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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 LEONARD A. EISENBERG,
4 CAROL A. EISENBERG,

5 Plaintiffs,

6 v.

18 CV 2092 (KMK)

7 ORAL ARGUMENT/DECISION

8 THE PERMANENT MISSION of
9 EQUATORIAL GUINEA of the
UNITED NATIONS,

10 Defendant.

11 -----x

12 United States Courthouse
13 White Plains, New York
14 July 29, 2019

17 Before: THE HONORABLE KENNETH M. KARAS, District Judge

20 APPEARANCES

21 DAVID I. GRAUER
22 Attorney for Plaintiffs

23
24 FRANCIS M. SSEKANDI
25 Attorney for Defendant

1 THE DEPUTY CLERK: The Honorable Kenneth M. Karas
2 presiding.

3 Leonard Eisenberg v. Permanent Mission, 18 Civ. 2092.
4 Counsel, please state your appearances.

5 MR. GRAUER: Good afternoon, your Honor. I represent
6 plaintiffs in the proceeding, opposition on the motion. David
7 Grauer, 50 Main Street, White Plains, New York.

8 THE COURT: Good afternoon, Mr. Grauer.

9 MR. SSEKANDI: Your Honor, I represent the
10 defendants. My name is Francis Ssekandi. I give you my card.

11 We move this motion to dismiss the entire action
12 brought by the plaintiffs on the basis that the Court lacks
13 subject matter jurisdiction.

14 THE COURT: Yes. So you just want to state your
15 appearance for the record, and then we can get started on the
16 argument.

17 MR. SSEKANDI: Okay. Thank you.

18 THE COURT: Good afternoon, Mr. Ssekandi.

19 So we're here for argument on the defense motion to
20 dismiss.

21 One of the things that was, I guess, even more than
22 suggested in the most recent submission is that the property
23 dispute may have been resolved and the only issue left is
24 compensation. Is that, in fact, the case?

25 MR. GRAUER: You want me to address it, your Honor?

1 THE COURT: Both of you.

2 MR. GRAUER: No, not at all, your Honor. The
3 essential elements of our complaint, which deal with the
4 property interests, are very much continued today. There's an
5 ongoing claim for property trespass, et cetera.

6 THE COURT: Okay.

7 MR. GRAUER: And the essential core elements are not
8 abated. Now, certainly they've got their factual scenarios.
9 We dispute them. We're not here to try the facts. But the
10 simple answer is that there has been no resolution.

11 THE COURT: Okay.

12 Do you have a different view, Mr. Ssekandi?

13 MR. SSEKANDI: Since you raised the issue, before I
14 go to --

15 THE COURT: Well, you raised it. I'm just following
16 up on it. But, yes.

17 MR. SSEKANDI: The defendant actually had to address
18 the plaintiffs' complaint in three forums. The first forum, of
19 course, was when the case was filed in the state court and
20 moved it to the federal court.

21 THE COURT: Yes.

22 MR. SSEKANDI: But, as you may have heard in the
23 previous discussions before you, the plaintiffs also relied --
24 also, according to the complaint, relied heavily on what the
25 City of White Plains brought up as violation notices. So we

1 have had to deal with that.

2 To the extent that the Ambassador was at the
3 (INDISCERNIBLE) to the White Plains Court, that has eventually
4 been addressed through the Office of the Foreign Missions. And
5 as far as we are concerned -- plaintiff has different views --
6 the issues raised by the City of White Plains have been
7 resolved.

8 The third forum was before the Office of Foreign
9 Missions. The Ambassador received a long letter from the
10 Director of the Office of Foreign Missions reciting almost
11 exactly the same issues contained in the complaint. We
12 attended the Office of Foreign Missions almost three times to
13 address these issues. We also visited the site. Unbeknownst
14 to me, I was at the defendant's premises, but the City of White
15 Plains and the representative of the Office of Foreign Missions
16 visited the plaintiff before coming to the defendant's
17 premises. The issues which were raised by the Office of
18 Foreign Missions have been raised. I requested a letter to
19 that effect, which has not been provided.

20 So we have had to deal with this in three forums,
21 but, as a result -- I think this is obvious in the pleadings --
22 the cabana had to be removed. The pipe which was protruding,
23 the groundwater pipe, has been removed.

24 THE COURT: So the cabana has been removed.

25 MR. SSEKANDI: The cabana was removed.

1 THE COURT: And the groundwater pipe --

2 MR. SSEKANDI: The groundwater pipe has been removed.
3 The surveyor -- I produced an affidavit from the surveyor who
4 surveyed the premises three times over the last several -- he
5 says in his affidavit that the pipe has been -- well, he says
6 it's still visible. It was removed. It is not visible.

7 Then on the question of the stone wall, even on the
8 plaintiffs' own survey, was on the site of the defendant, but
9 that has been trimmed and is no longer there.

10 So it's true we're not trying this on the merits, but
11 we have to start from there.

12 THE COURT: Hang on. Before we start from there,
13 Mr. Grauer I think wants to be heard on those assertions.

14 MR. GRAUER: Your Honor, we fundamentally disagree
15 with much of what he said. Without taking up the time of the
16 Court on this thing, and I understand it's a Rule 12 motion,
17 and I've actually made great effort to try to resolve the case
18 because we disagree on what he said, and the problem with any
19 resolution -- and I'm not going to get into particulars,
20 certainly, but the problem with any resolution outside of court
21 has been opposing counsel has stated that fundamentally they
22 assert their immunity and, therefore, we can't resolve the
23 case. But let's leave that aside.

24 On his points, fundamentally, we disagree.

25 Number one, none of the issues with the City of White

1 Plains have been resolved. We actually met with the City of
2 White Plains about a month ago. They have not been resolved.
3 Neither have any of the issues been resolved through the State
4 Department. No resolution.

5 The cabana -- the above-ground part of the cabana --
6 there was a shaved -- the structure left an encroaching
7 trespassing foundation there which is still trespassing and
8 encroaching on my client's property, the impact of which is
9 multiple. Aside from the fact that it's an ongoing trespass
10 and it's encroaching on my client's property, the presence of
11 the foundation prevents them from complying with any of the
12 other city codes and violations because they can't encircle the
13 pool to comply with ongoing violations that exist with the
14 City. They have an in-ground pool that is not enclosed, and
15 they can't meet those guidelines in the City without removing
16 the foundation because the electrical installations that run
17 preclude them from fencing without going onto our property and
18 putting fencing in place because the foundation, which goes
19 quite deep, apparently, encroaches on my client's property with
20 a significant depth.

21 If we have to try the case, we have to bring an
22 expert in. What am I going to do? I'll do that unless we
23 resolve the case after this honorable Court adjudicates the
24 immunity motion. Perhaps, at that stage, there will be able to
25 be some dialogue between counsel, once this immunity issue is

1 no longer on the table.

2 But the bottom line is that the pipe which they say
3 was removed, my client's report is it was placed underground
4 and it's still encroaching. And the groundwater issue is still
5 invading my client's property as well.

6 So the fundamental issues are remaining. There's
7 been a subterfuge from our perspective, if you'll forgive me --

8 THE COURT: Well, in any event, we're not here to
9 resolve that.

10 MR. GRAUER: No. I mean, there's been a subterfuge
11 from the perspective of what they've even attempted to do with
12 the Foreign -- with the State Department as well as the City of
13 White Plains. The violations are unresolved.

14 THE COURT: I got you.

15 MR. GRAUER: None of them have been cured.

16 THE COURT: All right.

17 MR. GRAUER: Not a one. Forgive me.

18 THE COURT: Okay. So I think we should just focus on
19 the merits of the argument.

20 So, Mr. Ssekandi, it's your motion. Anything you
21 want to add to what's in your papers?

22 MR. SSEKANDI: Well, before I go further, I relied on
23 Robinson case, which allowed -- says that when resolving the
24 issue, the issue of jurisdiction, the Court will look at the
25 complaint, but any additional evidence that is presented before

1 the Court.

