaintiffs, the trespass of the bamboo created a prescriptive easement in their favor. HN2[] To establish a prescriptive **[***10]** easement, however, a party must prove by clear and convincing evidence that the use of another's real property was open, notorious and continuous for a period of at least 10 years. (*See* **[**784]** Ciringione v Ryan, 162 AD3d 634, 634, 78 NYS3d 421 [2nd Dept 2018].) Here, defendants have utterly failed to prove any of the elements of a prescriptive easement, much less by clear and convincing evidence. There is no evidence that any of the parties were aware of the encroachment of the defendants' bamboo onto plaintiffs' property, with particular reference to the side of the house abutting defendants' property and the front yard, prior to 2017. Further, encroachment of bamboo roots underground and not visible hardly amounts to a "use" of real property or "open and notorious." Simply stated, the undisputed facts in this case do not support defendants' claim of having acquired a prescriptive easement.

Turning to the merits of the claim, the court will first consider the claim based upon a private nuisance. HN3[] The elements of a private nuisance claim were established by the Court of Appeals in Copart Indus. v Consolidated Edison Co. of N.Y. (41 NY2d 564, 569, 362 NE2d 968, 394 NYS2d 169 [1977]):

> "today it is recognized that one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment **[***11]** of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities." (Citations omitted.)

The court must therefore determine whether the encroachment of defendants' bamboo onto plaintiffs' property was intentional and unreasonable or negligent or reckless. HN4[] Any one of these three elements can form the basis for a nuisance claim. In Copart, supra, the Court expounded on what intentional and unreasonable means, quoting cited sources (at 571): "An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing **[*346]** it; or (b) knows that it is resulting or is substantially certain to result from his conduct" (*Restatement [First] of Torts § 825*; McKenna v Allied Chem. & Dye Corp., 8 AD2d 463, 467, 188 NYS2d 919, 923 [1959]; *see* Jerome Prince, Richardson on Evidence § 90 [10th ed 1973]).

HN5[↑] In *Aristides v Foster (73 AD3d 1105, 1106, 901 NYS2d 688 [2d Dept 2010]*, the Court held:

> "The elements of a private nuisance cause of action are an interference (1) substantial in nature, (2) **[****5]** intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act (*see Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 570, 394 NYS2d 169, 362 N.E.2d 968 [1977]*; *Donnelly v Nicotra, 55 AD3d 868, 868-869, 867 NYS2d 118 [2008]*; *JP Morgan Chase Bank v Whitmore, 41 AD3d 433,434, 838 NYS2d 142 [2007]*; *Vacca v Valerino, 16 AD3d 1159, 1160, 791 NYS2d 784 [2005]*; *Zimmerman v Carmack, 292 AD2d 601, 602, 739 NYS2d 430 [2002]*)."

This rule of law was reaffirmed by the Court in *Behar v Quaker Ridge Golf Club, Inc. (118 AD3d 833, 835, 988 NYS2d 633 [2d Dept 2014]*). See also *Gellman v Seawane Golf & Country Club, Inc. (24 AD3d 415, 417-418, 805 NYS2d 411 [2d Dept 2005]*), wherein **[***12]** the Court held as follows: "The plaintiffs established that the defendant's conduct constitutes a private nuisance because the operation of the driving range in a manner that allows golf balls to continuously escape the range produces a tangible and appreciable injury to the plaintiffs' property that renders its enjoyment especially uncomfortable and inconvenient."

[3] The court finds that plaintiffs proved that the defendants are liable for damages based on their private nuisance **[**785]** claim. The credible and uncontradicted evidence established that the bamboo spread onto plaintiffs' property was a substantial, intentional, unreasonable interference with plaintiffs' right to use and enjoy their property and that it was caused by the failure of defendants to act to prevent the migration of the bamboo from their property onto plaintiffs' property. The testimony of plaintiffs' and defendants' bamboo experts was that running bamboo is a species of plant that spreads in all directions and that deliberate actions must be taken to prevent the spread. Running bamboo is now a prohibited plant in New York State due to its highly invasive characteristics and the extreme difficulty to eradicate bamboo that **[***13]** has spread. Again, experts for both sides agreed that it was necessary to dig up and remove all root structures to eradicate the growth and then to install **[*347]** impenetrable barriers to a certain depth to prevent the spread of bamboo in the future. (Trial tr at 79-81 [Mr. Veracka]; trial tr at 305-309, 361-362, 388, 392-393 [Mr. Greenspan].)

