IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Leonard A. Eisenberg and Carol M. Eisenberg, Plaintiffs, v. Permanent Mission of Equatorial Guinea to the United Nations, Defendant.	)	Docket No.: 18-CV-02092

DEFENDANTS MEMORANDUM OF LAW

IN SUPPORT OF MOTION TO DISMISS

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A. **PRELIMINARY STATEMENT**

1. The defendant, the Permanent Mission of Equatorial Guinea to the United Nations, by and through undersigned counsel, respectfully requests that the Court dismiss this case for lack of subject matter jurisdiction. The plaintiffs' claims must be dismissed pursuant to Federal Rules of Civil Procedure 12 (b)(1) since the defendant is entitled to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). Title 28 U.S.C. §§ 1330, 1602-1611.

2. The plaintiffs allege that the defendant trespassed and encroached onto their property but have failed to overcome the presumption of foreign sovereign immunity. See 28 U.S.C. § 1602. *Gotham Asset Locators Inc. v. Israel* 27 F. Supp. 3d 409, *Universal Trading & Inv. Co., Inc. v. Bureau for Representing Ukrainian Interests in Intern. and Foreign Courts*, C.A.1 (Mass.) 2013, 727 F. 3d 10. Since the Court must first address whether it has subject matter jurisdiction, the plaintiffs must show that an exception to foreign state immunity applies under FSIA. 28 U.S.C. §§ 1605–1607. *See also Argentine Republic v. Amerada Hess Shipping Corp.*, U.S.N.Y.1989, *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993). But plaintiffs have failed to meet their burden of

proof. The plaintiffs' submissions to the Court, including their Verified Complaint and Affidavit in Support, fail to specify which FSIA exception grants the court subject matter jurisdiction over the defendant.

3. As the question of foreign sovereign immunity is a threshold issue, the plaintiffs seriously erred in failing to articulate a FSIA exception to foreign sovereign immunity. However, even if plaintiffs had pleaded a specific FSIA exception, we demonstrate below that the plaintiffs' claims do not fall within FSIA's enumerated exceptions. Thus, the defendant is entitled to dismissal of claims by reason of immunity.

B. LEGAL STANDARD

4. The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *McDaniel v. United States,* 899 F.Supp. 305, 307 (E.D. Tex. 1995). Accordingly, the plaintiff bears the burden to prove that jurisdiction exists. *Rhulen Agency v. Alabama Ins. Guaranty Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990). *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir. 1980). In a case involving a foreign sovereign, the Court must first determine whether the defendant meets the definition of "foreign state" in 28 U.S.C. §1603(a) and second, whether plaintiffs have shown that their claims meet one of the FSIA exceptions to immunity enumerated in §1605 or §1605A. If a defendant seeks to dismiss due to lack of subject matter jurisdiction, it must establish that it is a foreign state. A defendant who is able to present a prima facie case as a foreign state is presumed immune unless a plaintiff can demonstrate that an exception applies to the particular facts of the case. In assessing if plaintiffs discharged the burden of proof, a district court must review the allegations in the complaint, the undisputed facts placed before the court by the parties and resolve the disputed issues of fact in light of the applicable

law. *Robinson v. Government of Malay*, 269 F. 3d 133, 141. *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 393 (S.D.N.Y. 2009). Plaintiffs did not establish this Court's jurisdiction over this case. Thus, defendant's Motion to Dismiss should be granted and plaintiffs' claims dismissed for lack of subject-matter jurisdiction.

