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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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RICHARD O. VILLELLA, COURTNEY S. TARPLEY, JEFF ROSSI, MELISSA GILLMER, MICHAEL I. OLSHAKOSKI, and ROSEMARIE OLSHAKOSKI

Plaintiffs,

-against-

DOUGLAS W. LOGAN, HOMELAND TOWERS, LLC, NEW CINGULAR WIRELESS PCS, LLC d/b/a AT&T, and NEW YORK SMSA LIMITED PARTNERSHIP d/b/a VERIZON WIRELESS

Defendants.

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DECISION & ORDER
Index No. 501477/2020
Motion Seq. Nos. 8, 9, 10, 11, 12, 13

CAPONE, J.S.C.

The following papers, NYSCEF Docs. 360-491, were read and considered on (1) the motion of the Defendant Homeland Towers, LLC (hereinafter Homeland) which is for summary judgment dismissing the complaint insofar as asserted against it pursuant to CPLR 3212 [Seq 8]; (2) the motion of the Defendant New York SMSA Limited Partnership d/b/a Verizon Wireless (hereinafter Verizon), which is for summary judgment dismissing the complaint insofar as asserted against it pursuant to CPLR 3212 [Seq 9]; (3) the motion of the Plaintiffs Richard O. Villella, Courtney S. Tarpley, Michael I. Olshakoski, and Rosemarie Olshakoski (hereinafter Villella/Tarpley & Olshakoski) which is for summary judgment in their favor on the complaint pursuant to CPLR 3212 [Seq 10]; (4) the motion of the Defendant New Cingular Wireless PCS, LLC d/b/a AT&T (hereinafter AT&T) which is for summary judgment dismissing the complaint insofar as asserted against it pursuant to CPLR 3212 [Seq 11]; (5) the motion of the Plaintiffs Jeff Rossi and Melissa Gillmer (hereinafter Rossi/Gillmer) which is for summary judgment in their favor on the complaint pursuant to CPLR 3212 [Seq 12]; and (5) the motion of the Defendant

Douglas W. Logan (hereinafter Logan) which is for summary judgment dismissing the complaint insofar as asserted against him pursuant to CPLR 3212 [Seq 13].

PAPERS	**NYSCEF DOC NUMBER**
Seq 8	
MSJ of Defendant Homeland Towers, LLC	360-382
Opposition by Plaintiffs Villella, Tarpley, Olshakoski, and Olshakoski	469-470
Opposition by Plaintiffs Rossi and Gillmer	473
Reply of Defendant Homeland Towers, LLC	482
Seq 9	
MSJ of Defendant Verizon Wireless	383-403
Opposition by Plaintiffs Rossi and Gillmer	474
Reply of Defendant Verizon Wireless	483
Seq 10	
MSJ of Plaintiffs Villella, Tarpley, Olshakoski, and Olshakoski	404-409
Opposition by Defendant Homeland Towers, LLC	451-454
Opposition by Defendant Verizon Wireless	455-458
Opposition by Defendant AT&T	467
Opposition by Defendant Logan	477
Reply of Plaintiffs Villella, Tarpley, Olshakoski, and Olshakoski	485-489
Seq 11	
MSJ of Defendant AT&T	410-433
Opposition by Plaintiffs Villella, Tarpley, Olshakoski, and Olshakoski	468, 471
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MSJ of Plaintiffs Rossi and Gillmer	434-438
Opposition by Defendant Homeland Towers, LLC	459-462
Opposition by Defendant Verizon Wireless	463-466
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Seq 13	
MSJ of Defendant Logan	439-446
Opposition by Plaintiffs Villella, Tarpley, Olshakoski, and Olshakoski	472
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This is an action brought by the Plaintiffs to, inter alia, obtain a permanent injunction preventing the Defendants from, inter alia, undertaking any proposed excavation, tunnelling, tree removal, expansion and/or resurfacing of a common driveway which passes over land owned by the Plaintiffs Villella, Tarpley, and the Olshakoski Family Trust and provides access to the otherwise landlocked properties owned by Plaintiffs Rossi/Gillmer and Defendant Homeland (which property was formerly owned by Defendant Logan). Access is permitted pursuant to a written grant of a right-of-way in common which is contained in each of the parties' Deeds. The right-of-way burdens the properties owned by the Villella/Tarpley Plaintiffs and the Olshakoski Plaintiffs and benefits the Rossi/Gillmer Plaintiffs and Homeland. The original owner of the landlocked parcel now owned by Homeland took title to the landlocked parcel with "a right-of-way in common with others over lands now or formerly of O'Neil" (NYSCEF Doc. 119 [Amended Complaint at ¶ 15]; NYSCEF Doc 120). When Defendant Logan took title to the landlocked parcel, he did so with the same "right of way in common with others over lands now or formerly of O'Neil" (NYSCEF Doc. 119 [Amended Complaint at ¶ 16]; NYSCEF Doc 120). Finally, when Defendant Logan deeded the landlocked parcel to Defendant Homeland, he did so with the same "right of way in common with others over lands now or formerly of O'Neil" (NYSCEF Doc 121). The Plaintiffs collectively assert that the right-of-way granted to Defendant Homeland confers only a right to pass over the land for ingress and egress to the otherwise landlocked parcel. Defendant Homeland, however, has obtained a building permit which permits and requires, inter alia, certain alterations to the right-of-way which can be described generally as a widening of the common driveway, by removal of trees, to permit access by emergency vehicles, the resurfacing of the common driveway, and excavation within the common driveway to bury telecommunication and utility lines.