2 We presented the affidavit of the surveyor. And I
3 think I would like to, with your permission, leave this larger
4 map, because what we have submitted in our pleadings are very
5 small survey marks, but this is a larger map which will allow
6 the Court to be able to look at what it really involved.
7 Because it would help a lot. What we are looking at in
8 submissions are nothing compared to the actual map. So I just
9 leave it to the Court.

10 THE COURT: I'm happy to look at it. Sure.

11 MR. SSEKANDI: Yes. I mean, it gives you an idea --

12 THE COURT: What day is complete without looking at a
13 map?

14 MR. SSEKANDI: But we don't have to go through it
15 now.

16 THE COURT: Well, if not now, then when?

17 MR. SSEKANDI: With your permission, we could.

18 THE COURT: Let's have some fun.

19 Have you seen this?

20 MR. GRAUER: I have not. Counsel told me that he
21 brought something in with him today. I asked him for a copy.
22 He said he only has one. I'm not familiar with what has been
23 handed up.

24 THE COURT: Why don't you come on up.

25 MR. SSEKANDI: It's no different from the small

1 surveys, but it makes a big difference to see what's involved.

2 This is the whole line of the property. You enter
3 from here. So this is the plaintiffs' property, this side.

4 THE COURT: This side being the bottom of the map.
5 Lot 2. Right? Okay.

6 MR. SSEKANDI: All that is involved is around here.

7 THE COURT: Okay. Referring to the pool area.

8 MR. SSEKANDI: Now, referring to the pool area --

9 THE COURT: Sort of the southwestern corner.

10 MR. SSEKANDI: This is the premises. What happened
11 is there was a fence here, along here. And this fence was what
12 they call the chain-link fence. And once this was there, of
13 course, it protected the pool. The fence fell. A tree fell on
14 it and it was removed. And the Ambassador install another
15 fence which is much more -- what do they describe -- it is
16 vinyl.

17 THE COURT: Okay.

18 MR. SSEKANDI: It appears in this photograph. Along
19 here. The plaintiff objected to this and it was removed.

20 THE COURT: Okay.

21 MR. SSEKANDI: Now, of course, the pool remains only
22 with this. I know. I was there with White Plains. It is only
23 four feet. They need six feet. But the thing is it was
24 protected when the fence was repaired. Now that the fence is
25 out, of course, it's not protected. But the Ambassador is

1 working on it with the City.

2 What is at issue is around here. Admittedly, this
3 pipe -- there is a shower here, which you can see here, for the
4 pool. And the pipe goes under here and up to protrude here.
5 And all that comes out is -- there is a shower. It's not a
6 drainage pipe.

7 THE COURT: But if the pipe is on the property, it's
8 a trespass.

9 MR. SSEKANDI: Well, that's true, that's true. It's
10 not denied.

11 THE COURT: Okay. Go ahead.

12 MR. SSEKANDI: And then everything else that they
13 took about of a stone, this looks like a stone wall, but if you
14 go there, it's a remnant of what was there before. This
15 particular barbecue they talk about, according to this, is .5
16 west. West is on the side of the Ambassador. So .5, of
17 course, raises a lot of -- you know, on both sides. But
18 everything else except for the pipe -- the shower, the fence --
19 had protruded a little bit here. Because the original fence
20 that was found here did make a protrusion here. Even their own
21 survey shows that there was a protrusion. This is what we are
22 talking about.

23 THE COURT: Yes. I understand all of that. Okay.
24 But that's really neither here nor there. I mean, the extent
25 to which it's still a trespass is a matter that's not even in

1 dispute. I have to take their version of the facts as true for
2 purposes of the motion. Now, to the extent that you have facts
3 that say that, for example, the cabana has been removed and the
4 pipe is removed, but that Mr. Grauer says, well, no, the
5 foundation is still a trespass, it's still a disputed fact.

6 MR. GRAUER: It is, your Honor, with great respect.

7 And we would also, by the way, dispute this survey,
8 parenthetically, because we have a different survey which
9 disputes his calculations. But, again, that gets to the facts.

10 THE COURT: Right. It gets into facts. It gets into
11 to the merits.

12 In any event, to the extent jurisdiction invites the
13 introduction of facts and to the extent there's a dispute, then
14 we're not going to resolve those right now.

15 Okay.

16 MR. SSEKANDI: Your Honor, the motion has been
17 instituted under the Federal Rules of Civil Procedure, Rule
18 (12) (b) (1) and 12(3), which provide that a motion may be
19 instituted to dismiss the action for lack of subject matter
20 jurisdiction.

21 THE COURT: Right.

22 MR. SSEKANDI: In our pleadings, we spent a lot of
23 time discussing certain of the exceptions that have been
24 provided in the Foreign Sovereign Immunities Act, Title 28,
25 which, according to the response from counsel for the

1 plaintiff, are not relevant except for one which relates to the
2 rights in immovable property, and that is contained in Article
3 1605(a) (4) of the Foreign Sovereign Immunities Act.

4 The State of Equatorial Guinea is undisputedly a
5 sovereign state. Its presence or the presence of its Mission
6 in the United States is entirely for the purposes of its
7 membership in the United Nations.

8 THE COURT: Of course. I don't think there's any
9 dispute with any of that.

10 MR. SSEKANDI: So I hope it's not disputed. And as
11 it states, it enjoys sovereign immunities against jurisdiction
12 in the local courts. So the only jurisdiction that can be
13 exercised would have to be on the basis of the Foreign
14 Sovereign Immunities Act. And as has been said by Justice
15 Scalia and many others, including most recently Justice Thomas,
16 it provides the sole source to exercise jurisdiction over
17 foreign states.

18 Justice Scalia, in a *Reclamantes*, has observed with
19 relation to this exception the rights in immovable property is
20 an imprecise one susceptible of many different meanings as the
21 law for which that characterization of interest may be
22 relevant.

23 And at the bottom of this, in terms of discussion, is
24 whether or not trespass and encroachment is within the
25 exception, the rights in immovable property, or does the law of

1 torts define it. I will be addressing that a little bit later,
2 but let me deal with the rights in immovable property first.

3 Section 1604 of Title 28 states that, subject to
4 existing international agreements to which the United States is
5 a party at the time of enactment of this Act a foreign state
6 shall be immune from the jurisdiction of the courts of the
7 United States and of the states except as provided in Sections
8 1605 to 1607.

9 As I said, the other exceptions, we dealt with them
10 in our memorandum of law, but will not detain us today.

11 THE COURT: Agreed.

12 MR. SSEKANDI: Section 1605(a)(4) provides that a
13 foreign state shall not be immune from the jurisdiction of
14 courts of the United States in cases in which rights in
15 immovable property situated in the United States are an issue.

16 A number of cases have had to deal with this
17 particular exception, but, as is clear, the enactment of the
18 Foreign Sovereign Immunities Act came following the
19 codification of a similar exception by the Vienna Convention on
20 diplomatic relations of 1961. That Convention is part of U.S.
21 law. It was adopted in 1972. The law, of course, is problem
22 because the Vienna Convention appears to address agents rather
23 than the states.

24 And in terms of legislation in Conventions, until
25 recently, in 1975, Vienna Convention also, which has not come

1 into force, which addresses foreign missions, particularly
2 missions accredited to Public International Organization like
3 the United Nations. The Vienna Convention talks about premises
4 of the mission and their viability, but does not mention the
5 privileges of immunities which the mission enjoys.