Defendants vigorously argued that running bamboo can be contained by regularly mowing and clipping sprouts before they grow into stalks. Through defendants' testimony and the testimony of their landscaper and bamboo expert, they argued that this is how they limited the spread of the bamboo into the interior of their property. Their expert agreed that to contain bamboo this would be effective but candidly testified that this method would not eradicate the bamboo. He also acknowledged that the bamboo growth and roots that had spread underneath the plaintiffs' deck in the front of their house would have to be excavated to stop the spread and growth of the bamboo. The defendants' expert witness, Mr. Veracka, testified the practice of mowing and cutting above the surface bamboo growth was a means "to contain bamboo, not eradicate bamboo . . . The best **[***14]** solution is to have a barrier." (Trial tr at 80-81.) As noted, however, he admitted that excavation and root removal was the only means to contain the bamboo growth underneath the plaintiffs' front deck. This admission is at odds with his opinion that simple mowing of above surface growth is an effective way to manage the spread of running bamboo and casts in doubt the believability of his opinions. Further, this expert also acknowledged that he had used barriers dug into the ground to contain his own bamboo field **[****6]** decades ago. This testimony supports the opinion of plaintiffs' expert Mr. Greenspan that the only effective means to eradicate and contain the bamboo is to excavate and remove the existing bamboo growth and to install a barrier. In fact it was his opinion that mowing and cutting above surface growth only would spur underground horizontal root growth which, in the case of the plaintiffs' property, could result in damage to the house foundation and other underground structures. The plaintiffs' home is located relatively close to the defendants' property line such that the underground growth poses a real threat, according to Mr. Greenspan.

Defendants' landscaper **[***15]** and expert testified that the use of toxic pesticides would also be necessary to limit the growth of the bamboo above the ground surface. Significantly, none of the proof offered by defendants regarding the mowing and clipping method would eliminate the underground roots of the bamboo.

Since 2017 when they discovered the bamboo growth on their property, the plaintiffs have not cut or pruned the bamboo **[*348]** growth based upon the advice of their bamboo expert, Mr. Greenspan, who testified that the most effective way to limit the horizontal spread of

the bamboo to the house foundation would be to allow it to **[**786]** grow vertically. This would slow down the horizontal spread of the bamboo. Defendants argued that plaintiffs should have mowed and cut the bamboo growth to stop the vertical growth. Notably, defendants had no solution to the issue of underground root growth of the bamboo especially in regard to the area under the deck and the foundation of the house. Their expert, Mr. Veracka, testified, as noted, that excavation would be required to address the bamboo underneath the deck.

As noted above, many local governments have enacted laws to regulate running bamboo. It is clearly recognized as a **[***16]** noxious plant that wreaks havoc if not properly contained. The evidence is undisputed that the defendants' bamboo spread onto plaintiffs' property and that defendants made no effort to contain this bamboo before or after the bamboo spread onto plaintiffs' property had become apparent in 2017. There also is no question that the planting of the bamboo was intentional on the part of defendants who readily acknowledged that they had accepted their landscaper's recommendation of running bamboo as a screening between the parties' properties and paid to have it installed in and around 1990. It is not clear what part of the yard the original planting covered but by 2017 it had spread to the property behind plaintiffs' and defendants' properties and onto plaintiffs' property and to some extent the bamboo field had expanded inward on defendants' property. This growth carried on from 1990 to at least 2017 with defendants doing nothing to abate the spread of the bamboo onto neighboring properties. Defendants knew or should have known of the invasive nature of bamboo and the need to take substantial steps to contain the bamboo on their property. Certainly, they were aware of what needed to be **[***17]** done in 2017 when plaintiffs voiced their objections and insisted that the bamboo be removed from their property and that a barrier be installed to contain the bamboo on defendants' property. Defendants failed to take any steps to contain the bamboo on their property from 1990 to the present and continuing. At some point defendants' landscaper removed bamboo plants from the lot directly behind defendants' and plaintiffs' properties, without excavating to **[****7]** remove the bamboo root systems. Of note is that defendants' landscaper also testified that he had excavated to remove bamboo and the **[*349]** root systems at other locations to eradicate running bamboo but was never requested or authorized by defendants to do so with respect to the spread of the bamboo onto neighboring properties.