In addition to the permanent injunction barring all of the above-described activities, the Plaintiffs also seek a judicial declaration that the right-of-way over the Villella, Tarpley, and Olshakoski Family Trust properties is limited to ingress and egress only and, thus, any other activities, including but not limited to, the excavation, tunnelling, burying of conduit or wires underground, and/or expansion, re-grading, or other improvements to the common driveway contemplated and required by the Building Permit are prohibited.

Finally, the Plaintiffs seek an award of damages for alleged trespass, nuisance, nuisance per se, and fraud by the Defendants[1]. The Plaintiffs allege that if any of the future work described above (excavation, resurfacing, trenching, etc.) is performed in the future, those activities would constitute a trespass, nuisance, and nuisance per se for which the Plaintiffs should receive an award of damages. The Plaintiffs also allege that, in January 2020, the Defendants hired an engineering/surveying firm who spray painted and drilled boring holes in the right-of-way upon the Villella/Tarpley property and those activities constituted a trespass and nuisance by which the Plaintiffs have been damaged. Finally, the Plaintiffs allege that the Building Permit was applied for and issued fraudulently and, therefore, should be deemed null and void.

The history of this litigation, including a more detailed description of the parties, the pre-litigation background of the dispute, and the procedural background of this matter once the action was commenced, including the removal to Federal Court and return to this Court, is detailed in this Court's two prior Decision and Orders, e-filed February 23, 2022, and May 19, 2023 (NYSCEF Docs. 116, 349-351), and incorporated by reference herein. Importantly, by

[1] The causes of action for fraud and nuisance per se were dismissed by this Court insofar as asserted against Homeland, AT&T and Verizon by Decision and Order e-filed May 19, 2023.

Decision and Order, e-filed February 23, 2022, this Court (Davis, J.), granted the Plaintiffs' motion for a preliminary injunction, prohibiting the Defendant Homeland (and its agents/representatives/persons acting on its behalf) from "developing and construction in the right-of-way on plaintiff's properties," including the removal of any trees, while the action was pending (NYSCEF Doc 116, p 16).

Following the completion of discovery and the filing of a note of issue in March 2023 (NYSCEF Doc 346), the Court has now before it six motions for summary judgment, filed by each of the parties[2]. Analysis of the parties' respective positions with respect to the causes of action contained in the Amended Complaint will be taken in turn.

I. Declaratory Judgment & Permanent Injunction

According to the Amended Complaint, the Plaintiffs seek a judicial declaration pursuant to CPLR § 3001 that (1) the right-of-way in common ownership with others grants the right-of-way only for ingress and egress access to Moffatt Road; (2) the Defendants cannot unilaterally expand the scope of this right-of-way in common ownership with others to include unlawful construction and alteration of the Villella Property and the Olshakoski Property; and (3) the Defendants do not and did not have a property interest in the Villella Property and the Olshakoski Property other than that of ingress and egress as contemplated in the original grant of the right-of-way in common ownership with others (NYSCEF Doc 119, ¶¶ 93-95). The Amended Complaint also seeks a permanent injunction enjoining the Defendants from engaging in any activities within the right-of-way beyond ingress and egress (NYSCEF Doc 119, ¶¶104-

[2] The Plaintiffs' Villella and Tarpley and the Plaintiffs Rossi and Gillmer have moved separately for summary judgment in their favor on the complaint [Seq 10 & 12]. The submissions made in support of the Rossi/Gillmer motion [Seq 12] incorporates and adopts the legal arguments made by counsel for Plaintiffs Villella and Tarpley in support of their motion for summary judgment [Seq 10]. As such, even though separate motions were filed, the Plaintiffs' arguments for the relief sought are, effectively, identical and, therefore, treated as a uniform position.

106, 109-110).

The dispute at the center of this litigation is the legal interpretation of a single phrase contained within Homeland's deed: "TOGETHER WITH A RIGHT-OF-WAY IN COMMON WITH OTHERS OVER LANDS NOW OR FORMERLY OF O'NEIL," followed by a metes and bounds description of said right-of-way (NYSCEF Doc 121).