C. BACKGROUND FACTS

5. Plaintiffs commenced the present claim in Supreme Court of New York for unlawful trespass and unlawful encroachment. *See* Verified Complaint at 4, Leonard M. Eisenberg and Carol A. Eisenberg v. Permanent Mission of Equatorial Guinea to the United States (S.D.N.Y. 2017)(No. 1b-CV-02092). Defendant, a foreign sovereign, petitioned to remove the claim from state court to the federal district court, based on Section 1330 of the US Foreign Sovereign Immunities Act of 1976 (FSIA). Defendant's petition was granted. FSIA 28 U.S.C. § 1330 (a) states:

> The District courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

6. The Permanent Mission of Equatorial Guinea to the United Nations acquired title to the property known as 102 Hillair Circle, White Plains, NY, by Deed from Mildred Kayden, Trustee of the Mildred Kayden Living Trust, on September 8, 2010. The Deed was recorded on July 5, 2011. The property is currently occupied by Ambassador Anatolio Ndong Mba, the Permanent Representative of Equatorial Guinea to the United Nations and Head of Mission. A topographical survey of the property was attached to the Deed, included here as EXHIBIT 1.

7. The plaintiffs reside on the adjoining property, known as 100 Hillair Circle, White Plains, NY, which they acquired in 2008. *See Verified Complaint at* 1. The plaintiffs have brought this action against the defendant alleging encroachment and trespass on their property by the defendant, for which they seek declaratory relief and damages. *Verified Complaint at 12.*

8. More specifically, plaintiffs have cited a number of activities that are alleged to constitute trespass and encroachment, to wit, a chain link fence which at the bottom of the property diverted slightly into plaintiffs' property [paragraph 7 of Verified Complaint]; a vinyl fence constructed by defendant to replace the chain link fence removed in June 2017 by plaintiffs [paragraph 8 of Verified Complaint]; a water pipe, running from the shower next to the pool area of defendant and protruding into plaintiffs' property [Paragraph 19 of Verified Complaint]; the stonewall and pavers patio under the BBQ structure, next to the swimming pool area [Paragraph 18 of Verified Complaint]; and an overhanging roof structure on top of the BBQ [known as the Cabana] [Paragraph 18 of Verified Complaint].

9. When the defendant acquired the property at 102 Hillair Circle on September 8, 2010, the chain link fence, which precipitated the plaintiffs' allegations of trespass and encroachment onto their property, was an existing structure dividing the two properties. This is apparent from the original survey, which was recorded with the City of White Plains along with the Deed on July 5, 2011. *See* EXHIBIT 1. The survey defines the location and structures existing on or adjacent to the defendant's property at the time of purchase. *See* 102 Hillair Circle Deed, Recorded Survey, July 5, 2011, EXHIBIT 1. The existence of the chain link structure, with the apparent deviation across the property line, in the original survey is important and undermines plaintiffs' allegations of trespass and encroachment levelled against the defendant. *Davis v. Townsend*, Supreme Court, General Term, New York, 1851 WL 5252 (See Westlaw). The element of intent for trespass and

encroachment will be discussed in more detail below. *See* Liability for Intentional Intrusions on Land, Restatement Second, Torts § 158 (Am.Law.1979)

10. The Defendant further observes that the trespass and encroachment claims involving the chain link fence and water pipe were first reported to the defendant in 2016. *See* Letter from Mr. Longobucco dated November 26, 2016 – [EXHIBIT "E" to Verified Complaint]. This was eight years after the plaintiffs had bought their property and six years after the defendant had acquired the adjoining property at 102 Hillair Circle. Thus, it was reasonable for the defendant to assume that the fence and water pipe were either properly located or permitted. The remaining structures, including the vinyl fence constructed in the June of 2017 to replace the chain link, the barbeque station, paver's patio, and stonewall which the plaintiffs complained of, as also encroaching on their property are within defendant's property as shown in a recent survey of May 14, 2018. [See EXHIBIT 5]. In any event, none of the structures complained of were erected with the intent of challenging or dislodging plaintiffs' possession. In fact, upon being informed by the plaintiffs that the vinyl fence crossed the property line (which was denied), defendant removed it [Vinyl fence is shown in EXHIBIT 6, it is absent in the May 14, 2018 Survey, EXHIBIT 5]. The drainage pipe (EXHIBIT 2) and the gazebo structure on top of the BBQ (EXHIBIT 4), have since also been removed. *See attached photograph taken after the pipe was removed [EXHIBIT 3], and the Survey of May 14,2018, showing that no fence or gazebo currently exist. [EXHIBIT 5].*