6 Similarly, in the agreement to which the United
7 States is a party with the United Nations, the headquarters
8 agreement, and also the Convention on the Privileges and
9 Immunities of the United Nations, and even the Charter, this
10 agreement, the agreement between the United States and the
11 United Nations and the Convention on the Privileges and
12 Immunities of the United Nations reflect representatives of
13 member states and don't address the missions to which they
14 belong. And for lack of an independent legal personality,
15 permanent missions have over time, at least in this country,
16 been sued in their name, but on the basis that they represent
17 the states to which they belong, which has, in a way, brought
18 the arguments with regard to their immunities to be considered
19 only under the Foreign Sovereign Immunities Act, although that
20 Act was intended only for sovereign states and not to include
21 foreign missions or permanent missions.

22 Much later, the United States has promulgated the
23 Foreign Missions Act to try to remedy this situation, because,
24 under that Act, provision exists that mention foreign missions
25 and incorporated international organizations and the missions

1 that are accredited to them according benefits which they refer
2 to in that Act and also, most extensively, on the acquisition,
3 disposal and use of real property.

4 So the issue regarding foreign missions acquiring
5 property and using property in the United States, this is
6 regulated under the Foreign Missions Act.

7 So, while it is considered that a plea of immunity is
8 harsh, and everybody knows it is harsh, but states worldwide
9 have accepted the concept of immunity for sovereign states and
10 their instrumentality in countries abroad being accredited as
11 diplomats or, as in this case, admitted to be on U.S. soil
12 under an agreement with the United Nations. They have accepted
13 it as a matter of self-interest.

14 THE COURT: So, if I could, Mr. Ssekandi, I don't
15 have a strict time clock like they do, for example, in the
16 Court of Appeals, and this is all helpful background that I
17 understand, but I think we need to get to the heart of the
18 issue, which is the extent to which the property exception
19 applies or doesn't apply here. Because I don't think that
20 anything else is really -- I don't see that the plaintiffs are
21 disputing sort of the background of foreign sovereign
22 immunities. Their argument is they fit within the property
23 exception and your argument is they don't. And I just want to
24 give you a chance to amplify anything that was said in your
25 papers.

1 MR. SSEKANDI: I think the basic argument we have
2 advanced in this case has to do with the law applicable to
3 trespass and encroachment, which is the gravamen of the
4 complaint by the plaintiffs.

5 THE COURT: Yes.

6 MR. SSEKANDI: The plaintiffs have argued that there
7 was encroachment.

8 THE COURT: Was and is.

9 MR. SSEKANDI: There isn't, according to us.

10 THE COURT: Well, I know, but hang on. But we're not
11 going to try the merits of that case. Your argument is the
12 Court lacks subject matter jurisdiction because your client is
13 immune and the plaintiffs say, no, because this involves
14 interests in immovable property.

15 MR. SSEKANDI: Agreed.

16 THE COURT: Okay.

17 MR. SSEKANDI: The law applicable for trespass and
18 encroachment is New York law. And New York law defines -- in a
19 case we have referred to, defines both trespass and
20 encroachment as follows.

21 First of all, sometimes nuisance. If you talk about
22 the pipe, I think all you can do is probably not only trespass,
23 but also nuisance, so I will define nuisance as well.

24 A defendant is subject to liability for a private
25 nuisance if the defendant's conduct is a legal cause of the

1 invasion of an interest in a private use --

2 THE COURT: Hang on. When I read, I go too fast. So
3 just make sure when you're reading, you go slow so the court
4 reporter can get it all down. Okay? Because I have the same
5 issue. Trust me. So just try extra hard to go slow when
6 you're reading from a document. Okay?

7 MR. SSEKANDI: Well, maybe I will summarize.

8 THE COURT: Okay. That's fine.

9 MR. SSEKANDI: I think the two elements of nuisance
10 are intentional and unreasonable, negligent or reckless or
11 actionable under the rules of governing liability of normally
12 dangerous conditions or activities.

13 With regard to trespass, the elements set out in
14 Chaikin v. Karipas -- and I don't think this is disputed
15 because my friend also cited it -- the essential elements of a
16 cause of action sounding in trespass are the intention or entry
17 into the land of another without justification or permission.

18 The statement which defines trespass is the
19 restatement on the law of torts. We have given the definition
20 in our memorandum, but it is under the law of torts. The
21 Foreign Sovereign Immunities Act has a specific provision
22 regarding to torts, but that issue of torts has not been
23 pleaded and is not being argued. So the question is whether,
24 in this particular case, the activities or the acts which are
25 being complained of amount to actual property or are in the law

1 of torts.

2 With regard to the property, it is clear from the
3 cases we have cited, Reclamantes among them, and most recently
4 by the -- I think I have the case here -- in Gotham, the
5 actions complained of must to go to the root, the title, the
6 ownership or possession of the property.

7 THE COURT: Why isn't possessory interest enough?

8 MR. SSEKANDI: Because possession is transitory.

9 THE COURT: Possession in immovable property is
10 transitory?

11 MR. SSEKANDI: It is transitory if it is -- if it is
12 permanent and intended to be permanent.

13 There is, in this particular case --

14 THE COURT: Or ongoing. I mean, I don't understand.
15 If I park my bike on somebody else's property, it may not be
16 permanent. I mean, what is permanent? But if I say I'm not
17 moving it, then I'm affecting their possessory interest in
18 their property. And that's exactly what they're saying with
19 respect, for example, to the foundation and to the pipe. And
20 so it affects their possessory interest in immovable property.

21 MR. SSEKANDI: It is true. But the thing that we
22 have seen in Rodriguez v. Costa Rica, if it happens that what
23 you are complaining about is no longer in existence, then --

24 THE COURT: Okay, but hang on. We're not trying the
25 merits of whether your client continues to trespass. The only

1 question is whether plaintiffs' complaint raises issues that
2 entitle plaintiffs to fit within the exception to the Foreign
3 Sovereign Immunities Act.

4 MR. SSEKANDI: Yes.

5 THE COURT: Okay.

6 MR. SSEKANDI: But the only reason that you would
7 convert possession and trespass to fit into the rights in
8 immovable property is if they can mature to the possessor
9 (INDISCERNIBLE) into a claim for adverse possession. And under
10 New York law, that issue has been dealt with very clearly in
11 the -- I'm sure I brought --

12 THE COURT: So the Second Circuit says, and I'm
13 quoting now from *In re WorldCom, Inc.*, 546 F.3d 211, 218,
14 "Trespass law protects a person's exclusive possessory interest
15 in property. That interest is necessarily infringed when a
16 person places a tangible thing upon the land without permission
17 or privilege."

18 So the pipe is, among other things, what plaintiffs
19 say is trespassing on their property; that is, it affects the
20 exclusive possessory interest they have in immovable property.

21 MR. SSEKANDI: That is true.

22 The reason I showed you the map is because what we
23 are talking about is a very small part of the property.

24 THE COURT: Be that as it may, that goes to the
25 question of the amount of damages, but it doesn't mean there

1 isn't a trespass.

2 And again, we're not here -- I'm not here to say the
3 plaintiffs are going to win the lawsuit. That's not what we're
4 here to decide. We're here to decide whether or not
5 plaintiffs' lawsuit is within the subject matter jurisdiction
6 of the Court; that is, whether it fits within the immovable
7 property exception to the Foreign Sovereign Immunities Act.

8 MR. SSEKANDI: We've cited a case before you and it
9 refers to a recent amendment in 2008 of the New York Property
10 Law which tries to exclude certain claims which they term as
11 de minimus. In other words -- and I was trying to bring the --
12 to read you the law. I believe I cited it, but -- I thought I
13 brought it. But I think I cited it in my pleadings. The
14 de minimus rule, which is -- just a minute.

