



Cited

As of: Dec 05, 2012

**Terrence Brown, Respondent, v Hermia Nelson, Appellant.**

**4120, 109918/05**

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST  
DEPARTMENT**

***55 A.D.3d 317; 864 N.Y.S.2d 34; 2008 N.Y. App. Div. LEXIS 7033; 2008 NY Slip Op  
7198***

**October 2, 2008, Decided**

**October 2, 2008, Entered**

**CORE TERMS:** injunction, garage, skylight, encroached, removal, mandatory injunction, prescriptive easement, undue hardship, encroachment, interfered, directing, enjoyment

Moskowitz, JJ. Concur--Tom, J.P., Mazzarelli, Friedman, Williams and Moskowitz, JJ.

**OPINION**

[\*317] [\*\*35] Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 10, 2007, which, after a nonjury trial, granted plaintiff's motion for a mandatory injunction and directed defendant to demolish and remove a brick garage wall and a skylight on her property, unanimously modified, on the law, to the extent of vacating the injunction in favor of plaintiff as to the skylight, and otherwise affirmed, without costs.

**HEADNOTES**

Injunctions--When Injunctive Relief Appropriate.--Mandatory injunction directing defendant to remove garage wall was proper; wall encroached on plaintiff's property by several inches, and defendant had not obtained prescriptive easement; encroachment interfered with plaintiff's full use and enjoyment of his property, and removal of wall would not cause undue hardship to defendant.

[\*318] The trial court's issuance of a mandatory injunction directing defendant to remove the garage wall was proper. The evidence demonstrates that the garage wall encroached on plaintiff's property by several inches, and defendant failed to establish that she had obtained a prescriptive easement. The encroachment interfered with plaintiff's full use and enjoyment of his property, and defendant offered no evidence that removal of the garage

**COUNSEL:** [\*\*\*1] Lambert & Shackman, PLLC, New York (Steven Shackman of counsel), for appellant.

Townsend & Valente, LLP, New York (Francis L. Valente, Jr. of counsel), for respondent.

**JUDGES:** Tom, J.P., Mazzarelli, Friedman, Williams,

wall would cause undue hardship to her. The evidence establishes that the benefit to plaintiff if the injunction [\*\*\*2] were granted and the irreparable harm to him if the injunction were not granted substantially outweighed the injury to defendant if the injunction were granted (*see Matter of Angiolillo v Town of Greenburgh*, 21 AD3d 1101, 1104, 801 NYS2d 629 [2005]). We reject defendant's argument that plaintiff's claim regarding the wall is time-barred. *Real Property Actions and Proceedings Law § 611* does not apply to this case because there is no abutting wall on plaintiff's property. Moreover, defendant waived the defense by failing to plead it or move for dismissal on that ground (*CPLR*

3211 [e]).

However, we find that the injunction mandating removal of the skylight was not warranted. Plaintiff's own expert testified unequivocally that after the skylight was moved in response to the Department of Building's notice of violation, it no longer encroached on plaintiff's property.

We have considered defendant's remaining contentions and find them unavailing. Concur--Tom, J.P., Mazzaelli, Friedman, Williams and Moskowitz, JJ.