

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CITY OF NEW ROCHELLE,

Index No. 54190/2016

Plaintiff,

-against-

**VERIFIED ANSWER
WITH AFFIRMATIVE
DEFENSES AND
COUNTERCLAIMS**

FLAVIO LA ROCCA, MARIA LA ROCCA, FLAVIO LA
ROCCA & SONS, INC. a.k.a F. LAROCCA & SONS, INC.
and FMLR REALTY MANAGEMENT LLC,

Defendants.
-----X

Defendants FLAVIO LA ROCCA, MARIA LA ROCCA, FLAVIO LA ROCCA & SONS, INC. a.k.a. F. LAROCCA & SONS, INC. and FMLR REALTY MANAGEMENT LLC (collectively "Defendants"), by their attorneys SILVERBERG ZALANTIS LLC, allege as their Verified Answer with Affirmative Defenses and Counterclaims to the Verified Complaint ("Complaint") of the Plaintiff CITY OF NEW ROCHELLE ("City" or "Plaintiff") as follows:

1. Deny the allegations contained in paragraph 1 of the Complaint.
2. Deny the allegations contained in paragraph 2 of the Complaint.
3. Deny the allegations contained in paragraph 3 of the Complaint, except admit that

Plaintiff has initiated this Action by the filing of a Summons and Complaint and seeks certain relief of the Court as set forth in the Complaint, which document speaks for itself.

4. Admit the allegations contained in paragraph 4 of the Complaint.
5. Admit the allegations contained in paragraph 5 of the Complaint.
6. Admit the allegations contained in paragraph 6 of the Complaint.
7. Admit the allegations contained in paragraph 7 of the Complaint.
8. Admit the allegations contained in paragraph 8 of the Complaint.

9. No response is necessary to the assertion made in paragraph 9 of the Complaint, which defines the term by which the Defendants are referred to in the Complaint, which document speaks for itself.

10. Deny the allegations contained in paragraph 10 of the Complaint and refer all questions of law to the Court.

11. Deny the allegations contained in paragraph 11 of the Complaint.

12. Deny the allegations contained in paragraph 12 of the Complaint.

13. Deny the allegations contained in paragraph 13 of the Complaint.

14. Deny the allegations contained in paragraph 14 of the Complaint.

15. Deny the allegations contained in paragraph 15 of the Complaint.

16. Deny the allegations contained in paragraph 16 of the Complaint.

17. Deny the allegations contained in paragraph 17 of the Complaint.

18. Deny the allegations contained in paragraph 18 of the Complaint.

**AS AND FOR A FIRST CAUSE OF ACTION
(TRESPASS)**

19. Repeat and reallege the responses to paragraphs 1 through 18 of the Complaint as set forth above.

20. Deny the allegations contained in paragraph 20 of the Complaint and refer all questions of law to the Court.

21. Deny the allegations contained in paragraph 21 of the Complaint.

22. Deny the allegations contained in paragraph 22 of the Complaint.

23. Deny the allegations contained in paragraph 23 of the Complaint.

24. Deny the allegations contained in paragraph 24 of the Complaint.

25. Deny the allegations contained in paragraph 25 of the Complaint.

**AS AND FOR A SECOND CAUSE OF ACTION
(NEGLIGENCE)**

26. Repeat and reallege the responses to paragraphs 1 through 25 of the Complaint as set forth above.

27. Deny the allegations contained in paragraph 27 of the Complaint, except admit that the New Rochelle City Ordinance contains Section 301-4, which ordinance speaks for itself and all questions of law are referred to the Court.

28. Deny the allegations contained in paragraph 28 of the Complaint, except admit that the New Rochelle City Ordinance contains Section 301-7, which ordinance speaks for itself and all questions of law are referred to the Court.

29. Deny the allegations contained in paragraph 29 of the Complaint, except admit that the New York Real Property Actions and Proceedings Law contains Section 861, which law speaks for itself and all questions of law are referred to the Court.