15 Marco v. Chanel talks about the size of the
16 protrusion, whether, you know, various neighbors complain about
17 planting or mowing across the lawn or planting their flowers
18 across a boundary. And the intention of this law was to
19 eliminate from litigation those claims that are so minute in
20 terms of extension to a neighbor's property that it is not
21 worth the litigation. I think the law itself extinguishes that
22 kind of activity from being litigated.

23 THE COURT: Yes. But isn't that more of a rule of a
24 Rule 12(b)(6) argument that plaintiffs failed to state a claim
25 than it is that the court lacks subject matter jurisdiction?

1 MR. SSEKANDI: The question is whether he has been
2 able to put forward a claim that is sufficient under law that
3 amounts to trespass and encroachment. But the question of
4 jurisdiction is equally relevant because, in determining the
5 question of jurisdiction, the Court has to look at both the
6 facts which are pleaded by the complainant and any facts which
7 may be presented to the Court by the defendant who is disputing
8 those facts. And according to the surveyor in this particular
9 case, it is clear that there's nothing which is protruding into
10 the property of the defendant.

11 THE COURT: Okay, but when you say the surveyor, you
12 mean your surveyor.

13 MR. SSEKANDI: Our surveyor.

14 THE COURT: Yes. Okay. But, again, we're not here
15 to resolve the battle of the surveyors, interesting though that
16 may be. The question is whether or not plaintiff is rightfully
17 in this court pressing this claim.

18 MR. SSEKANDI: Well, we have made two submissions,
19 one submission relating to the categorization of the action of
20 trespass and encroachment on which the plaintiffs rely. And we
21 make the submission that this does not rise to a rights in
22 immovable property.

23 The second submission we have made is that the
24 particular property in White Plains is part of the premises of
25 the Permanent Mission of Equatorial Guinea to the United

1 Nations because it houses the head of the Mission. This
2 premises, according to -- and you will excuse me if I say it
3 again -- Article 31 of the Vienna Convention, which originally
4 codified the real property exception, eliminated out of the
5 available exceptions to immunity public-owned property. In
6 other words, the exception applies if, as the Act itself, the
7 Sovereign Immunities Act, says, they were only codifying into
8 the law the well-known exception -- the well-known practice in
9 international law and the well-known exception on real
10 property. And that well-known exception did not apply to
11 public, but private property owned by, under the Vienna
12 Convention, an agent.

13 But the question then arises if the public property
14 of the Mission in the name of an agent would be excluded from
15 the exception, how about if the particular property is actually
16 in the name of the property. I have indicated that --

17 THE COURT: I'm not following this at all. I mean,
18 the plaintiffs are asserting a claim based on their interest in
19 their immovable property that they say is being compromised by
20 your client. That's it.

21 MR. SSEKANDI: Yes. Agreed.

22 THE COURT: Okay.

23 MR. SSEKANDI: The question is whom do they sue.

24 THE COURT: Well --

25 MR. SSEKANDI: Can they sue the Permanent Mission?

1 Because Permanent Mission --

2 THE COURT: Well, who should they have sued, then?

3 MR. SSEKANDI: Whoever trespass, if they can, but
4 they cannot sue --

5 THE COURT: But if they sue the Ambassador, aren't
6 they --

7 MR. SSEKANDI: They cannot sue the -- the immunities
8 which immunize the Mission from suit --

9 THE COURT: Well, unless it's covered by one of the
10 exceptions.

11 MR. SSEKANDI: The exception under the Foreign
12 Sovereign Immunities Act was intended, as it was said in the
13 Act, to deal with commercial activities, and this is not a
14 commercial activity. There have been a misunderstanding of the
15 original exception as understood in international law, and it
16 has been codified under the Vienna Convention.

17 When the Supreme Court address this issue most
18 recently in the Permanent Mission of India v. New York City,
19 they had before them an attempted articulation of what the
20 particular exception covers by the Court of Appeal. That
21 articulation included obligations. And that articulation has
22 been questioned because, first of all, the Supreme Court did
23 not follow it. They mentioned it. But the Supreme Court went
24 back to the original. The Supreme Court said the tax lien goes
25 to the root, title and compromise the validity of the title.

1 So that all this question of possession and all this question
2 of obligation have not been followed.

3 And in Gotham, the court in Gotham did opine that the
4 Supreme Court -- the Court of Appeal is not known for
5 enumeration. They have enumerated -- everybody has been trying
6 to articulate what these rights in immovable property means
7 and, every time, the courts have come back and said it is
8 limited. It does not apply just because you --

9 THE COURT: No, but, in Gotham, it was basically a
10 quasi-contract claim.

11 MR. SSEKANDI: Right.

12 THE COURT: That's not what the plaintiffs are
13 asserting here. They're asserting their possessory interest in
14 their real property, the immovable property, which they say is
15 being compromised by your client's trespass. That's it.
16 There's no contract at issue.

17 MR. SSEKANDI: That's true, but the immunity defense,
18 the immunity defense, has two aspects. The immunity defense
19 does not go to the justice of the claim.

20 THE COURT: Right.

21 MR. SSEKANDI: The immunity defense is a shield. So,
22 in other words --

23 THE COURT: Right, but there are exceptions.

24 MR. SSEKANDI: It may be unfair.

25 THE COURT: But there are exceptions. It's not a

1 question of fairness. It's a question of whether the exception
2 applies.

3 MR. SSEKANDI: And whether the exception fits that.

4 THE COURT: Right. And I'm trying to understand how
5 it is a trespass claim involving real property doesn't fit
6 within the immovable property exception.

7 MR. SSEKANDI: And I'm giving you two grounds.

8 One, if it is de minimus in extent, it does not,
9 under New York law, amount to the level of -- the property
10 trespass which matures into -- because the question is
11 whether -- if it continue, whether this could be mature.

12 THE COURT: So one is the de minimus exception. And
13 the second is?

14 MR. SSEKANDI: The second is actually clear. A
15 lawsuit can be instituted against an agent, for example, if the
16 agent owns private property, but if the agent is actually
17 living in a property that belongs to immune, the premises of
18 the mission, you cannot bring suit per se. In other words,
19 it's a shield irrespective of the merits.

20 THE COURT: No. You're rewriting it. That's not how
21 it works.

22 MR. SSEKANDI: No, no, no. I'm not rewriting it.

23 THE COURT: That's not how it works.

24 MR. SSEKANDI: The question is, for example,
25 supposing it was an agent and you were apply Article 31 of the

1 Vienna Convention. You arrive at the same problem we are
2 having now because you would not proceed against the agent if
3 the property was not private.

4 THE COURT: Okay.

5 MR. SSEKANDI: And in the case of the Permanent
6 Mission of India v. New York City, the court was able to go
7 beyond. Because the district court had previously determined
8 that the part of the premises occupied by the Permanent Mission
9 of India was actually not tax exempt because -- it had lost its
10 tax exception because it had been leased and occupied by
11 (INDISCERNIBLE) employees. This was critical. If that
12 determination had not been met, the New York City would not
13 have been successful irrespective of using the tax lien. In
14 fact, in the end, that case was resolved by the State
15 Department determining that that particular property enjoyed
16 tax exception and the case never proceeded.

17 So you have two problems you have to deal with. One,
18 in the square of the Foreign Immunities Act and the question
19 whether this case fits into the rights in immovable property
20 according to the cases. I'm saying it doesn't. If you are
21 inclined to so hold, you still would not be able to sue the
22 Mission because what you are dealing with is public property
23 and public property is excluded from the analysis of whether or
24 not --

25 THE COURT: I don't understand how it's public

1 property since it's the Permanent Mission of Equatorial Guinea.
2 I mean, it's not public property. It's the property that is
3 owned by Equatorial Guinea.