11. This dispute does not concern "rights in the immovable property [in] issue" between the parties, an exception to immunity in Section 1605 of FSIA. The acts alleged did not challenge the title, ownership or possession of plaintiffs' property. 28 U.S. Sections 1605 (a)(4). *Asociacion de Reclamantes v. United Mexican States*, 735 F. 2d 1517, 1520 (CADC 1984). Rather, what is at issue is no more than a boundary concern caused by imprecise boundary lines on the

ground. The topographic Survey on May 14, 2018, by land surveyors Gabriel E. Senor, P.C., commissioned by defendant has gone a long way to resolve this matter. The survey shows that there is currently no fence between the properties and that the stonewall, pavers patio and barbeque area all reside within the defendant's property. Following the survey, the pipe protruding into plaintiffs' property was removed. [EXHIBIT 3.]

D. ARGUMENT

(a) THE DEFENDANT IS A FOREIGN SOVEREIGN IMMUNE FROM JURISDICTION

12. "FSIA provides the exclusive basis for acquiring subject matter jurisdiction over foreign states, their agencies and instrumentalities." Title 28 U.S.C. Section 1604. *Permanent Mission of India to the United Nations et.al. v City of New York*, 551 US 193 at 197(2007); *Gabriel Fagot Rodriguez, et al., v. The Republic of Costa Rica, 297 F.3d 1; Robison v. Government of Malaysia*, 269 F.3d 133; *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439 (1989). Thus, the Court must first consider jurisdiction under FSIA. Under the Statute, a foreign state is presumably immune from the jurisdiction of the courts of the United States, *Id.* §1604, unless the case falls within one of the exceptions to immunity set out in Section 1605. *Saudi Arabia v. Nelson,* 507 U.S.349, 355 (1993); *Verlinden B. V. v. Central Bank of Nigeria,* 461 U.S. 480, 488-489 (1983); see 28 U. S. C. § 1604; *J. Dellapenna, Suing Foreign Governments and Their Corporations 1*, and n. 64 (1988).

13. The FSIA statute must be applied by the district courts in every action against a foreign sovereign because subject matter jurisdiction depends on the existence of one of the specified exceptions to sovereign immunity. *See Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, S.CT. 1962 (2983). *See also Cargill Int'l S.A v. M/T Pavel Dybenko,* 991 F.2d 1012, 1019 (2d Cir. 1993. "Initially, the defendant [must] present [ ] a prima facie case that it is a foreign sovereign and then the burden shifts to the plaintiff to submit evidence showing that, under the FSIA

exceptions, immunity should not be granted." *Gotham Asset Locators Inc. v State of Israel* 27 F. Supp, 3d 409; *Swarna v. Al-Awadi*, 622 F.3d 123, 143 (2d Cir. 2010) (citing *Virtual Countries Inc. v. Republic of S. Africa*, 300 F.3d 230, 241 (2d Cir. 2002)).

14. On the basis of a long line of past precedents, a permanent mission like the Permanent Mission of Equatorial Guinea to the United Nations (defendant), is considered a "foreign state," as defined under FSIA §1603(a). Under the Statute, a "foreign state" is defined to include a political subdivision of a foreign state or agency or instrumentality of a foreign state, but not the individual actors. This definition has been applied by the courts to permanent missions of member states to the United Nations, foreign embassies and other entities that are considered an integral part of a foreign government. The Permanent Mission of Equatorial Guinea to the United Nations falls within this definition because it is a governmental component of the State of Equatorial Guinea, representing Equatorial Guinea at the United Nations. 28 U.S.C. § 1603(a) of FSIA. *USAA Cas. Ins., Co. Permanent Mission of the Republic of Namibia* 681 F.3d 103 (2d Cir. 2012), cf. *Gray v. Permanent Mission of the People's Republic of the Congo*, 443 F.Supp. 816, 820 (S.D.N.Y), 580 F.2d 1044 (2d Cir. 1978). The burden is, thus, on the plaintiffs to show that an exception to the sovereign immunity shield created by FSIA for defendant exists to justify subject matter jurisdiction. "Under the FSIA, federal courts, therefore, inquire at the "threshold of every action" against a foreign state, whether an exception to sovereign immunity exists that permits the court to exercise federal jurisdiction against the defendant. *Verlinden B.V. v. Central Bank of Nigeria*, id. At 493. As discussed in the subsequent section, the plaintiffs did not meet their burden of proof in this respect.