The Plaintiffs contend, in support of their separate motions for summary judgment and in opposition to the Defendants motions for summary judgment, that the term "right of way" is, effectively, a term of art which, according to Court of Appeals case law, confers only the right of ingress and egress when that term is utilized in an easement grant. Since here the grant is a simple right-of-way, without more or less, the Defendants only have the authority to use the right-of-way for access to and from Moffatt Road. All other activities which the Defendants seek to undertake in connection with the cell tower project in the right-of-way, including excavation, expansion, re-grading, tree removal, and/or burying of underground communication and electrical lines, is simply not permitted. According to the Plaintiffs, this interpretation is both consistent with the case law as well as consistent with the intent of the original grantor. Accordingly, this Court should grant the branches of the Plaintiffs' separate motions for summary judgment on the Plaintiffs' Amended Complaint and award the judicial declarations and permanent injunction sought regarding the use of the right-of-way for ingress and egress only, and should deny the branches of the Defendants separate motions which seek summary judgment dismissing the declaratory judgment and permanent injunction causes of action insofar as asserted against each of them separately.

The Defendant Homeland argues, both in support of its motion for summary judgment and in opposition to the Plaintiffs' separate motions, that the easement grant language is broad

and unrestricted and, therefore, so long as the use and type of activity the Defendant seeks to perform in the right-of-way is not unreasonable, the use and activities are permitted. Homeland further notes that the activities Homeland seeks to undertake in connection with the cell phone tower project are authorized pursuant to the Federal Court Consent Order, required pursuant to the Building Permit and the Village Code, and are similar in kind to the types of activities and uses that the other property owners have engaged in with respect to the right-of-way. Since the easement grants a right of way "in common" with the other owners, Homeland must be permitted to use the right-of-way in the same and similar manners as the other common owners. Homeland also argues that the term "right of way" in not a term of art at all and the language of the grant must be given its most common and usual meaning. The brief language from the Court of Appeals cases which the Plaintiffs rely upon to support their position that the use of the term "right-of-way" permits, as a matter of law, only ingress and egress, which argument this Court (Davis, J.), adopted and agreed with in granting a preliminary injunction in the Plaintiffs favor prohibiting any and all activities in the common driveway, is simply unsupported by closer review of the facts of each of those Court of Appeals cases, which casts significant doubt on the accuracy of the short statements contained in those Orders and renders each so distinguishable from the matter at hand as to make that caselaw inapplicable here. Since a common sense reading of the easement language contains no language prohibiting or excluding any of the requested activities, the activities contemplated here are permitted and the branches of the Plaintiffs' motions which sought summary judgment in their favor on the declaratory judgment and permanent injunction causes of action must be denied and the branches of Homeland's motion for summary judgment dismissing the declaratory judgment and permanent injunction causes of action should be granted.

The Defendant Verizon argues that, because Homeland has the lawful right to perform the Approved Work within the easement, there is no unlawful conduct to enjoin and the declaratory judgment and permanent injunction causes of action must be dismissed (NYSCEF Doc 385, p 13). The Defendant AT&T similarly contends that because nothing in the language of the easement expressly prohibits the Approved Work and because the work is consistent with the intended use and scope of the easement as demonstrated by the other owners' use of same, Homeland has conclusively established that the Approved Work is permitted and, therefore, the declaratory judgment and permanent injunction causes of action must be dismissed (NYSCEF Doc 411). The Defendant Logan does not address the declaratory judgment or permanent injunction causes of action in either his submissions in support of his motion for summary judgment or in his submissions in opposition to the Plaintiffs' separate motions for summary judgment (NYSCEF Docs 439-446, 477-479).

Preliminary Injunction

As noted above, this Court is mindful of and has taken judicial notice of the thoughtful, reasoned Decision and Order issued by this Court (Davis, J.), in connection with the Plaintiffs motion, brought by order to show cause, for a preliminary injunction enjoining the Defendant Homeland from using the right of way in the manner authorized by the Building Permit pending the final resolution of this matter (NYSCEF Doc 116). Specifically, this Court has reviewed and considered the Court's analysis contained therein regarding the Plaintiffs' "likelihood of success on the merits" (NYSCEF Doc 116, p 7-10) because, in many ways, the arguments raised in support and in opposition to that motion are identical to the arguments raised now in support and in opposition to the several motions for summary judgment. Indeed, the legal landscape regarding interpretation of the language of an easement grant, whether the phrase "right of way"