4 MR. SSEKANDI: Not in its private capacity.

5 THE COURT: Come on. They're not running it as an
6 amusement park. It houses the Ambassador.

7 MR. SSEKANDI: Yes.

8 THE COURT: So it's an official use of that property.
9 It's a governmental use of that property.

10 MR. SSEKANDI: I know. And that is -- you go back to
11 semantic. When Justice Scalia was interpreting this rights in
12 immovable property, he said it was intended to codify the
13 restriction theory of international law whereby the rights
14 impairing the state may be sued in its activities that are
15 private, but not its activities.

16 THE COURT: We've lost the microphone, so you just
17 have to make sure you speak very clearly. Since the power went
18 out, we've lost the microphone.

19 MR. SSEKANDI: Well, the Latin word is *rex imperii*.
20 It's R-E-X-I-M-P-E-R-I-I. In other words, the state can be
21 sued in its private, but not public capacity. So that's the
22 relevance of the premises being public. In other words, the
23 premises are not being used in a commercial activity, it is
24 being used as part of the Mission functions. And, therefore,
25 the question is whether the Mission can be sued in relation to

1 those -- I mean, nobody is saying that the Mission or the
2 Ambassador deliberately go and do the trespass. This things
3 happened to be there. In fact, as it happens, the pipe and
4 different fence were there when the property was bought. Most
5 of these things were there. But that's immaterial for
6 trespass. I agree. But the question is the Mission is being
7 sued in its capacity and as owner --

8 THE COURT: I understand that argument.

9 Is there anything else you want to add to your
10 papers? Because you've been at this now for 40 minutes or so.

11 MR. SSEKANDI: Well, I'll read you from --

12 THE COURT: Sure.

13 MR. SSEKANDI: -- a treatise on diplomate --
14 actually, it is quoted by the Court of Appeal in their
15 judgment.

16 There is also evidence that the International
17 Commission did not contemplate the explicit actions against its
18 ascending state in respect of mission premises. In drafting
19 exceptions to Article 31 of the Vienna Convention, the immunity
20 of a diplomatic agent, words were expressly inserted to
21 preclude proceedings against a diplomatic agent holding mission
22 premises in his own name. It will be anomalous if a state by
23 placing its mission premises in the name of its head of mission
24 could secure for them a higher degree of immunity.

25 And in a recent draft convention, which is also apply

1 by the Court of Appeal in Permanent Mission of India v. New
2 York, the article which would be corresponding to the rights in
3 immovable property exception under the Title 28 is Article 13.
4 That article, because it is actually broader than the Vienna
5 Convention, it has not yet come into force, but missing in the
6 citation of this article by the Court of Appeal is a footnote
7 by the (INDISCERNIBLE) which drafted the article. It says
8 Article 13 is without prejudice to the privileges and
9 immunities enjoyed by a state under international in relation
10 to property of the diplomatic missions as provided in Article
11 3. That article, for the first time, referred to the
12 privileges enjoyed by diplomatic missions. So diplomatic
13 mission that enjoy independently of the state its own
14 immunities. And this immunities are coextensive with what is
15 provided in the Vienna Convention.

16 THE COURT: Okay.

17 MR. SSEKANDI: And cases of interpretation of Article
18 31 of the Vienna Convention are restricting the application of
19 that article to cases where property held by diplomats is
20 private, not public property.

21 In other words, there are two different arguments I'm
22 making, one within the U.S. law itself and one on international
23 law as it applies elsewhere, other than here. In other words,
24 if you apply the international law codified under Article 31 of
25 the Vienna Convention, which is actually also part of U.S. law

1 and now the Foreign Missions Act, foreign missions having
2 benefits and those benefits are such that property owned by a
3 mission would be excluded from the local jurisdiction conferred
4 under the law. In other words, you would not institute the
5 action against the permanent foreign mission arising out of
6 property mission owns.

7 Lastly, the Foreign Missions Act has a provision
8 which I think I have produced and can be found in the -- I
9 don't want to spend the time because I want to finish on time,
10 but once the foreign mission has been a determination with
11 regard to acquisition of property or resolved, like in this
12 particular case, they got involved in resolving this dispute,
13 then this, first of all, cannot be interpreted as a waiver of
14 immunities of the mission or of the state -- or the mission,
15 but, also, at the same time, it would be sufficient to dispose
16 of the case.

17 I actually find it very difficult to understand how
18 it can be possible that the Mission is being required to have
19 to plead these facts as presented. I'm sure that the plaintiff
20 must have been able to avail himself of remedies and obtain
21 remedies he was asking for and still continue with this action
22 against the Mission.

23 THE COURT: Okay. Thank you very much.

24 Mr. Grauer.

25 MR. GRAUER: Thank you very much, your Honor. I'll

1 try to be brief. I mean, there's a lot of material that's been
2 thrown around here by learned counsel, and a lot of it is not
3 really germane to what's a relatively fairly limited issue
4 before the Court.

5 First of all, we haven't availed ourselves of any
6 other remedies. We have nothing to do with what the City of
7 White Plains has done with regard to bringing the Ambassador to
8 court or whatever else they have done. I can only tell you
9 that none of the violations with the City have been resolved.
10 I can tell you that the ongoing encroachments and trespasses
11 are certainly not de minimus and they are very substantial in
12 nature.

13 THE COURT: Why are they not de minimus?

14 MR. GRAUER: Because they are -- first of all,
15 they're partly of a permanent nature. There's a foundation
16 which is large and deep that is encroaching on my client's
17 property in a significant manner and it doesn't belong there
18 and it's interfering with my client's possessory rights in the
19 real property. It's interfering with their ability to use and
20 enjoy the property. And as a matter of fact, if they wanted to
21 put up a fence on the boundary, my clients could not even do
22 that at the present moment because of the fact that there's a
23 permanent concrete structure that goes down a substantial depth
24 that impacts upon their ability to fence off their property and
25 enclose their property.

1 THE COURT: Well, it impacts it to the extent they
2 get to only fence off -- they don't get to fence off the
3 entirety of their property, but if they're barred from fencing
4 off say two feet of the entire parcel of land, why is that not
5 de minimus?

6 MR. GRAUER: If anything impacts upon my client's
7 ability to use their property --

8 THE COURT: Anything?

9 MR. GRAUER: What I'm saying is, your Honor, they are
10 currently prevented and barred from using their property. They
11 have an ongoing encroachment.

12 THE COURT: They're barred from using that piece of
13 their property.

14 MR. GRAUER: Well, it impacts upon their possessory
15 rights in real property.

16 THE COURT: But why not in a de minimus way?

17 MR. GRAUER: Well, it's certainly not de minimus
18 without getting into an argument over what would or would not
19 be de minimus.

20 THE COURT: Well, you say it's not de minimus, but I
21 want to know why.

22 MR. GRAUER: Well, for starters, that's not even an
23 issue before this Court today. What is before this Court today
24 is a 12(b)(1) motion that's dealing with an argument of
25 immunity and dealing with an argument --

1 THE COURT: But the argument is that the lawsuit
2 doesn't involve an interest in immoveable property to the
3 extent that New York law recognizes that there's such a thing
4 as a de minimus trespass, which doesn't really amount to a
5 tort.

6 MR. GRAUER: We would dispute that under the facts of
7 this case, number one.

8 THE COURT: Why? What facts?

9 MR. GRAUER: The facts of this case?

10 THE COURT: Yes.

11 MR. GRAUER: We would dispute the fact that there is
12 a permanent stone structure that is impacting on my client's
13 property. My clients tells me it encroaches nearly a foot onto
14 their property.

