

Bandier v Tim Blenk Tree Care Inc.

2007 NY Slip Op 32341(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0016141/2005

Judge: Robert W. Doyle

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This opinion is uncorrected and not selected for official publication.

In support of the motion, defendant submits, *inter alia*, a copy of the contract; the examination before trial testimonies of Tim Blenk, Dorothy Bandier, Tom Stubelek and James Sottilo; an affidavit of Conrad Decker; and copies of Blenk Tree's work orders. Tim Blenk testified to the effect that he is the President of Tim Blenk Tree Care Inc. and has a bachelor's degree in integrated pest management as well as a master's degree in plant science. He stated that he entered into a contract with the Bandiers in March, 2004. The contract provided that his company would make ten to twelve visits to the property during the contract period by a trained diagnostician to inspect the trees and shrubs for insect and disease activity, automatically treat controllable insect and disease problems and recommend additional services to increase the vigor of the plants. At the first visit to the property, defendant was told by the caretaker, Tom Stubelek, that the privets were turning brown and they both agreed that the privets were stressed from the harsh winter. Blenk suggested to Stubelek that he cut out the dead branches from the privet balls. He stated he saw the scale on the privets but felt no need to treat it since there is always some degree of scale present.

Blenk stated that from June 2004 through the end of the year, he and his employees tried to chemically suppress the scale, they tried to stimulate selected privet by adding micro nutrients, they tried hand removal and power washed some areas that had significant layering of adult scale. He stated that Blenk Tree was not responsible under the contract for pruning the privets and suggested to Mr. Stubelek that he prune less. Blenk also stated that his company was not retained to monitor the drainage, root systems or fertilizers on the premises, as these were Stubelek's and the irrigation company's duties. Later in the summer, Blenk stated that he noticed large infestations of scale on the privet hedge at premises other than plaintiff's that had never been seen before in the industry. In addition, the insect was not responding to conventional control measures that had been successful in the past.

Blenk averred that he called Scott Clark at Cornell Extension for advice. After visiting the premises and taking samples, Blenk learned from Mr. Clark that many factors could have affected the privet hedges, such as the cold weather, the old age of the privets, excessive pruning and poor drainage. Blenk began to follow Mr. Clark's suggestions. Later in the fall, Blenk spoke with Mrs. Bandier regarding whether the privet would ever return to its earlier health and he responded that it would over time. Blenk stated that Mrs. Bandier was considering replacing the privet hedges.

In her examination before trial, Dorothy Bandier testified to the effect that she is the plaintiff's wife and although she is an avid gardener, she is not an expert. She noticed that the privets were turning brown in late May and notified Blenk. She stated that Blenk always performed under the contract and took care of whatever was needed. However, she averred that Blenk breached the contract when the privet did not respond to Blenk's treatment. In August, she noticed that the hedges were dying and was told by Blenk that he was treating the scale. The following year, she hired another company, Tree Wise. She also hired a nursery to replace the dead privets. She learned from a neighbor that they also had problems with scale on their privets and were working with Blenk but were not replacing their hedges. Mrs. Bandier stated that she never hired anyone to analyze the problem.

Tom Stubelek testified at his examination before trial that he has worked as the gardener/superintendent of the Bandier premises for the past fifteen years. He was in charge of irrigation, fertilization of the lawn, mulching and pruning. He stated that in the beginning of 2004 he noticed winter kill on the privet hedges. He also stated that he never observed scale on the property until 2004 and there

was never a problem with voles in the root systems. Sometime in April he noticed scale on the privets but it was not a heavy concentration and did not cause alarm. He stated that Mrs. Bandier received a bill for spraying the hedge in May. He stated that Blenk made several informal visits to the premises and that he was satisfied with Blenk's services. Based upon his gardening experience, he did not think Blenk caused the scale problem. In late August, he noticed a problem with the privets and spoke to neighbors who also had problems with scale on their privets. He recalled that the Bandiers hired a company in late fall to begin replacing the privets.

