

Pland Place Realty Corp. v Hauber

2007 NY Slip Op 30480(U)

March 30, 2007

Supreme Court, Richmond County

Docket Number: 0011917/2002

Judge: Joseph J. Maltese

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PLAND PLACE REALTY CORP.,

Plaintiff

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

against

**FRANK A. HAUBER, ELIZABETH K. HAUBER,
MICHAEL G. FRENCH, KAREN FRENCH,
EDWARD G. COLLORD, JOYCE COLLORD,
KEITH ANDERSEN and LINDA ANDERSEN,**

Defendants

The plaintiff, a land development corporation, is seeking damages from the defendants, all of whom are homeowners whose developed land abuts the plaintiff's undeveloped land. The plaintiff claims that the defendants have each knowingly and intentionally dumped waste water from their washing machines and/or dishwashers onto the plaintiff's land and have allowed waste water and debris to leak from the leech fields of the underground septic sewers onto the plaintiff's land.

Plaintiff asserts that as a result of the defendants' illegal dumping of waste water from their washing machines and/or dishwashers onto plaintiff's land, the land became wet and changed the nature of its parcel. Thereafter, the New York State Department of Environmental Conservation (DEC) re-mapped the parcel that extended the already delineated buffer zone of the neighboring "wetlands" to include the plaintiff's land. The buffer zone of a wetland has restricted use in accordance with DEC regulations. The plaintiff claims that it intended to subdivide the parcel and build eight houses upon them for re-sale to the public. The plaintiff asserts that as a result of the defendants' illegal actions in dumping waste water onto its land, it can now only build one house to conform with DEC regulations. Consequently, plaintiff claims it has sustained a loss in value of its land, which may include the loss of profit of the seven houses it can not now build.

Since at least August of 2003, the City of New York installed sanitary sewers in this portion of Staten Island and the usage of the septic sewer systems has been eliminated. However, they are still in place and have not been dug up. The plaintiff asserts that the damage was done long before the installation of the sanitary sewers.

The defendants have each sought summary judgment pursuant to CPLR §3212 seeking a dismissal of the plaintiff's complaint for failure to state a viable cause of action and dismissal of the cross-complaints from their co-defendant neighbors, who all abut the plaintiff's land.

Specifically, the defendants: Keith R. Andersen and Linda Andersen (hereinafter "Andersen"), who reside at 48 Ruggles Street, Staten Island, New York, moved for summary judgment seeking that the plaintiff, Pland Place Realty Corp.'s (hereinafter "Pland Place") complaint and cross-claims be dismissed for failure to establish a prima facie case of negligence against the defendants pursuant to NY CPLR §3212.

Co-defendants, Michael G. French and Karen French, who reside at 16 Ruggles Street, Staten Island, New York, also moved to dismiss the plaintiff's complaint and cross-claims for failure to establish a cause of action as listed in the plaintiff's second, fifth, sixth and seventh Causes of Action respectively for negligence, trespass and nuisance, unlawful ejection that it was and put out of possession of its real property pursuant to NY Real Property Actions and Proceeding Law (RPAPL), for which it seeks treble damages pursuant to RPAPL §853.

The defendants, Frank A. Hauber and Elizabeth Hauber, have also cross moved to dismiss the plaintiff's complaint and cross-claims for failure to state causes of action.

The co-defendant, Joyce Collord, who resides at 18 Ruggles Street, Staten Island, New York, seeks, for good cause shown, permission to file a cross motion 16 days after the 60th day in which to make motions pursuant to this court's rules. Substantively, she claims that she is so removed geographically from the plaintiff's property that she could not have caused the water to drain off onto the plaintiff's land as it claims. In addition, she seeks to preclude the co-defendant's Andersen from testifying at trial.

The plaintiff opposed these motions for summary judgment and asserts that this matter has already been adjudicated as to the illegal dumping of waste water onto its land. Some of the defendants have been issued summonses by the New York City Health Department for allowing water to pool from their septic tank into the plaintiff's wooded area behind their land. The Andersen defendants claims that they were not given a summons by Board of Health, however, plaintiff asserts that a white pipe came from Andersen's land onto plaintiff's property.

The defendants claim that their land pitches down onto the plaintiff's land and that they cannot be held liable for rain water runoff onto the plaintiff's parcel. The defendants, except for the Andersens, paid fines on the summonses for the illegal dumping of waste water. Accordingly, the plaintiff's counsel verbally claimed that the paying of those fines constituted an admission against the defendant's interest and that the plaintiff should be entitled to summary judgment on liability. To demonstrate the plaintiff's claims of illegal dumping of waste water, it has produced photographs showing PVC pipes coming from some of the defendants' properties onto plaintiff's land and a survey, which also allegedly demonstrate pipes coming onto its land from the defendants' properties.

In addition to the photographs and survey demonstrating the PVC pipe, the plaintiff has presented an affidavit from a hydrologist as an expert witness who, from his *curriculum vitae*, possesses a Masters in Hydrogeology and who has extensive experience in the field of hydrogeology. The

hydrogeologist tested the land for water and the presence of certain plants and animals present in a wetlands as characterized by the DEC. His investigation of the subject property disclosed in his affidavit that the property along Ruggles Street in Staten Island, New York, which are owned by the defendants, were discharging their waste water and runoffs onto the plaintiff, Pland Place's property, which thereby caused the encroachment of the wetlands onto the plaintiff's property. While the defendants correctly argue that the quantum of damages, i.e., the loss of profit on seven houses, sought by the plaintiff is somewhat speculative, that does not mandate that this court dismiss the plaintiff's complaint for failure to properly state causes of action.

On a motion for summary judgment, the function of the court is issue finding, and not issue determination. (*Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]; *Aff'd* 65 NY2d 732 [1985]). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion. (*Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989]). A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable (*American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dept 1994]). There are numerous issues of the fact herein so that the applications of the defendants for summary judgment must be denied.

Accordingly, it is hereby:

ORDERED, that all of defendants' applications to dismiss the plaintiff's causes of action contained in its complaint is denied; and it is further

ORDERED, that the Collord defendants' application seeking to preclude the Andersen defendants from testifying is denied; and it is further

ORDERED, that plaintiff's request for summary judgment on liability is also denied; and it is further

ORDERED, that all other applications are also denied; and it is further

ORDERED, that the parties shall appear in this court for a pre-trial conference on **Monday, April 23, 2007.**

ENTER,

DATED: March 30, 2007

Joseph J. Maltese
Justice of the Supreme Court