15 THE COURT: Okay. So it's a foot.

16 How big is your client's property? What's the size
17 of it?

18 MR. GRAUER: I can't --I cannot give you that answer.

19 THE COURT: Thousands of feet, right?

20 MR. GRAUER: Well, it's not thousands of feet.

21 THE COURT: Hundreds.

22 MR. GRAUER: It is what it is.

23 THE COURT: So hang on.

24 If that's not de minimus, what is?

25 I'm sorry if this seems to bother you, but I am

1 trying to --

2 MR. GRAUER: No, no, no. Nothing --

3 THE COURT: So it's a foot, and I'm trying to
4 understand, if that's not de minimus, then what is?

5 MR. GRAUER: Well, perhaps the flowers that he was
6 talking about or grass that he was talking about could be de
7 minimus. If somebody has a flower bed, perhaps, that's
8 encroaching on someone else's property, perhaps a flower bed
9 could be de minimus.

10 I don't know what would be or would not be
11 de minimus. What I'm saying is that there is no law in New
12 York that would take the view that the facts in our pleading do
13 not constitute trespass. That's all I would say.

14 THE COURT: Well, but what if the courts would say it
15 was de minimus trespass.

16 MR. GRAUER: I'm not aware that the courts would say
17 in New York that it's de minimus trespass. And if the courts
18 were to say that, with great respect, your Honor, I think it
19 would perhaps go to the measure of damages.

20 The point I'm trying to make today before this
21 honorable Court is that the motion that they have filed with
22 this Court is one of subject matter jurisdiction. They have
23 said to this Court that we are not permitted to sue them
24 because they are protected under Sovereign Immunity, and what
25 I'm suggesting is that we fit squarely within a recognized

1 exception of sovereign immunity because they are impacting upon
2 our rights in immovable property and they are -- and I would
3 tell you that the water pipe which was buried that he
4 himself -- that counsel himself has acknowledged to your Honor
5 is still discharging water illegally on our property and still
6 encroaching on our property is also not de minimus. We would
7 also dispute the fact that it's simply a shower pipe. Rather,
8 we believe, from what my clients have told me, that it
9 impacts -- that it's disgorging groundwater onto my client's
10 property.

11 But the point I'm making -- the fundamental or more
12 principal point that I'm making is that they have not filed a
13 motion to dismiss for failure to state a cause of action.
14 They're not challenging the sufficiency of my cause of action.
15 They're not suggesting that I haven't properly alleged
16 trespass. Rather, what they're saying is that they don't fit
17 within a recognized exception to the Foreign Sovereign
18 Immunities Act. And what I'm suggesting to your Honor is that
19 they're throwing around a lot of terminology today, they've
20 gone through this whole argument of the Vienna Convention
21 before, and there is solid case law, including and not limited
22 to the case of *Mukaddam v. Permanent Mission of Saudi Arabia*,
23 which is 111 F. Supp.2d 457, that clearly defines the dichotomy
24 between the Foreign Sovereign Immunities Act and the Vienna
25 Convention and explains why there should not be any dialogue

1 going on today before this honorable Court dealing with the
2 Vienna Convention.

3 We didn't sue any individuals or agents. We sued
4 only one entity, and that is the lawful owner of the property
5 that abuts our client's property. We're not involved in
6 tortious interference. We're not involved in commercial
7 activities. None of that dialogue getting into that whole
8 exposition of how this is not -- that this is perhaps a tort
9 and we don't fit within the tortious exception definition or --
10 that scenario, none of that is really applicable.

11 I would go so far as to tell your Honor that, in the
12 analysis -- forgive me, but, in the analysis that's presented
13 at the top of Mukaddam, it explains very clearly in U.S.
14 District Court for the Southern District that, in resolving a
15 motion to dismiss, the Court has to accept as true the factual
16 allegations set forth in the complaint and draw reasonable
17 inferences in favor of the plaintiff.

18 Now, again, I'm not here to take this Court's time to
19 try the facts. Suffice it to say that we have ongoing
20 encroachments.

21 Let me just say the following, your Honor, as well,
22 that counsel, learned counsel, has gone to great lengths to
23 discuss the Reclamantes decision and, there again, the Court
24 made it very, very clear that when you analyze the exceptions
25 to sovereign immunity, there's such a thing as a local action

1 rule, and in analyzing what that local action rule is and how
2 it works, it's interesting, but to contrast cases, let's say,
3 that would not fit within the exception. For example, an
4 action for damages against builders for breach of a
5 construction contract. That is one example. An action that
6 implicates -- an action -- another example. And they give a
7 couple of examples. When the Supreme Court gets to examples of
8 cases that fit squarely within the recognized exception, they
9 talk about two different cases. They talk about one being an
10 action for trespass, that being a local action, and then they
11 talk about an action to determine adverse claims to real
12 property as a local action.

13 Now, here, I will tell you that the analysis that
14 counsel furnished to the Court that their admitted encroachment
15 on our property doesn't constitute a trespass because it hasn't
16 yet ripened into an adverse possession claim is simply,
17 similarly, not the law. We're not involved in a claim for
18 adverse possession. We're involved simply in a trespass
19 action. It's interfering with our right to use and enjoy and
20 possess our property.

21 And honestly, you know, we went to sell the property,
22 we would have a defect on title. The title company would raise
23 an exception. And we would have to go out and try to secure a
24 boundary-line agreement. We would have to deal with a variety
25 of things.

1 THE COURT: It affects your client's ability to
2 convey the property.

3 MR. GRAUER: It certainly affects my client's ability
4 to convey the property, which is another benchmark to address
5 your question of what would be de minimus or not de minimus.
6 Something that affects the marketability and the right to
7 alienate my property is certainly of a material nature.

8 Let me just take another moment.

9 I would suggest to your Honor that the papers that
10 they filed on their motion really explain that this is really
11 what it's all about. They're trying to say that we have not
12 met the burden of proof because of the fact that we don't fit
13 within the immovable property exception, but the case law that
14 we have submitted to this Court demonstrates that we are
15 squarely within that exception. And to suggest that the case
16 is moot because the allegations of trespass and encroachment do
17 not exist, I would suggest to your Honor that the opposite of
18 that was actually conceded here in open court today.

19 And I don't want to take more time with this Court.
20 Our papers stand on their own. And I just want to thank the
21 Court for its patience and diligence in listening to this
22 dialogue today.

23 THE COURT: Thank you, Mr. Grauer.

24 You get the last word, Mr. Ssekandi. It's your
25 motion. Anything else you want to add?

1 MR. SSEKANDI: I just want to mention that, in
2 mentioning Justice Scalia, our learned friend failed to mention
3 what I cited for the local proposition. He omitted to refer to
4 Pace v. Ott. Pace v. Ott is cited thereto. And that is not
5 local because that was a case where the plaintiff was suing for
6 damages, pollution resulting from discharging oil in saltwater
7 by pipes. In other words, none of the issues that are raised
8 by the plaintiff eliminate the pipe because the pipe alone
9 could not stand by itself to fit into the rights in immovable
10 property on the basis of this case, Pace v. Ott. So you are
11 left now with the other things, if they exist.

12 Now, I would like to -- I think we have to be honest
13 in these things.

14 THE COURT: We always have to be honest.

15 MR. SSEKANDI: Yes. Because the photos here which we
16 represented in our response memorandum, you saw them. They are
17 photographs, one which shows the pipe where it exists and where
18 the pipe no longer -- I mean after --

19 THE COURT: Right, but it only shows on the surface.
20 It doesn't show underground.

21 MR. SSEKANDI: Well, you can make the decision. My
22 instructions are that the pipe --

23 THE COURT: Hang on one second.

24 (Pause)

25 THE COURT: Go ahead. I'm sorry.

1 MR. SSEKANDI: My instructions are that the pipe has
2 been removed.

3 THE COURT: Okay.

4 MR. SSEKANDI: The second thing I would like to
5 mention is, in looking for the New York real property action in
6 proceedings law, it is Article 543 subsection 1 and 2. And I
7 cited it in my memorandum of law.