is a term of art or not, and what other Courts have done when faced with scenarios similar to the one at hand, has not materially changed since Justice Davis granted the Plaintiffs a preliminary injunction in February 2022. At that time, Justice Davis considered and agreed with the Plaintiffs' position that the Court of Appeals, in *Holden v City of New York* (7 NY2d 840 [1959]), had conclusively held that "[t]he reservation of a mere 'right-of-way' […] included only the right of passage over the surface of the land" (NYSCEF Doc 116, p 8). Indeed, Justice Davis noted that, while the Court of Appeals' pronouncement was "sparse," it was nevertheless "on point to the central question" before him and Homeland had "ignore[d]" any discussion of *Holden* in their Memorandum of Law (NYSCEF Doc 116, p 8). Justice Davis went on to note, as argued by the Plaintiffs, that this legal declaration was affirmed by the Court of Appeals seven years later in *Heyert v Orange & Rockland Utilities* (17 NY2d 352 [1966]), and that the Third Department case law cited to and relied upon by Homeland was unavailing. Justice Davis again appeared to note that Homeland had seemingly glossed over that the language of the easement was not simply for a "right-of-way" but rather a "right-of-way […] **over** lands now or formerly of," which Justice Davis noted bolstered the Plaintiffs' position that the right of way only permits ingress and egress over the land (NYSCEF Doc 116, p 9). Having concluded that the Plaintiffs were likely to succeed on the merits, Justice Davis analyzed the remaining elements (irreparable harm and balancing of the equities) and concluded that a preliminary injunction should be granted. Since Justice Davis decided the preliminary injunction motion, discovery has been completed, including the deposition of the Plaintiffs and the Building Inspector, and that testimony has been provided to this Court in connection with the motions for summary judgment.

Prima Facie Burden

Both Homeland[3] and the Plaintiffs have moved for summary judgment in their favor on the cause of action seeking a declaration (or denial of that declaration) that the language contained in Homeland's deed granting a right-of-way in common with others over the lands formerly owned by O'Neil permits only ingress and egress as well as on the cause of action for a permanent injunction prohibiting any activities within the right-of-way authorized by the Building Permit. As proponents of a motion for summary judgment, each has the burden, initially, of establishing their entitlement to the relief sought as a matter of law and of eliminating all issues of fact.

The extent of an easement or right-of-way claimed under a grant is generally determined by the language used in the grant (*see Menucha of Nyack, LLC v Fisher*, 110 AD3d 1037 [2d Dept 2013]; *Starcic v Hardy*, 31 AD3d 630 [2d Dept 2006]; *O'Malley v Hill & Dale Prop. Owners*, 299 AD2d 400, 402 [2d Dept 2002]; *Perillo v Credendino*, 264 AD2d 473 [2d Dept 1999]). However, where the language of the grant is ambiguous or unclear, the court will consider surrounding circumstances tending to show the grantor's intent in creating the easement (*see Schulz v Dattero*, 104 AD3d 831, 835 [2d Dept 2013]; *Board of Mgrs. of Bayside Plaza Condominium v Mittman*, 50 AD3d 718, 719 [2d Dept 2008]; *Somers v Shatz*, 22 AD3d 565, 567 [2d Dept 2005]; *Route 22 Assocs. v Cipes*, 204 AD2d 705, 706 [2d Dept 1994]). "If the parties to a reservation [of an easement or right of way] have failed to express their meaning sufficiently, it becomes a question to be ascertained by a court and in order to arrive at the intent, the

[3] As noted previously, while the Defendants Verizon and AT&T have moved for summary judgment dismissing the complaint insofar as asserted against them, they raise no distinct arguments as to implication of an award of the declaratory relief and a permanent injunction insofar as asserted against them individually. Rather, they support Homeland's position with respect to the scope of permitted activities within the right-of-way.

surrounding circumstances may be inquired into and taken into consideration" (49 NY Jur, Easements, § 40, at 125–126, citing *Herman v Roberts*, 119 NY 37 [1890]; *see Sordi v Adenbaum*, 143 AD2d 898 [2d Dept 1988]).

This Court finds that, on the competing motions for summary judgment, the language of the deed granting Homeland a right-of-way in common with others over lands formerly owned by O'Neil is ambiguous in terms of the scope of permitted activities within the right-of-way. This Court rejects the Plaintiffs' contention that the easement must be limited to ingress and egress only as a matter of law based upon the use of the phrase "right-of-way" in the grant. This Court finds it significant that the terms "ingress," "egress," or any other similar terms, are not found within the grant itself. The Court also finds that the Court of Appeals cases of *Holden* (supra) and *Heyert* (supra) are factually distinguishable from the case at hand and, therefore, this Court declines to apply their holdings to this matter in the manner this Court (Davis, J.), did in granting the Plaintiffs' motion for a preliminary injunction. This Court determines that the use of the phrase "right-of-way" in this grant was not so clear and unambiguous as to render further analysis of the scope of the rights under the grant unnecessary.