30. Deny the allegations contained in paragraph 30 of the Complaint.

31. Deny the allegations contained in paragraph 31 of the Complaint.

32. Deny the allegations contained in paragraph 32 of the Complaint.

33. Deny the allegations contained in paragraph 33 of the Complaint.

**AS AND FOR A THIRD CAUSE OF ACTION
(NUISANCE)**

34. Repeat and reallege the responses to paragraphs 1 through 33 of the Complaint as set forth above.

35. Deny the allegations contained in paragraph 35 of the Complaint.

36. Deny the allegations contained in paragraph 36 of the Complaint.

37. Deny the allegations contained in paragraph 37 of the Complaint.

**AS AND FOR A FOURTH CAUSE OF ACTION
(CONVERSION)**

38. Repeat and reallege the responses to paragraphs 1 through 37 of the Complaint as set forth above.

39. Deny the allegations contained in paragraph 39 of the Complaint and refer all questions of law to the Court.

40. Deny the allegations contained in paragraph 40 of the Complaint.

41. Deny the allegations contained in paragraph 41 of the Complaint.

**AS AND FOR A FIFTH CAUSE OF ACTION
(VIOLATION OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 861)**

42. Repeat and reallege the responses to paragraphs 1 through 41 of the Complaint as set forth above.

43. Deny the allegations contained in paragraph 43 of the Complaint and refer all questions of law to the Court.

44. Deny the allegations contained in paragraph 44 of the Complaint.

45. Deny the allegations contained in paragraph 45 of the Complaint.

46. Deny the allegations contained in paragraph 46 of the Complaint.

47. Deny the allegations contained in paragraph 47 of the Complaint.

48. Deny the allegations contained in paragraph 48 of the Complaint.

**AS AND FOR A SIXTH CAUSE OF ACTION
(NUISANCE BY ENCROACHING ON EAST STREET AND FIFTH AVENUE)**

49. Repeat and reallege the responses to paragraphs 1 through 48 of the Complaint as set forth above.

50. Deny the allegations contained in paragraph 50 of the Complaint and refer all questions of law to the Court.

51. Deny the allegations contained in paragraph 51 of the Complaint and refer all questions of law to the Court.

52. Admit the allegations contained in paragraph 52 of the Complaint.

53. Deny the allegations contained in paragraph 53 of the Complaint.

54. Deny the allegations contained in paragraph 54 of the Complaint, except admit that the New Rochelle City Ordinance contains Section 111-38, which ordinance speaks for itself and all questions of law are referred to the Court.

55. Admit the allegations contained in paragraph 55 of the Complaint, but deny that a special permit is required for Defendants' use of their property.

56. Deny the allegations contained in paragraph 56 of the Complaint.

57. Deny the allegations contained in paragraph 57 of the Complaint.

58. Deny the allegations contained in paragraph 58 of the Complaint, except admit that the City sent Defendant FMLR Management LLC certain correspondence dated June 22, 2009 attached to the Complaint as Exhibit "3", which document speaks for itself.

59. Deny the allegations contained in paragraph 59 of the Complaint, except admit that the City sent Defendant FMLR Management LLC certain correspondence dated November 18, 2015 attached to the Complaint as Exhibit "4", which document speaks for itself.

60. Deny the allegations contained in paragraph 60 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

61. The claims asserted by the Plaintiff in the Complaint fail to state a cause of action upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

62. There is a complete defense to this action (and all of the Plaintiff's claims) based upon documentary evidence.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

63. Plaintiff's claims are barred in whole or in part under the doctrine of laches and/or waiver.

64. Defendant FMLR Realty Management LLC ("FMLR") owns the property known as 436 Fifth Avenue, New Rochelle, New York (the "Defendants' Property"), which is a corner lot that has frontage on Fifth Avenue and East Street..

65. FMLR acquired Defendants' Property by deed from Defendants Flavio La Rocca and Maria La Rocco (collectively, the "La Roccas") dated January 30, 2008 and recorded in the Westchester County Clerk's Office on March 18, 2008 with Control Number 480660036.

66. The La Roccas acquired Defendants' Property by deed dated September 18, 2002 and recorded in the Westchester County Clerk's Office on November 12, 2002 with Control Number 423020239.