Defendants' argument that mowing and clipping are effective means to prevent the spread of bamboo is belied by the determination in 2015 to make it unlawful to plant running bamboo in the State of New York. Also, the many local jurisdictions that have gone further to regulate existing bamboo fields to require setbacks from neighbors' properties and to require the removal of bamboo that had spread to other properties **[***18]** are further evidence that the containment method offered by defendants is not in fact an effective means to stop the spread of running bamboo and to eradicate the underground root systems. If running bamboo could effectively be eradicated by simple mowing and cutting as argued by defendants, then why was it outlawed by the State of New York and why do many local jurisdictions regulate and limit the spread and location of existing fields of running bamboo? As testified to by experts for both parties, the only effective means to eradicate bamboo is to excavate and completely remove the root systems and the only effective means to stop the spread is to install a barrier shield to current standards.

[787]** All of the foregoing supports the court's conclusion that the spread of defendants' bamboo field onto plaintiffs' property was a substantial interference with the use and enjoyment of that property and therefore constitutes a private nuisance. This is true under any of the tests set forth in *Copart Indus. v Consolidated Edison Co. of N.Y.*, supra, *Aristides v Foster*, supra, or *Gellman v Seawane Golf & Country Club, Inc.*, supra.

[4] The court next considers whether plaintiffs have proved a trespass claim against defendants.

> ***HN6***[] "The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without **[***19]** justification or permission (*see* *Carlson v Zimmerman, 63 AD3d 772, 773, 882 NYS2d 139 [2009]*; *Woodhull v Town of Riverhead, 46 AD3d 802, 804, 849 NYS2d 79 [2007]*), or a refusal to leave after permission has been granted but thereafter withdrawn (*see* *Rager v McCloskey, 305 NY 75, 79, 111 NE2d 214 [1953]*; *Navarro v Federal Paper Bd. Co., 185 AD2d 590, 592, 586 NYS2d 381 [1992]*). Intent is defined as intending the act which produces the unlawful intrusion, where the intrusion **[*350]** is an immediate or inevitable consequence of that act (*see* *Phillips v Sun Oil Co., 307 NY 328, 331, 121 NE2d 249 [1954]*)." (*Volunteer Fire Assn. of Tappan, Inc. v County of Rockland, 101 AD3d 853, 855, 956 NYS2d 102 [2d Dept 2012]*.)

The defendants intentionally planted the bamboo on their property. While not necessarily "immediate" there is no question that the intrusion upon plaintiffs' property was inevitable given the fact that defendants did nothing to prevent the spread of the bamboo. The nature of running bamboo is to spread in all directions unless action is taken to contain it, as testified by the experts for both sides. Accordingly, the court finds that the bamboo encroachment onto plaintiffs' property constitutes a trespass, plaintiffs having proved the elements of trespass by a preponderance of the evidence.