8 THE COURT: Okay. Thank you.

9 MR. SSEKANDI: Thank you.

10 THE COURT: All right. So the plaintiffs have
11 brought this action against the Permanent Mission of Equatorial
12 Guinea to the United Nations, which I'll call the defendant,
13 alleging that the defendant built and maintained structures
14 that trespassed and encroached onto their property.

15 Before the Court is the defense motion to dismiss
16 pursuant to Rule 12(b)(1) for lack of subject matter
17 jurisdiction and, in particular, that the defendant is covered
18 as immune under the Foreign Sovereign Immunities Act.

19 Now, in terms of some of the more salient allegations
20 from plaintiffs' complaint, plaintiffs allege they are
21 residents of Westchester County who own certain real estate in
22 White Plains; that the neighboring property to their White
23 Plains property is owned by the defendant and is used as the
24 Ambassador's residence.

25 Going as far back as November of '16, plaintiffs sent

1 defendant a letter indicating that a fence was abutting the
2 premises owned by plaintiffs and that the defendant's property
3 was encroaching onto plaintiffs' property. That's from
4 paragraph 7 of the complaint.

5 Now, in June of '17, the plaintiffs removed that
6 fence themselves. They conducted a survey and they set down
7 stakes, which were removed by the defendant, and they also
8 reconstructed the fence.

9 So in November of '18, the plaintiffs sent defendant
10 another letter indicating that, in addition to the fence, a
11 "barbecue area," a stone wall and pavers patio and an
12 overhanging roof structure above the barbecue, which everybody
13 has been calling the cabana, as well as a groundwater pipe were
14 extending onto plaintiffs' property by up to four feet.

15 Now, I'll pause here and note that some of these
16 claims, according to the defendant, are no longer true, that
17 the defendant has made certain changes. So, for example, the
18 cabana is down. The pipe has been removed. And the plaintiffs
19 dispute those assertions and they claim, for example, that
20 there's still a foundation, that there is a pipe under the
21 ground.

22 The purpose of this proceeding is not to have a trial
23 on the merits of plaintiffs' claims. And it's enough to say
24 that the Court recognizes that the defendant at least disputes
25 some of the continuing trespass claims by plaintiffs. And even

1 though the Court doesn't take everything that plaintiff says as
2 true, there is clearly a dispute here that, in large part, goes
3 to the merits of plaintiffs' claim or the extent to which they
4 claim they can get injunctive or even need injunctive relief.
5 Plaintiffs also, parenthetically, it should be noted, seek
6 damages.

7 Now, of course, 12(b)(1) is the rule that a defendant
8 invokes when challenging the court's subject matter
9 jurisdiction, which a court has only if it has authority to
10 adjudicate the cause pressed in the complaint. And that's
11 obviously a threshold question. And a claim is dismissed if a
12 district court lacks the statutory or constitutional power to
13 adjudicate the case. And in evaluating a 12(b)(1) motion to
14 dismiss, the court can consider matters outside the pleadings.

15 Now, the basis for the motion is the Foreign
16 Sovereign Immunities Act, which provides the sole basis for
17 obtaining jurisdiction over a foreign state in federal court,
18 as noted by the Supreme Court in what we'll call the Permanent
19 Mission of India II case, 551 U.S. 193, 197.

20 Under the FSIA, "the district courts shall have
21 original jurisdiction of any nonjury civil action against a
22 foreign state as to any claim for relief in personam with
23 respect to which the foreign state is not entitled to immunity
24 either under Section 1605-1607 of this title." And that's from
25 28 U.S.C. Section 1330(a). What's more, "a foreign state shall

1 be immune from the jurisdiction of the courts of the United
2 States ... except as provided in Section 1605 to 1607 of this
3 chapter." In other words, a foreign state is presumptively
4 immune from suit unless an exception applies. And that's from
5 page 197 of Permanent Mission of India II.

6 So, initially, a defendant has to present a prima
7 facie case that it is a foreign sovereign and that then shifts
8 the burden to the plaintiff to submit evidence showing that,
9 under the exceptions to the FSIA, immunity should not be
10 granted. And that's from Gotham Asset Locaters, Inc. v. State
11 of Israel, a Southern District case, 27 F. Supp.3d 409, 412.
12 But the ultimate burden of persuasion remains always with the
13 foreign sovereign. Same case, same page.

14 "In other words, in assessing whether a plaintiff has
15 sufficiently alleged or proffered evidence to support
16 jurisdiction under the FSIA, a district court must review the
17 allegations in the complaint, the undisputed facts, if any,
18 placed before it by the parties, and if the plaintiff comes
19 forward with sufficient evidence to carry its burden of
20 production on this issue, resolve disputed issues of fact,"
21 quoting Robinson v. Government of Malaysia, 269 F.3d 133, 141.

22 So, here, there's no dispute that the defendant, the
23 Permanent Mission of Equatorial Guinea to the United Nations,
24 is an arm of the Republic of Equatorial Guinea and, therefore,
25 a foreign sovereign. So it is at that point that the

1 plaintiffs have to establish that an exception applies.

2 Now, the FSIA provides a number of exceptions in
3 1605. The only one that's at issue here, and even plaintiffs
4 acknowledge this is the only one, is where jurisdiction is
5 proper in cases involving rights in immovable property situated
6 in the United States. And that's 1605(a)(4).

7 And then we talked about Justice Scalia. Then he was
8 a judge in the D.C. Circuit. And he discussed this exception
9 in *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d
10 1517. And then Judge Scalia explains that "disputes directly
11 implicating property interests or rights to possession" are
12 ones in which "rights in ... property" are "in issue" for
13 purposes of the exception.

14 Now, more recently, the Second Circuit has weighed in
15 and held that the immovable property exception applies to "any
16 case where what is at issue is (1) the foreign country's rights
17 to or interest in immovable property situated in the United
18 States; (2) the foreign country's use or possession of such
19 immovable property; or (3) the foreign country's obligations
20 arising directly out of such rights to or use of the property."
21 And that's *City of New York v. Permanent Mission of India to*
22 *the United Nations*. We'll call it *Permanent Mission of India*
23 *I*. That gets affirmed by *Permanent of Mission II*. The Second
24 Circuit site is 446 F.3d 365, 374.

25 What's more, the Supreme Court has clarified that the

1 immovable property exception is not "limit[ed]...to cases in
2 which the specific right at issue is title, ownership or
3 possession. Neither does it specifically exclude cases in
4 which the validity of a lien is at issue. Rather, the
5 exception focuses more broadly on 'rights in' property."
6 That's Permanent Mission of India II at page 198.

7 Now, on the other hand, "where the right of actual
8 possession or title is not at stake, merely compensation rights
9 are not remotely rights in immovable property within the
10 meaning of [the FSIA exception]. They are not property
11 interest in real estate nor possessory rights nor even rights
12 to payment of money secured by an interest in land. Neither
13 the title to nor the use of the [disputed lands] can
14 conceivably be affected by the outcome of this suit." That's
15 from *Fagot Rodriguez v. Republic of Costa Rica*, 139 F.Supp.2d
16 173, 195.

17 So, in other words, according to the Second Circuit,
18 "the immovable property exception is limited to disputes
19 directly implicating present property interests." That's *India*
20 *I* at 375.

21 So, reading all these cases, it's fair to say that
22 where a foreign state's present possession of immovable
23 property is in dispute, the immovable property exception
24 applies such that a district court has subject matter
25 jurisdiction.

1 Now, there are a number of things that the defense
2 says in response to this, one of which is that the exception
3 doesn't apply because this is merely a "boundary concern" that
4 does not challenge plaintiffs' title, ownership or possession
5 of the property. But the complaint that's at issue and the one
6 that's being tested to determine whether or not the Court has
7 subject matter jurisdiction over its litigation is, in fact,
8 this is in dispute because, in the complaint, the plaintiffs
9 are challenging the defendant's current use and possession of
10 its property. And that's important here because the essence of
11 trespass is an injury to the right of possession. That was
12 noted in, among other cases, *Brown v. PLP*, 2011 WL 4054871 at
13 *8. It's a Western District of New York decision. And I
14 already quoted from the *WorldCom* case earlier.