67. From the time the La Roccas purchased Defendants' Property in 2002 to present, the property has been used as a contractor's yard for storage of equipment by the contracting business run by Defendant Flavio La Rocca & Sons, Inc. a.k.a. F. LaRocca & Sons, Inc. ("La Rocca, Inc.").

68. While the City now asserts in this Complaint that it owns East Street, for as long as Defendants have owned Defendants' Property, the City has refused to maintain, repair and/or improve East Street.

69. As a result, Defendants, at their sole cost and expense, maintain, including snow removal, improve and repair East Street, and for years the City did not object to this.

70. While it is impossible to know for certain as the Complaint does not provide a street address, tax lot number or a survey for the property defined as the "Parcel" in the Complaint, it appears that the Parcel is an area of land on the other side of East Street and further north on East Street (farther away from Fifth Avenue) than Defendants' Property.

71. As part of Defendants' maintenance of East Street, Defendants were required to perform certain work on East Street to access its property, which work is what the City appears to object to in the Complaint.

72. Defendants relied upon the City's refusal to maintain, improve or repair East Street and its failure to object to the Defendants' maintenance, repair and improvement of East Street to maintain, improve and repair East Street at its sole cost and expense.

73. However, the Defendants never removed any trees from the Parcel, never installed a parking lot on the Parcel and do not use the Parcel as a parking lot.

74. The City only began objecting to the location of Defendants' property when the City decided to construct a park/playground on the other side of East Street from Defendants' Property, which was last scheduled to be completed in 2018, and, upon information and belief, after Defendants vocally opposed the City's proposed eminent domain of Defendants' Property to be part of a new site for the City's Department of Public Works.

75. The City cannot have it both ways. It cannot assert ownership of East Street in order to allege that Defendants' Property encroaches on East Street, but then refuse to maintain, improve and/or repair East Street as the City, as a municipality, would be required to do for any City road or street used by the public.

76. The City still refuses to maintain, improve and/or repair East Street.

77. Defendants incurred and continue to incur considerable expense in reliance upon the City's inaction with respect to East Street.

78. In addition, the alleged encroachments asserted by the City have existed for years, yet for years the City did not object to these alleged encroachments, which the Defendants relied upon to their detriment.

79. Defendants would be severely prejudiced if the City was now permitted to assert these claims.

80. Defendants would suffer significant financial harm if the City was now permitted to assert these claims.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

81. Plaintiff's claims are barred by the statute of limitations.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

82. The Complaint fails to state a claim against Defendants Flavio La Rocca or Maria La Rocca in their individual capacity.

83. The Defendants' Property is owned by Defendant FMLR.

84. At all relevant times, the business operated at the Defendants' Property, which maintains, improves and repairs East Street, is owned by La Rocca, Inc.

85. Any allegations asserted in the Complaint are against Defendants FMLR or La Rocca, Inc. and not against Defendants Flavio La Rocca or Maria La Rocca in their individual capacities.

86. The Complaint does not assert, nor is there any basis in law, to pierce the corporate veil as against Defendants Flavio La Rocca or Maria La Rocca.

87. The Complaint should be dismissed as against Defendants Flavio La Rocca and Maria La Rocca.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

88. Plaintiff's claims are barred by the doctrines of unclean hands and bad faith.

89. Upon information and belief, in or about 2014, Plaintiff initiated a plan to acquire the Defendants' Property and several other neighboring properties by eminent domain to use for the site of the City's Department of Public Works.

90. Upon information and belief, Defendants vocally opposed the City's eminent domain plan.

91. Upon information and belief, the City ultimately did not acquire Defendants' Property by eminent domain.

92. Upon information and belief, after the City's eminent domain plan did not come to fruition, Plaintiff began targeting Defendants and subjecting them to unequal treatment, both with respect to the Defendants' Property and another property owned by Defendants.

93. Upon information and belief, Plaintiff's actions in bringing this Complaint are a direct result of Defendants' opposition to Plaintiff's plan to acquire the Defendants' Property through eminent domain, and the City's ultimate failure to do so.