(b) PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF PROOF

15. In both state and federal courts, jurisdiction exists over a foreign state when an exception to foreign immunity applies. If the plaintiff is able to demonstrate that an exception exists under FSIA, the court then analyzes state substantive law to determine liability. *See* §1606. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 622 n.11 (1983). The exceptions under FSIA § 1605-1607 are:

Cases where:

(i) Immunity has been waived by the foreign state (§1605(a)(1));

(ii) A commercial activity is carried out in the United States by a foreign state (§1605(a)(2)).

(iii) Property taken by the foreign state in violation of International Law is in issue and the property is in the United States in connection with a commercial activity (§1605(a)(3));

(iv) Rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue (§1605(a)(4));

(v) Money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state which acting within the scope of his office or employment; Except this paragraph shall not apply to— (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights (§1605(a)(5));

vi) Certain actions instituted to enforce an arbitration agreement made with a foreign state (§1605(a)(6));

vii) Certain actions involving maritime liens (§1605(b)); and

viii) Certain counterclaims (§1607).

16. As previously stated, the burden of proof is on plaintiffs who allege jurisdiction to prove the basis for such assertion. In the instant case, the plaintiffs have failed in this regard and the immunity affirmed by FSIA must prevail. *Verlinden B.V. v. Central Bank of Nigeria* at 493. The plaintiffs did not raise a specific FSIA exception in the Complaint to demonstrate that the court has subject matter jurisdiction. When defendant asserted immunity under FSIA and the Vienna Convention in a letter dated March 15, 2018 addressed to this Court, the plaintiffs merely responded that the court has jurisdiction under FSIA but did not state which exception rebuts the defendant's presumptive immunity. The plaintiffs simply stated "the Court possesses subject matter jurisdiction under a clearly recognized exception to the FSIA." *See Mr. Grauer's* Letter to the Hon. Judge Kenneth Karas, of March 24, 2018. The plaintiffs also asserted that they met the burden of pleading by alleging the facts that satisfied one of the FSIA's statutory exceptions to immunity, but did not specify the exception which provides for subject matter jurisdiction over the defendant. *See* Mr. Grauer's letter to Judge Karas May 30, *2018*. Thus, plaintiffs have failed to meet their burden to prove that one of the exceptions is applicable in this case. *Verlinden B.V. v. Central Bank of Nigeria,* id. At 493

17. The allegations of trespass and encroachment are governed by New York law and can give rise to a property or tort claim. However, the plaintiffs have the burden to prove that the alleged trespass or encroachment satisfies one or more of the enumerated exceptions to immunity

in Title 28 U.S.C. Section 1605. The failure by plaintiffs to identify and prove a specific exception under FSIA Section 1605, which is essential to support the claims in this action, is prejudicial to defendant. The failure to do so would, in fact be sufficient for this court to dismiss plaintiffs' claims. *Robinson v. Government of Malaysia*, ibid.

(c) NO FSIA EXCEPTIONS APPLY TO PLAINTIFFS CLAIMS

18. Even assuming that plaintiffs pleaded one of the enumerated FSIA exceptions, it would be moot as none of the exceptions are applicable in this case. We address each of the exceptions below to leave no doubt that the immunity defense by defendant must prevail.