[5] Finally, the court considers plaintiffs' claim of negligence against defendants. ***HN7***[⬆] Defendants **[****8]** owe plaintiffs a "duty to exercise reasonable care in the maintenance and use of [their] property to prevent foreseeable injury that might occur on adjoining property." (*Gellman v Seawane Golf & Country Club, Inc., 24 AD3d 415, 418, 805 NYS2d 411 [2d Dept 2005]*; *Associated Mut. Ins. Coop. v 198, LLC, 78 AD3d 597, 597, 914 NYS2d 7 [1st Dept 2010]*.) Based upon the foregoing findings of fact, there **[***20]** is no question in the court's mind that defendants failed to exercise reasonable care in the maintenance of their property by failing to take actions to prevent the spread of the bamboo onto plaintiffs' property. They acknowledged that they had not installed a barrier or taken any measures whatsoever to contain the bamboo on their property. By the testimony of their own bamboo expert, it was inevitable that the bamboo would spread to adjoining properties, which it in fact did to plaintiffs' property and the adjoining property to the rear of defendants' property. Accordingly, the court finds that plaintiffs have proved by a preponderance of the evidence that defendants were negligent in failing to take timely action to prevent the spread of bamboo onto neighboring properties.

Defendants allege that plaintiffs failed to mitigate their damages by not mowing and clipping the bamboo that had spread onto their property. Relying on their bamboo expert, plaintiffs did not mow and clip the bamboo because of the possibility that would spur new growth further into their property, where they were concerned about their home, waterlines and the spread of bamboo further into their property. The plaintiffs **[***21]** were **[**788]** advised that the only means to eradicate the bamboo on **[*351]** their property was by excavating and removing all roots coupled with the installation of an appropriate barrier to thereafter prevent encroachment. As discussed at length herein, the court agrees, based upon the opinion of plaintiffs' expert, whom the court credits based upon the quality of his testimony. The court also notes that the testimony of defendants' experts concurs in many respects with the conclusions of plaintiffs' expert. Thus, the court finds that plaintiffs acted in good faith by accepting the recommendation of their bamboo expert in lieu of mowing and clipping.

The court finds that defendants are responsible for the eradication of the bamboo that had spread onto plaintiffs' property from defendants' property and the installation of a barrier to prevent the spread in the future. The court accepts the proof submitted by plaintiffs regarding the cost to perform these services as set forth in exhibit 23 and hereby awards plaintiffs the sum of $46,165.63. Additional damages as requested in exhibit 23 are awarded as follows: $900 for a dumpster; $5,000 for hand labor to remove rhizomes the length of the concrete wall and **[***22]** under the concrete wall; $800 for topsoil; $1,700 for landscape and shrub replacement to front and right side of house; $600 to re-mulch; $250 for lawn repair and $850 for rhizome removal of the back concrete patio, for a total additional sum of $10,983.75 inclusive of sales tax for a total award of $57,149.38.

Plaintiffs also claim damages for loss of use of the property due to the extensive and substantial bamboo on their property. Plaintiffs' evidence consisted of testimony of a recognized real estate expert as to the loss of rental value for 2017 through 2020. ***HN8***[⬆] The measure of damages for loss of use resulting from temporary injury to real property is the decrease in rental value. (*See Jenkins v Etlinger, 55 NY2d 35, 432 NE2d 589, 447 NYS2d 696 [1982]*; *Matter of Behar v Friedman, 180 AD3d 671, 119 NYS3d 222 [2d [*9]Dept 2020]*.) Plaintiffs' expert testified that there was zero rental value due to the bamboo growth she observed in photos. The expert, however, never visited the property. The court acknowledges that the expert, Ms. Janalyn Travis-Messer, is highly qualified to render rental value opinions for property located on Shelter Island. However, the court finds it difficult to accept her valuations without a personal visit to the property to observe the conditions both outside and inside the property for each **[***23]** of the seasons she renders a loss of rental value opinion. The court accepts that it is likely that there was some loss of use of rental value based upon the spread and growth of the bamboo. Given **[*352]** the court's conclusion that the values ascribed by the real estate expert lack a necessary foundation (onsite inspections), the court finds that plaintiffs have not met their burden of proof as to the value of the loss of use of plaintiffs' real property

causally connected to the spread of bamboo from defendants' property onto plaintiffs' property.

Accordingly, the court grants plaintiffs a judgment against defendant in the sum of $57,149.38, without prejudgment interest, with statutory costs and disbursements. All other requests for relief not specifically granted herein are denied.

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