Nevertheless, this Court also rejects Homeland's broad contention that the language of the right-of-way is unlimited and, therefore, any activities deemed reasonable and useful to the landlocked parcel must be permitted. The grant it not unlimited because it contains the phrases "in common with others" and "over lands," each of which tend to imply that the grantor intended that the right-of-way be used in some particular manner. To rule that the grant is wholly unlimited would require this Court to ignore the inclusion of those words and phrases.

Indeed, this Court concludes that the grant is not sufficiently defined by the terms used and, therefore, this Court must look to the behavior of the parties to determine the intent and

scope of the right of way, including any language within the grant itself which can provide context. Here, the Court notes that the grant includes the phrase "in common with others," which implies that the rights of the respective landowners are uniform and shall be consistent. The Court further finds that inclusion of the phrase "over lands" implies that the grant did not contemplate underground activities.

The Building Permit calls for removal of four trees, the adding of approximately 1,500 square feet of gravel driveway within the easement, and the underground placement of electric and telecommunications lines within the right-of-way (*compare* Plaintiffs Statement of Material Facts, NYSCEF Doc. 406, ¶ 16, *with* Homeland's Statement of Material Facts, NYSCEF Doc 361, ¶ 34-35).

It cannot be disputed, given this Court's review of the deposition testimony of the Plaintiffs and non-party Bujarski, the Village Building Inspector, that the Plaintiffs' properties along the right-of-way are each serviced by the type of utilities which Homeland seeks to run within the easement to service its property. The testimony and evidence submitted by Homeland establishes that the wires, pole, and other utility infrastructure providing utilities to the Plaintiffs' properties are either located within the right-of-way or pass through and over the right-of-way to the residences of the Plaintiffs (NYSCEF Doc 372, p 61 [Bujarski]; NYSCEF Doc 373, p 20-21 [Tarpley]; NYSCEF Doc 374, p 60-64, 67-71 [Villella]; NYSCEF Doc 375, p 26, 35, 38 [Gillmer]; NYSCEF Doc 376, p 33-39 [Rossi]; NYSCEF Doc 378, p 36 [M. Olshakoski] [confirming presence of utility pole in the right of way]).

There is also ample testimony establishing that the right-of-way has been improved, regraded, and resurfaced by the Plaintiffs numerous times over the years to ensure that the right-of-way remains in good condition and has been used in a manner consistent with permitting

construction, utility, and other large delivery trucks to access the properties (NYSCEF Doc 373, p 17-19, 35-40, 43-44 [Tarpley]; NYSCEF Doc 374, p 25-27, 31-32, 40-48, 56-60, 92-93, 145-146 [Villella]; NYSCEF Doc 375, p 22, 25, 29 [Gillmer]; NYSCEF Doc 376, p 52-54, 69-71, 75-77, 86-87, 126-129 [Rossi]; NYSCEF Doc 377, p 26-28, 32-33, 35 [R. Olshakoski]; NYSCEF Doc 378, p 18-19 [M. Olshakoski]).

Finally, there is compelling evidence establishing that the improvements to the right-of-way, including tree removal to widen the drivable area, were included in the Building Permit in consultation with the local Fire Department in order to ensure emergency vehicles can reach all of the properties served by the right-of-way (NYSCEF Doc 372, p 19-25, 30-31, 62-63, 65-66 [Bujarski]; NYSCEF Doc 376, p 71-72 [Rossi] [testimony that, when he called the fire department to his property, the Fire Department parked the truck on Moffat without ever attempting to come up the drive to his home]). Under the Village Code all roads must be of sufficient size and quality to permit emergency access (NYSCEF Doc 372, p 63-64 [Bujarski]).

Based upon the above cited testimony, as well as the documents submitted by Homeland and the Plaintiffs' in support of their respective motions (and in opposition to each other's respective motions), this Court finds that the evidence establishes that improvements of the right-of-way which are required by the Village under the Village Code, calling for the removal of four trees and the adding of approximately 1,500 square feet of gravel driveway within the easement, are improvements which are within the scope of the grant of the right-of-way for access, consistent with the Plaintiffs' prior use of the right-of way, and are designed to ensure all owners whose properties are on the right-of-way have equal and appropriate emergency and non-emergency access (*see* Village Code § 168-36[B][1]).

With respect to the trenching and excavation of the right-of-way for the purpose of

burying underground conduit, however, the Court further concludes that these activities are not contemplated by the language of the grant. This is especially true because the grant uses the phrase "over lands." There is no testimony from any Plaintiff that utilities (or anything similar in nature) has ever been buried under the right-of-way in the past. As such, it is this Court's determination that the digging of trenches in the right-of-way for the purpose of burying conduit is not permitted under the grant of the right-of-way. While the burial of utility wires, which appears to be the preferred method under the Village Code (*see* Village Code § 168-46), is not permitted, Homeland is permitted to receive utilities to its property in the same manner as its neighbors the Plaintiffs. Indeed, Building Inspector Bujarski testified that he would still have issued the building permit if the utilities/wires were run overhead, rather than underground (NYSCEF Doc 372, p 66 [Bujarski]).