(i) THE WAIVER OF IMMUNITY EXCEPTION

19. Under 1605(a)(1), the courts require that a foreign state must waive its immunity to exercise jurisdiction, "explicitly or by implication," but it must be unequivocal. Any ambiguity is construed in favor of the foreign sovereign. *See* 1605(a)(1). Here, the defendant has repeatedly raised the immunity defense and, thus, in absence of evidence to the contrary, the Court must conclude that defendant has not waived its defenses.

(ii) THE COMMERCIAL ACTIVITY EXCEPTION

20. In assessing the commercial activity exception delineated in 1605(a)(2), the court evaluates the "nature" rather than the "purpose" of the activity performed by the foreign state to determine whether the defendant's action is commercial. *See* § 1605(a)(2). *See* also §1603(d) for definition of commercial activity. In the seminal case *Republic of Argentina v. Weltover* involving a lawsuit by two U.S. corporations against Argentina for non-payment, the Supreme Court established a "nature not purpose" criterion to determine "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which the private party engages in trade and traffic or commerce." *Republic of Argentina v. Weltover,* 504 U.S. 607. *Rodrigues v. Costa Rica* 297 F 3d 1. In this case, the defendant remains immune due to

the fact that the nature of the activity performed by the Mission is governmental rather than commercial. The Mission's acquisition of 102 Hillair Circle to house the Head of a Mission in a host country is a public function (*juris emperii)* and not a private trade or business activity. Thus, the defendant's action does not qualify as a commercial activity. In any case, plaintiffs have not alleged or proved that defendant's actions vis-à-vis the property in White Plains are commercial or that any commercial activity was carried out on the property or elsewhere.

(iii) THE EXPROPRIATION EXCEPTION

21. A FSIA exception also exists if the court determines that a "taking" has occurred in violation of international law. *See* § 1605(a)(3). This means that plaintiff must show that their rights in property has been taken or expropriated by the foreign state thereby violating international law. This exception also requires that the foreign state's actions are linked to a commercial activity. As discussed in the previous paragraph, the UN Permanent Mission's purchase of residential property to house its Ambassador does not constitute a commercial activity and there is no proof that the defendant has engaged in nationalization or expropriation property. Thus, there is no taking of property in violation of international law.

(iv) THE RIGHTS IN IMMOVABLE PROPERTY [IN] ISSUE EXCEPTION

22. The majority of cases involving the immovable property exception have often hinged on whether the case implicates rights in property that "inhibits a quintessential property ownership right—the right to convey." *See Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352 (2007). In the Permanent Mission of India case, the Supreme Court determined that the tax lien placed on the Mission property by the City of New York affected the right to convey that property and thus met the requirement of this exception to immunity. This is not the case here. Here, the plaintiffs allege trespass and encroachment involving, essentially, a fence

and a small end of a water pipe which under New York law qualify as *de minimis* and thus non-adverse. *Article 543(1) and (2) New York Real Property Actions and Proceedings Law.* See also *Fagot Rodriguez v. Republic of Costa Rica* in which the Court found a similar case of trespass to be too insignificant to defeat immunity under the right in immovable exception. *Gabriel Fagot Rodriguez v. Republic of Costa Rica*, 297 F.3d 1.

19. Fagot Rodriguez involved a property dispute between Costa Rica and the owner of property, Rodriguez, leased as a Consulate. The plaintiff sought to defeat the immunity from suit by Costa Rica by claiming that the use of the property after expiration of the lease constituted trespass and thus fell within the immovable property exception. The court observed that the immovable property exception "was not intended broadly to abrogate immunity for any action touching upon real estate." *Gabriel Fagot Rodriguez v. Republic of Costa Rica quoting the court in MacArthur Area Citizens Ass'n, 809 F.2d at 921.* Rather, its purpose is to permit jurisdiction in cases where the United States' interests in adjudicating the dispute are particularly strong. Id. at p.12. The Court concluded that "courts have construed the immovable property exception to apply only in cases that implicate rights of ownership, use, or possession. *See, e.g., City of Englewood v. Socialist People's Libyan Arab Jamahiriya,* 773 F.2d 31, 36 (3d Cir.1985) (describing the immovable property exception as a ''title dispute exception'' codifying ''the recognized principle of international law that a sovereign may resolve disputes over title to real estate within its geographic limits''); *cf. Logan v. Dupuis,* 990 F. Supp. 26, 29 (D.D.C.1997) (interpreting the analogous exception to diplomatic immunity to exclude suits for breach of a rental contract)." Id. P.13. Just as in *Republic of Costa Rica* and *Logan* cases, the acts attributed to the defendant in this case do not go to the core of or challenge the plaintiffs' right to title or ownership