AS AND FOR A FIRST COUNTERCLAIM

94. Repeat and reallege the allegations contained in paragraphs 61 to 93 above as if fully-stated herein.

95. Defendants' Property has certain concrete jersey barriers, which barriers the City claims encroach upon East Street.

96. When the City constructed a park across East Street from Defendants' Property, it took certain concrete jersey barriers from Defendants' Property that belonged to the Defendants.

97. The City installed these concrete jersey barriers across the street from Defendants' Property as a barrier to the park and then subsequently asphalted these jersey barriers in place, which installation encroaches upon East Street.

98. The City never asked or offered to pay Defendants to take the concrete jersey barrier's for the City's use, and the Defendants never consented to the City doing so.

99. The City's actions constitute conversion of Defendants' property.

100. The value of the concrete jersey barriers that the City took from Defendants is approximately \$40,000.

101. By removing the Defendants' concrete jersey barriers and installing them on East Street in front of the park for the City's own use, the City has eliminated the utility of the concrete jersey barriers and the Defendants' could no longer use them for their own purposes.

102. Even if the concrete jersey barriers still did have utility, Defendants have not been able to use the property it purchased for its own purposes because of the conversion committed by the City to use the concrete jersey barriers for its own purposes.

103. Defendants are entitled to damages for the City's conversion of Defendants' property and/or compensatory damages.

AS AND FOR A SECOND COUNTERCLAIM

104. Repeat and reallege the allegations contained in paragraphs 61 to 103 above as if fully-stated herein.

105. From 2002 to present, the Defendants, at their sole cost and expense, have maintained and/or improved East Street, including but not limited to plowing and repairing pot holes and removing debris, in order to properly access its property.

106. During that time, the City has refused to maintain, repair and/or improve East Street.

107. If the City is asserting its ownership over East Street, then it should have been maintaining, repairing and improving East Street from 2002 to present.

108. The Defendants have incurred considerable expenses, in an amount to be determined by the Court, from maintaining, repairing and improving East Street for nearly 20 years.


109. The Defendants are entitled to be reimbursed by the City for those expenses related to actions that should have been done by the City, as a municipality that owns East Street.

WHEREFORE, it is respectfully requested that this Court grant the following relief:

- A. That the Verified Complaint be dismissed in its entirety;
- B. On its first Counterclaim, that the Defendants be awarded damages in the amount of \$40,000 for the City's conversion of Defendants' property;
- C. On its second Counterclaim, that the Defendants be awarded damages, in an amount to be determined by the Court, for the costs incurred by Defendants for the maintenance, repair and improvement of East Street;
- D. Reasonable costs and attorneys' fees;
- E. Together with such other and further relief as this Court deems just and proper.

Dated: Tarrytown, New York
April 29, 2019

SILVERBERG ZALANTIS LLC

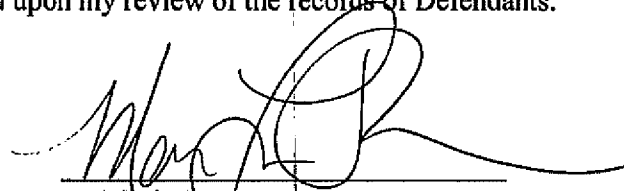
By: 
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VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF WESTCHESTER)

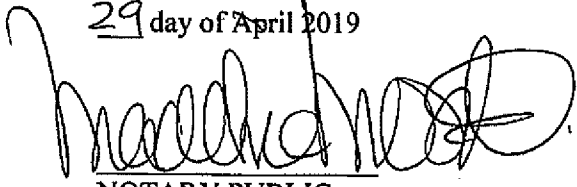
Maria La Rocca, being duly sworn, deposes and says:

I am a named Defendant in the above-referenced action. I have read the annexed Verified Answer with Affirmative Defenses, know the contents thereof and the same are true to my knowledge, except as to the matters therein stated to be on information and belief, and as to such matters I believe the same to be true based upon my review of the records of Defendants.



Maria La Rocca

Sworn to before me this
29 day of April 2019



NOTARY PUBLIC

MADLINE MONSERRATE
No. 01MO6349129
Notary Public, State of New York
Qualified in Westchester County
My Commission Expires 10/11/2020