As noted above, the remaining named Defendants either support Homeland's position seeking dismissal of the declaratory judgment and permanent injunction causes of action or take no position with respect thereto. While the Amended Complaint does not distinguish among the named Defendants, it appears clear to the Court that the Defendants Verizon, AT&T, and Logan have no obligation or intention to engage in any activities within the right-of-way. As such, to the extent the separate motions of Defendants Verizon, AT&T, and Logan may be construed as seeking dismissal of the causes of action seeking declaratory judgment and permanent injunction insofar as asserted against them, the branches of their separate motions are granted.

Based on all of the foregoing, the Court finds that the Plaintiffs' first cause of action for a declaratory judgment is granted only to the extent that the Plaintiffs are entitled to a declaration that Homeland cannot unilaterally expand the scope of the right-of-way in common ownership with others over land to include trenching and excavation within the right-of-way for the purpose

of the underground burial of electric and telecommunications lines. Similarly, this Court finds that the Plaintiffs' second cause of action for a permanent injunction is granted only to the extent that the Plaintiffs are entitled to a permanent injunction enjoining Homeland from undertaking any trenching and excavation work within the right-of-way for the underground burial of electric and telecommunications lines. Aside from these limited awards of relief, the Plaintiffs' causes of action seeking a declaratory judgment and a permanent injunction are otherwise denied and dismissed as against all named Defendants.

II. Trespass & Nuisance

According to the Amended Complaint, the Plaintiffs allege that, because the right-of-way only confers a right for ingress and egress, any actions taken by the Defendants within the right-of-way beyond such ingress and egress is considered a trespass upon the Villella/Tarpley and Olshakoski Plaintiffs' property (NYSCEF Doc 119, ¶ 120). The Amended Complaint alleges that Defendant Logan, personally and through his agents, also repeatedly entered onto the Villella property unlawfully in order to make intended modifications in anticipation of building permit approval (NYSCEF Doc 119, ¶ 121). The Plaintiffs further allege that, in or about January 20, 2020, the Defendants hired and allowed an engineering/surveying firm to spray paint and drill boring holes on both the Villella/Tarpley and Olshakoski properties without obtaining the consent of the property owners (NYSCEF Doc 119, ¶¶ 122-123 [emphasis added]). Accordingly, the Plaintiffs assert that the Defendants have trespassed upon the Villella/Tarpley and Olshakoski properties and the Plaintiffs are entitled to an award of damages as a result (NYSCEF Doc 119, ¶124).

The Amended Complaint further alleges that these same facts support a finding that the Defendants have willfully created a nuisance upon the Villella/Tarpley and Olshakoski

properties (NYSCEF Doc 119, ¶¶ 123, 129). The Amended Complaint alleges that, because the Defendants do not have the permission or right to enter upon the Villella/Tarpley and Olshakoski properties to remove trees, to install additional roadway within the right-of-way, and to dig trenching for the permanent installation of underground electric and telecommunications conduit infrastructure, to undertake such activities is both prohibited and would constitute unlawful nuisance and nuisance per se[4], by which the Plaintiffs' have been damaged (NYSCEF Doc 119, ¶¶ 125, 129-130).

The Defendant Homeland contends that summary judgment dismissing the trespass and nuisance causes of action insofar as asserted against it is warranted because the complained of activities to be conducted within the right-of-way have never occurred due to the issuance of the preliminary injunction. As such, the thrust of the Plaintiffs' complaint is that, in the future those activities would constitute a trespass and nuisance. However, the only way any of those activities would be undertaken is if this Court determines that Homeland is legally entitled to engage in those activities. To the extent the Amended Complaint asserts a cause of action for trespass based upon the activities of the firm hired by Homeland to conduct certain pre-construction activities in the right-of-way before the preliminary injunction was granted, those activities are protected under General Obligations Law § 9-105 and cannot serve as a basis for a trespass claim.

The Defendant Verizon and Defendant AT&T each contend, separately, that summary judgment dismissing the trespass and nuisance and nuisance per se causes of action insofar as asserted against them is warranted because there is simply no dispute that Verizon and AT&T

[4] As noted above, the nuisance per se cause of action was dismissed insofar as asserted against the Defendants Homeland, Verizon, and AT&T previously.

have not engaged in any activities in the right-of-way, have never entered onto the Plaintiffs' properties, and there is no evidence that either have unreasonably or substantially interfered with any of the Plaintiffs' use and enjoyment of their land.