of their property and, therefore, fall short of the requirements under the immovable property exception to sovereign immunity.

20. The interpretation of the FSIA immovable property exception advanced by the first circuit in the *Gabriel Fagot Rodriguez* case brings it in line with the exception to immunity for diplomatic agents in Section 31 of the Vienna Convention on Diplomatic Relations 1961 as interpreted in *Logan v. Depuis* 990 F. Supp.26. Section 31 (1) provides that: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

> A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purpose of the mission." UN, Treaty Series, vol. 500, p.95.

25. In *Logan v. Depuis*, 990 F. Supp. 26, the Court observed that "treatises on the law of diplomatic immunity suggest that the term 'real action' as used in Article 31(1)(a) does not encompass all civil suits pertaining to real property." The court rejected plaintiff's position which rested on reading 'real action' to mean an 'action relating to real property', adding that an "interpretation so broad as to encompass not only suits involving rental premises, but any dispute – a claim concerning construction and repair work, an insurance coverage dispute, personal injury action – somehow related to a piece of real property," is inconsistent with Article 31. While *Logan v Depuis* was concerned with the immunity of diplomatic agents under the Vienna Convention and the FSIA immovable property exception involves sovereign immunity, there is ample evidence that there is no conflict between the two exceptions to immunity. See also: *Asociacion de Reclamantes v. United Mexican States*, 735 F. 2d 1517, 1520 (CADC 1984). (Scalia J.). See also: *Republic of Arg. V. Weltover Inc.*, 504 U.S. 607; *Saudi Arabia v. Nelson*, 507 U.S. 349 denying application of the Commercial Exception where premises are not private). *Republic of*

Philippines v. Pimentel, 128 S. Ct 2180; *FG Hemisphere, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C.Cir 2006).

26. The court, in *Gotham Asset Locators Inc. v. State of Israel* 27 F.Supp. 3d 409, was tasked in determining whether a suit brought by an asset location company (Gotham Asset Location) against the State of Israel fell under the immovable property exception. In determining that questions, the second circuit distinguished the Court of Appeal's holding in *Permanent Mission of India v. New York City,* which allowed the case to proceed because it concerned 'the extent of [the foreign sovereigns'] obligations under local law (there, property taxes) arising directly out of their ownership of real property in the United States'. id. at 376., observing that the Supreme Court in the India case affirmed the Court of Appeal's decision, reasoning that [a] tax lien ... inhibits one of the quintessential rights of property ownership - the right to convey," and that a suit to establish the validity of a lien therefore "plain[ly]..implicates rights in immovable property". 551 U.S. at 198. The Court in *Gotham Asset Locators Inc. v. State of Israel* also cited *Asociacion de Reclammantes v United Mexican States* (Scalia J.) 735 F. 2d 1517, with approval, emphasizing that the exception's "application is limited to cases in which rights in such real estate 'are in issue." It is submitted that these cases are relevant to the case here. As was the case in Gotham, the plaintiffs' claims here do not rise to rights in title claim and thus, the immovable property exception does not apply.