15 Now, also instructive here is the Supreme Court's
16 decision in *India II*, which did affirm the Second Circuit. In
17 that case, that was a suit to establish the validity of a tax
18 lien on the foreign state's property and whether it fell under
19 the immovable property exception because the tax lien inhibited
20 one of the quintessential rights of property ownership, which
21 is the right to convey. And that's what plaintiffs say is the
22 issue here. They're saying that the defense use of the
23 property and its trespass on the plaintiffs' property calls
24 into question both the plaintiffs' and the defendant's
25 possessory rights, and that could affect their ability to

1 convey the property, they being the plaintiffs. And there's
2 plenty of case law that says that that is the type of claim
3 that a plaintiff can bring. In other words, a plaintiff can
4 bring a quiet-title action to allege, among other things, or to
5 claim that somebody else's use of the property is adverse to
6 that of the plaintiff because, among other things, it clouds
7 title of the property.

8 As such, this case is distinct from a number of
9 cases, but including Universal Trading & Investment
10 Company v. Bureau for Representing Ukrainian Interests in
11 International and Foreign Courts, 898 F.Supp.2d 301. It's a
12 District of Massachusetts decision that was affirmed by the
13 First Circuit. But, there, the plaintiff was an asset recovery
14 company that sued Ukraine for breach of contract because of
15 Ukraine's alleged failure to pay for services rendered in which
16 the plaintiff had located certain properties obtained. They
17 obtained money judgments on those properties in an effort to
18 freeze the assets of Ukraine. The district court said that the
19 immovable property exception did not apply because, even though
20 the suit was related to real estate in the U.S., it didn't put
21 rights in that real estate at issue; rather, it was a lawsuit
22 that was brought basically in connection with a money judgment
23 and that that did not have the same relationship to the use of
24 the property, including any future purchases of the property.
25 But, here, the plaintiffs allege that the defendant's alleged

1 trespass does have an effect on the land and its future
2 purchases.

3 The case also is, therefore, distinguishable from
4 Gotham Asset. We talked about that a little bit earlier.
5 There, the plaintiff's claim concerned work that was performed
6 in relation to the property at issue and whether or not the
7 plaintiff was entitled to recover for that work based on a
8 quasi-contract theory. And so the court there held, not
9 surprisingly, that the immovable property exception didn't
10 apply because it did not directly implicate the property
11 interest in any way, or, to put it another way, it was a
12 contract case and not a case involving the law of property.

13 And, here, the case does involve, based on
14 plaintiffs' allegations, the laws of real property and tort.
15 So, for example, the plaintiffs are going to have to establish
16 the elements of a trespass, showing interference with their
17 right of possession of the real property either by an unlawful
18 act or a lawful act performed in an unlawful manner.

19 Now, in response, the defendant argues that there's
20 really no sort of plausible trespass claim because any actions
21 were not intentional and because any harm was de minimus. A
22 couple points about that.

23 So, first, that goes to the merits and that's not
24 what we're here to decide. And to the extent that it's fodder
25 for a 12(b)(6) motion, that motion hasn't been made. What's

1 been made is called the one motion challenging the Court's
2 jurisdiction. So to the extent that the defense might have a
3 defense to these claims based on intent or based on de minimus
4 harm, that is a fight for another day.

5 Also, I'll note the case is distinguishable from the
6 Costa Rica case. There, the landlord sued Costa Rica on the
7 grounds of trespass, seeking compensatory damages -- in other
8 words, back rent -- because Costa Rica, acting as a tenant, had
9 used certain land as its consulate without authorization. And,
10 there, the court found that the immovable property exception
11 didn't apply because the real right at issue was compensatory.
12 "Where the right to actual possession or title is not at stake,
13 compensation rights are not remotely rights in immovable
14 property within the meaning of the FSIA exception," said the
15 court. And that's why I asked what I did at the beginning
16 about where we were in terms of the posture of the case. And
17 the First Circuit affirmed, explaining that the defendant had
18 not used or possessed plaintiff's property in years and never
19 challenged plaintiff's title. So the only right at stake was
20 the right to compensation for the nonpayment of rent, said the
21 First Circuit, and so agreed with the district court that the
22 exception did not apply.

23 But, here, the allegations are that the defendant is
24 alleged to be in present possession and use of a portion of
25 plaintiffs' property. And so plaintiffs are not only seeking

1 compensatory damages. They also seek injunctive and
2 declaratory relief and to quiet-title. So the use of the
3 disputed land, in fact, can be affected by the outcome of the
4 lawsuit.

5 So, for all those reasons, the motion to dismiss is
6 denied.

7 They're evacuating the courthouse because it's hot
8 out, I guess. I don't know. So it's a good thing, I guess,
9 that we're done.

10 So do you want me to set a discovery schedule?

11 MR. GRAUER: We will want to do that, but it need not
12 take place -- I mean, it's subject to discretion of the Court.

13 THE COURT: You all can submit one if you want.

14 MR. GRAUER: Yes. I mean, it's subject to discretion
15 of the Court because they're evacuating us, but the answer is
16 we will want to do that. I certainly am going to want to reach
17 out again to counsel to see if we can get the case resolved,
18 which we would love to do, but if it doesn't happen, yes, we
19 will want to do that, your Honor.

20 THE COURT: So why don't we say you'll submit a
21 proposed discovery schedule in a month. That gives you time to
22 try to settle this case.

23 For the life of me, I don't understand why this case
24 doesn't settle.

25 MR. GRAUER: Well, it hasn't settled up to this

1 point --

2 THE COURT: I understand.

3 MR. GRAUER: -- because of the position that's come
4 from the other side that we have no right to sue them. Perhaps
5 this can now bridge it. I would love that to happen.

6 THE COURT: Okay.

7 Yes.

8 MR. SSEKANDI: Your Honor, I have no instructions to
9 continue proceeding with this case. My instructions are, if we
10 lose the motion, we will weigh the possibilities of appealing
11 the ruling.

12 THE COURT: Okay.

13 MR. SSEKANDI: In which case, I would have to go and
14 get further instructions.

15 THE COURT: Fair enough.

16 So within your time to appeal, or within 30 days, you
17 will either let everybody know if you're going to appeal or, if
18 not, submit a discovery schedule.

19 MR. SSEKANDI: Okay.

20 MR. GRAUER: So we're going to hear from opposing
21 counsel whether he's going to appeal.

22 So there will be, I guess, a memo endorsement, your
23 Honor? That's a question I'm asking. In terms of what's
24 happening today --

25 THE COURT: I'm going to do an order saying, for the

1 reasons stated on the record, motion denied. And I'll note
2 that you are to either submit a discovery schedule in 30 days
3 or the defendant is to let everybody know if it intends to
4 appeal.

5 MR. GRAUER: Does the Court want us to do anything
6 with regard to the transcript today or not necessarily?

7 THE COURT: That's up to you.

8 MR. GRAUER: Okay. We don't have to do it for your
9 Honor?

10 THE COURT: If there is an appeal, somebody's going
11 to need to get it.

12 MR. GRAUER: No, no. A hundred percent. If there's
13 an appeal, we will need to obtain that.

14 THE COURT: Yes.

15 MR. GRAUER: We understand.

16 THE COURT: Okay. I guess we'll let you go before it
17 gets to be too hot in here.

18 MR. SSEKANDI: There were some problems with regard
19 to discovery.

20 THE COURT: Well, look, that's a here and there
21 problem. We're here and that's there. And hopefully there is
22 a place where there will be power.

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