The Plaintiffs contend that they are entitled to summary judgment on the trespass cause of action because it is undisputed that the firm hired by the Defendants came onto the Plaintiffs' properties and used spray paint and drilled boring holes on January 20, 2020. The Plaintiffs assert that they have sufficiently "alleged the trespass claim and are therefore entitled to damage as this Court sees just and fit" (NYSCEF Doc 408, p 13-14). Nuisance is not addressed substantively by the Plaintiffs.

"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" (*Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 855 [2d Dept 2012]; *see Wlody v Birch Family Services, Inc.*, 210 AD3d 1036 [2d Dept 2022]).

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 (*see Copart Indus., Inc. v Consolidated Edison Co. of NY, Inc.*, 41 NY2d 564, 570 [1977]; *Aristides v Foster*, 73 AD3d 1105, 1106 [2d Dept 2010]).

As determined above, this Court finds that Homeland is only prohibited from undertaking the trenching and excavation for the burial of underground electric and telecommunication lines within the right-of-way and Homeland is legally entitled to engage in all other Approved Work and activities required by the Building Permit in the right-of-way. As such, it follows that the

Plaintiffs' claims of trespass and nuisance cannot stand to the extent those causes of action are based upon the activities this Court has concluded Homeland is legally entitled to engage in within the right-of-way (*see Mangusi v Town of Mount Pleasant*, 19 AD3d 656, 657 [2d Dept 2005]["An action for trespass may not be maintained where the alleged trespasser has an easement over the land in question"]).

With respect to the allegation that, on January 20, 2020, employees of an engineering firm entered upon the Villella/Tarpley property without permissions, it was the testimony of the Plaintiffs Tarpley and Villella that employees from the surveying firm Badey & Watson entered the Villella/Tarpley property, spray painted the rock wall, and put rods in the ground (NYSCEF 373, p 30-32; NYSCEF Doc 374, p 100). Villella testified that he called the firm, and they removed the orange paint and the rods immediately, resulting in no damage to his rock wall (NYSCEF Doc 374, p 100-101). This Court finds that Homeland has met its prima facie burden of establishing its entitlement to dismissal of this cause of action as the actions by their agents are protected pursuant to General Obligations Law § 9-105 and, while the surveyors may have been held liable for any damage to the Plaintiffs' land, as noted above, Villella testified that there was no damage to his rock wall. In opposition the Plaintiffs have failed to raise a triable issue of fact.

While not explicitly outlined in the Defendant Logan's motion, the Court notes that, with respect to the claim for nuisance per se, the Amended Complaint is devoid of any allegation, nor has any evidence been submitted to the Court establishing, that the Defendants' actions are in violation of the law. As such, dismissal of that cause of action insofar as asserted against Logan, the only Defendant who didn't previously move for this relief, is warranted at this juncture.

Accordingly, based on all of the foregoing, the branches of the Defendants' separate

motions which are to dismiss the causes of action seeking damages for trespass and nuisance insofar as asserted against them each are granted and those causes of action are dismissed and the Plaintiffs' nuisance per se cause of action insofar as asserted against Defendant Logan is likewise dismissed.

III. Fraud insofar as asserted against Defendant Logan

Finally, the Defendant Logan has moved for summary judgment[5] dismissing the fraud cause of action insofar as asserted against him. To the extent the Amended Complaint alleged this fraud cause of action against the other named Defendants, this Court dismissed that cause of action insofar as asserted against them previously.

The Plaintiffs contend that dismissal of the fraud action against Logan is not warranted because they have sufficiently alleged that Logan made a material misrepresentation to the Village of Nelsonville and knowingly omitted relevant information, to wit that he had a right-of-way but no ownership interest in the Plaintiffs' property itself in seeking a building permit.

"The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury; a plaintiff must show not only that he actually relied on the misrepresentation, but also that such reliance was reasonable" (*see Spector v Wendy*, 63 AD3d 820 [2d Dept 2009][internal quotation and citations omitted]).

While the Plaintiffs may have alleged a material misrepresentation and/or material omission by Logan, Logan has established, prima facie, that the Plaintiffs have not alleged or

[5] Counsel for Logan asks that the Plaintiffs actions be deemed frivolous, and Defendant Logan be awarded attorney's fees. The Court declines to award attorney's fees and that branch of the Defendant Logan's motion is denied.

established any of the remaining elements and their submissions in opposition to Logan's motion does not raise a triable issue of fact. Accordingly, the cause of action alleging fraud insofar as asserted against Defendant Logan must be dismissed.

IV. Remaining Contentions

Any other relief sought and/or any additional arguments made in the parties' respective motions and not explicitly addressed herein are without merit or need not be considered in light of this Court's determination.