27. In the most recent case involving the FSIA immovable property exception, the Supreme Court rejected a broad interpretation urged by the plaintiffs of the immovable property exception to cover almost every issue concerning real property owned by a foreign sovereign in the United States. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649. The Supreme Court observed that the *in rem* nature of a property owners' action by itself did not pierce the Indian tribe's im-

munity. It also rejected the plaintiffs' argument that the Indian tribe's purchase of private property barred the tribe from asserting sovereign immunity. The Indian tribe, which is deemed a foreign state in litigation before United States courts, is relevant here because it also concerned the issue of trespass [on Indian Tribal land] to which the Plaintiff laid claim through adverse possession.

28. The plaintiffs, the Lundgrens, fenced off the land claimed by an Indian Tribe and asserted ownership based on adverse possession. The suit involved trespass and encroachment over the Indian Tribe's land. Justice Gorsuch, writing for the Majority, rejected the plaintiffs' claims that the manner in which the Indian Tribe acquired the land [as private purchase] was dispositive of the Indian Tribe's claim to immunity. It is submitted that the holding in this case is dispositive in this case of the claim that trespass and/or encroachment rise to rights in immovable property [in] issue. To do so would over-extend "what sorts of property interest would qualify." See *Gotham Asset Locators Inc. v. State of Israel*_27 F.Supp. 3d 409 at 375. Chief Justice Roberts, after reviewing the alternative remedies available to parties faced with immunity issues, quipped: "At the very least, I hope the Lundgrens would carefully examine the full range of legal options for resolving this title dispute with their neighbors, before crossing into the disputed land and firing up their chainsaws."

29. The plaintiffs have alleged that the defendant committed trespass and encroachment on their property. The defendant disputes this allegation, on the grounds that none of the activities enumerated in the Verified Complaint were committed by the defendant with intent to challenge or displace the plaintiffs' possession of their land. Since the defendant does not confute the plaintiffs' title or ownership rights, the allegations fall outside the scope of the immovable property exception.

30. The plaintiffs thus fail to satisfy the essential elements of trespass. Trespass is defined in the Restatement (second) of Torts as an intentional intrusion on land. *See* Restatement Second, Torts § 158 Liability for Intentional Intrusions on Land, which reads:

> Restatement (Second) of Torts §158. Liability For Intentional Intrusions On Land
> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
> (a) Enters land in the possession of the other, or causes a thing or a third person to do so, or
> (b) Remains on the land, or
> (c) Fails to remove from the land a thing which he is under a duty to remove. [Westlaw]

31. The approach followed by the New York courts is similar to the Restatement of Torts (2nd). In *Chaikin v. Karipas,* the New York Supreme Court established that the essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification or permission. *Chaikin v. Karipas,* 162 A.D.3d 842, 843 [2d Dept. 2018]. See also *Reyes v. Carroll,* 137 A.D.3d 886, 888, 27 N.Y.S.3d 80; *Boring v. Town of Babylon,* 147 laA.D.3d 892, 893, 47 N.Y.S.3d 419). A landowner has to prove intent to trespass to satisfy the essential elements of trespass. *22 Irving Place Corp. v 30 Irving LLC*, 57 Misc. 3d 253, 255, 56 (Sup Ct, NY County 2017) (Building owner's alleged entry onto adjacent land to erect scaffolding did not give rise to trespass). The plaintiff's burden extends beyond proof of an invasion of their right to exclusive possession of the land to proof that such invasion or intrusion is the result of an act either intentionally done or so negligently done that such intent will be presumed. *Long Island Gynecological Services v. Murphy*, 298 AD2d 504 (2d Dept 2002). The trespass may not be based on a mere nonfeasance or an omission to perform a duty.

32. The plaintiffs have not proven that the acts enumerated in the Verified Complaint, alleged to constitute trespass and encroachment, were done intentionally and/or that any damage

resulted the intentional acts of defendant. The allegations of trespass relate to a chain link fence that Plaintiffs eventually removed in June 2017. *See* Verified Complaint at 2. This fence was already on the property when the defendant bought the property. *See* attached Survey [Exhibit 1]. Plaintiffs also cite a vinyl fence that was installed by occupants of defendant property to replace the chain link fence removed by plaintiffs. Based on the best information and belief at that time, this fence was not encroaching when erected. But it was later removed, following the objections by plaintiffs some months later. The fence is shown behind the tree close to the BBQ stand, and the tree is on the property line between the two neighboring properties. [A photograph of the vinyl fence from the Verified Complaint is attached as Exhibit 6.]