James Sottilo testified to the effect that he is the owner of Treewise Organic Experts. He was hired by the Bandiers in the spring of 2005. While he was unaware of the treatment provided by Blenk Tree, he began to start new inner growth of the damaged privets by suggesting new pruning methods, power washing the bushes and adding supplements to the soil. He stated that it generally takes two to three years for the new growth to start taking over as the main leaders of the plant. He averred that it was difficult working with the Bandiers in that his suggestions for treatments were rebuffed as too expensive. He further stated that to allow plants to regenerate could be as expensive as replacing them, and it was a matter of whether the owners wanted to see the improvement in an instant or wanted to wait for it to develop. His company also worked with neighboring properties which had similar scale problems and none of the owners replaced the hedges as a result.

Sottilo stated that his company was retained from 2005 through the spring of 2006. His contract provided that he would visit the premises five times per year and recommend treatment to the plant life. He noticed that his treatment resulted in an improvement in the overall look of the plants but the scale was never one hundred percent under control. In 2005, as President of the Arborist Association, he assisted in sponsoring a round table seminar for horticulturists in the area which focused on the treatment of prunicola scale. He learned that all of the attendees, including Blenk, had experienced a problem with scale in Southampton in the previous year. The attendees, as part of the seminar, also drove to several homes in the area and observed scale on the hedges. Sottilo stated that this seminar was extremely helpful in providing a treatment timetable to control the scale problem.

In his personal affidavit, Conrad Decker avers that he is a consulting arborist. He visited the premises in October, 2005 and made the following observations. He noted possible rodent damage where feeding on the roots may have compromised the plant's ability to absorb nutrients and water. Soil and plant samples were analyzed which determined that white prunicola scale was present and a high level of nitrogen from fertilizer in the turf was present. He concludes that neither the maintenance practices nor the application of pesticides by Blenk Tree directly or indirectly caused the damage to the privet hedges.

The record reveals work orders demonstrating that Blenk Tree provided treatments to the privet on thirteen occasions from June 17 through October 30, 2004. Blenk Tree also provided treatment to other trees on the premises beginning in February, 2004. With the above evidence, defendant has demonstrated, *prima facie*, its entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

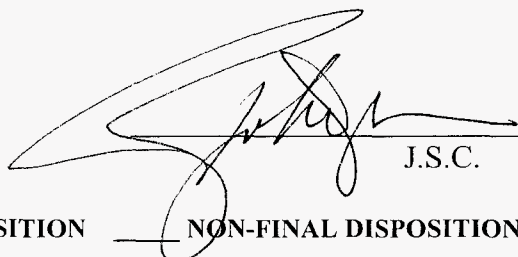
In opposition, plaintiff submits, inter alia, portions of the above examinations before trial and an affidavit by his wife, Dorothy Bandier wherein she avers that Blenk Tree rendered faulty care to the privet hedges that caused their destruction.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, when a contractor performs its obligations in a workmanlike manner according to the plans and specifications agreed to b the owner, the contractor is not liable for the damage that may result (*see, Larchmont Nurseries, Inc., v Daly*, 33 AD3d 872, 827 NYS2d 56 [2006]). Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must “show facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v City of New York, supra.*)”

Here, the evidence reveals that Blenk performed under the terms of the contract and according to industry standards. The treatment rendered by Blenk Tree was the same as that provided by its replacement, Treewise Organic Experts, and the appearance of the privet hedges improved over time. In addition, Mr. Sottilo concurred with Blenk in his opinion that the privet would eventually return to its former appearance. Inasmuch as there were many factors over which Blenk Tree had no control that could have affected the privet, it cannot be said that Blenk’s care and treatment of the privet hedges caused their destruction. Thus, the court finds that Blenk Tree did not breach the contract. Plaintiff fails to raise an issue of fact by his wife’s affidavit which is speculative and conclusory. As such, her opinions are insufficient to defeat Blenk Tree’s entitlement to summary judgment. Plaintiff’s attorney’s affirmation in opposition is unsupported by factual proof and is, therefore, of no probative value and also fails to raise an issue of fact (*see, Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325, 786 NYS2d 146 [2004]).

Accordingly, the motion for summary judgment dismissing the complaint is granted.

Dated: JUL 24 2007



J.S.C.

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