Accordingly, it is hereby

ORDERED that the branches of the Defendants' separate motions [Seqs 8, 9 & 11] which sought summary judgment dismissing the trespass and nuisance causes of action alleged in the Plaintiffs' Amended Complaint insofar as asserted against them individually are granted, and those causes of action are dismissed in their entirety; and it is further

ORDERED that the Defendant Logan's motion [Seq 13] which sought summary judgment dismissing the Plaintiffs' Amended Complaint insofar as asserted against him is granted, and the Amended Complaint insofar as asserted against Defendant Logan is dismissed in its entirety; and it is further

ORDERED that the branches of the Plaintiffs' separate motions [Seqs 10 & 12] which sought, in effect, a permanent injunction enjoining the Defendant Homeland Towers, LLC from engaging in trenching and the permanent installation of underground electric and telecommunications conduit infrastructure within the right-of-way contained in the Deed from Defendant Logan to Defendant Homeland Towers, LLC, for real property known as 15 Rockledge Road, Nelsonville, New York is granted; and it is further

ORDERED that the Defendant Homeland Towers, LLC is hereby enjoined from

engaging in any trenching within the right-of-way for the purpose of installing underground electric and telecommunications conduit infrastructure; and it is further

ORDERED that the remaining branches of the Plaintiffs' separate motions [Seqs 10 & 12] which sought, in effect, a permanent injunction enjoining the Defendant Homeland Towers, LLC from conducting the remaining activities required and authorized by the Building Permit within the right-of-way are denied; and it is further

ORDERED that the branches of the Plaintiffs' separate motions [Seqs 10 & 12] which sought, in effect, a judgment declaring that the Defendant Homeland Towers, LLC is not lawfully permitted to engage in trenching and the permanent installation of underground electric and telecommunications conduit infrastructure within the right-of-way contained in the Deed from Defendant Logan to Defendant Homeland Towers, LLC, for real property known as 15 Rockledge Road, Nelsonville, New York is granted; and it is hereby

ADJUDGED and DECREED that the Homeland Towers, LLC is not lawfully permitted to engage in trenching and the permanent installation of underground electric and telecommunications conduit infrastructure within the right-of-way contained in the Deed from Defendant Logan to Defendant Homeland Towers, LLC, for real property known as 15 Rockledge Road, Nelsonville, New York; and it is further

ORDERED that the remaining branches of the Plaintiffs' separate motions [Seqs 10 & 12] which sought, in effect, a judgment declaring that the Defendant Homeland Towers, LLC is not lawfully permitted to conduct the remaining activities required and authorized by the Building Permit within the right-of-way are denied; and it is further

ORDERED that the branches of the Defendants' separate motions [Seqs 8, 9 & 11] which sought, in effect, dismissal of so much of the cause of action seeking a permanent injunction

enjoining the Defendant Homeland Towers, LLC from engaging in trenching and the permanent installation of underground electric and telecommunications conduit infrastructure within the right-of-way contained in the deed of the Defendant Homeland Tower, LLC are denied; and it is further

ORDERED that the remaining branches of the Defendants' separate motions [Seqs 8, 9 & 11] which sought, in effect, dismissal of so much of the cause of action seeking a permanent injunction enjoining the Defendant Homeland Towers, LLC from conducting the remaining activities required and authorized by the Building Permit within the right-of-way are granted and so much of that cause of action is dismissed; and it is further

ORDERED that the branches of the Defendants' separate motions [Seqs 8, 9 & 11] which sought, in effect, dismissal of so much of the cause of action seeking a declaratory judgment declaring that the Defendant Homeland Towers, LLC is not lawfully permitted to engage in trenching and the permanent installation of underground electric and telecommunications conduit infrastructure within the right-of-way contained in the Deed from Defendant Logan to Defendant Homeland Towers, LLC, for real property known as 15 Rockledge Road, Nelsonville, New York is denied; and it is further

ORDERED that the remaining branches of the Defendants' separate motions [Seqs 8, 9 & 11] which sought, in effect, summary judgment dismissing so much of the cause of action seeking a declaratory judgment declaring that the Defendant Homeland Tower, LLC is not lawfully permitted to conduct the remaining activities required and authorized by the Building Permit within the right-of-way are granted and so much of that cause of action is dismissed; and it is further

ORDERED that all remaining branches of any of the e-filed motions not explicitly

addressed are denied; and it is further

ORDERED that the preliminary injunction issued by this Court (Davis, J.), by Decision and Order e-filed February 23, 2022, shall remain in effect for thirty (30) days following service and filing of this Decision and Order with Notice of Entry to permit counsel to seek any emergency relief before the Appellate Division, Second Judicial Department. Unless an Order from the Appellate Division staying enforcement of this Court's order is e-filed within the thirty-day window, the preliminary injunction shall lift without further Order of this Court.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 11, 2023
Carmel, New York

HON. GINA C. CAPONE, J.S.C.