33. Plaintiffs have also referred to a water pipe, which appears to be located a few feet beyond the property line into the plaintiffs' property. This water pipe was an extension of a pipe running from the shower at the defendant's swimming pool and lies at the very bottom of the property. It is in the same location in contention, where the chain link fence slightly protruded into plaintiffs' property, prior to its removal. To the best information and belief, this pipe was also in place at the time the defendant property was acquired. The recent survey has revealed that it was in plaintiffs' side of the property and it has been removed. The rest of the structures complained of by plaintiffs as encroaching have been proved to be within the defendant property, according to the recent survey of May 14, 2018 (Exhibit 5).

34. The defendant wishes to draw the attention of the court to the fact that non-structural encroachments under New York Law are covered by the *de minimis* rule and are deemed permissive and non-adverse. Article 543(1) and (2) of the New York Real Property Actions and Proceedings Law, states:

1. Notwithstanding any other provision of this article, the existence of *de minimis* non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse.

2. Notwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse.

35. The consequence of application of the *de minimis* rule is to remove these non-structural encroachments, such as the fence and water pipe, from the "rights in immovable property [in] issue" exception, because they do not "inhibit (s) a quintessential property ownership right – the right to convey". *Gabriel Fagot Rodriguez v. Republic of Costa Rica.* Id. They do not threaten the plaintiffs' title, ownership or possession of his property. They are deemed at law to be "permissive and non-adverse". Id.

(v) THE NON-COMMERCIAL TORTS EXCEPTION

36. The non-commercial torts exception, which holds states liable for certain tortious acts of its employees, is also inapplicable. Under § 1605(a)(5), a foreign state is not immune for acts (not otherwise covered by the commercial activity exception) in which money damages are sought for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his or her office or employment. The exception does not apply if it is:

- based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion is abused; and
- arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

37. In order to succeed under the non-commercial torts exception, plaintiff "must show that the defendant's act would give [rise] to liability if viewed through the lens of tort law." §

1605(a)(5). Defendant contends that the tort exception is not applicable in this case because the actions alleged in this case were discretionary and outside the scope of 1605(a) (5. The exception applies only to non-discretionary torts. The delegable nature of the activities attributed to defendant as constituting trespass and encroachment, immunizes the Defendant from suit. 28 U.S.C. § 1605(a)(5)(A). *Gabriel Fagot Rodrigues v. Costa Rica* id. The actions described in the Verified Complaint concern activities carried out at the defendant' property by its occupants and fall under the category of "discretionary function". id. Section 1605(a)(5) (A). These actions are, therefore, not covered by the Section 1605(a)(5) exception. *MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918 (D.C. Cir.), amended on other grounds, 823 F.2d 606 (D.C.Cir.1987).

(vi) THE EXCEPTIONS CONCERNING ARBITRATION AGREEMENTS, MARITIME LIENS AND COUNTERCLAIMS

38. Lastly, there is no evidence that the remaining exceptions concerning arbitration agreements, maritime liens or counterclaims are applicable here. There is no agreement to arbitration; the actions alleged do not concern maritime liens or counterclaims.

E. CONCLUSION

39. The plaintiffs have failed to rebut the presumption of foreign state immunity. They have not established that the exceptions to immunity detailed in Section 1605 apply in this case. As there are no exceptions to the Foreign Sovereign Immunities that apply in this suit, there is no basis for acquiring jurisdiction over the defendant. Thus, the defendant's motion to dismiss due to lack of subject-matter jurisdiction over a foreign state should be granted.

Dated: October 5, 2018

Respectfully submitted,
s/ Francis SSekandi

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