

**Island Realty Assoc., LLC v Motta**

2007 NY Slip Op 32661(U)

August 21, 2007

Supreme Court, Richmond County

Docket Number: 0012941/2004

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

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**Index No.: 12941/2004  
Motion No.: 1, 2, 3, 4**

**ISLAND REALTY ASSOCIATES, LLC and LEONARD  
SLAVITT, AS EXECUTOR OF THE ESTATE OF  
ABRAHAM SLAVITT,**

*Plaintiffs*

*against*

**JOSEPH MOTTA and JOAN MOTTA,**

*Defendants*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

The following items were considered in the review of these varied motions

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 3, 6
Orders to Show Cause and Affidavits Annexed	2
Answering Affidavits	5, 7
Replying Papers	4
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In this action, motions numbered 1, 2, and 3 were erroneously marked withdrawn by the court. They are now restored, submitted, and all of the motions will be resolved by this decision and order. Motion number 1, made by the defendant pursuant to CPLR § 3025, seeks an order granting leave to amend their answer to assert four affirmative defenses *nunc pro tunc*. Motion number 2, also made by the defendant via an Order to Show Cause, seeks to vacate the plaintiffs' notice to take the deposition of the defendants' expert, Henry Salmon, as well as quashing the subpoena pertaining to the defendants' expert. Motion number 3, made by the plaintiffs pursuant to CPLR § 3212, seeks summary judgment on the issue of liability and requests that this matter be set down for an inquest on damages. Finally, motion number 4 seeks an order pursuant to CPLR § 3101 directing the defendant to provide expert witness disclosures within 20 days.

In motion number 1, the defendant seeks leave to assert four new affirmative defenses. To wit:

- 1) The diminution, if any, of the market value of plaintiff's property is less than the alleged cost of restoration as a result of the alleged damage.
- 2) The landscaper, Philip Ruggerio, was an independent contractor, not an employee of Joseph and Joan Motta in the performance of any work and as such, the defendants are not liable for damages, beyond those trees requested to be cut down or trimmed by the defendants;
- 3) The work performed by the landscaper was outside the scope of the request of the defendants and therefore the defendants' involvement was casual and involuntary; and
- 4) Any collateral source payments pursuant to CPLR § 4545(c) if damages are recovered against the defendant, the amount of such damages shall be diminished by the amount.

It is well settled that CPLR § 3025 "is to be liberally construed to permit pleadings to be amended... in the absence of laches, undue prejudice and unfair advantage." (*Murray v. City of New York* 43 NY 400 [1977]). Accordingly, motion number 1 is granted and the four affirmative defenses are permitted *nunc pro tunc*.

Motion number 2, made by the defendant via order to show cause, seeks to quash the subpoena and notice of deposition served by the plaintiffs upon the defendants' expert Henry Salmon. Pursuant to CPLR § 3101 (d), the defendants served upon the plaintiff notice that Henry Salmon, a real estate appraiser from Equity Valuations Associates, would testify at the trial of this action respective the value of the plaintiff's land and the effect, if any, of the land's value as a result of the alleged tree destruction. The defendants are correct that pursuant to CPLR § 3101(d)(1)(iii), further disclosure of expected testimony of an expert may be obtained:

- 1) Only by Court Order;
- 2) Upon a showing of special circumstances; and
- 3) Subject to the restrictions as to scope ...

After reviewing the plaintiff's notice to take the deposition of the defendants' expert, it does not show any special circumstances that would require the deposition of an expert witness. Accordingly, motion number 2 is granted and the subpoena and notice to take deposition of the defendants' expert are quashed.

Motion number 3 is made by the plaintiff and seeks summary judgment on the issue of liability pursuant to CPLR § 3212 and requests that this matter be set down for inquest. The defendants oppose this motion. In this action, the plaintiffs allege that the defendant illegally trespassed upon their property on or about October 22, 2003 and caused approximately 200 mature trees to be removed. The complaint seeks both compensatory and treble damages for the defendants' action. It is undisputed that the defendants directed the cutting and removal of trees from the plaintiff's property.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003]). 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]). In opposition to this motion, the plaintiff submits an attorney's affirmation only which by itself, is insufficient to defeat a motion for summary judgment (*Zuckerman v. City of New York* 49 NY2d 557 [1980]; *Stahl v. Stralberg* 287 AD2d 613 [2d Dept 2001]). Accordingly, motion number 3, granting summary judgment on liability only in favor of the plaintiff is granted.

Motion number 4, made by the defendants, moves pursuant to CPLR § 3101 directing the defendants to provide expert witness disclosure. In their moving papers, the plaintiffs' counsel argues that the defendant failed to identify the defendants' expert's name. While this is true, the defendants state that they did attach to the 3101(d) response the Curriculum Vitae of the expert, namely, Henry Arlin Salmon, CREA, or Equity Valuation Associates. Accordingly, the defendant shall correct this by re-serving a 3101(d) response inclusive of Mr. Salmon's name.

The plaintiff also objects to the defendants' response pertaining to the subject matter. The defendants' response was "The expert is expected to testify as to whether there was a change in the value of the land due to the alleged destruction of the trees and other plant life." In comparison to the plaintiff's own subject matter response, they are nearly identical. Specifically, the plaintiff's 3101(d) response states that the subject matter of the plaintiff's expert is "The witness is expected to testify regarding the estimated damage caused by defendants' illegal and unauthorized removal of trees, plants, and other natural growth from the real property." Accordingly, that part of the plaintiff's motion is denied.

The plaintiff then seeks to compel a further and more detailed response with respect to "The substance of the facts and opinions" section of the 3101(d) exchange. The defendants' response was that "The expert will testify as to the value of the land before and after the incident based on an extensive appraisal." The plaintiff states that this response is patently insufficient since the expert's determination regarding land value and the basis upon which the expert performed his appraisal must be disclosed. While a party is not obligated pursuant to CPLR 3101(d)(1)(I) to disclose his expert's report, they are however, required to provide "for the disclosure in reasonable detail of the subject matter on which the expert is expected to testify and a summary of the grounds for the expert's opinion" (*Rodriguez v. Pontillo* 278 A.D.2d 400 [2d Dept 2000]). This is because the report itself constitutes material prepared for litigation and is not subject to disclosure unless the party seeking disclosure has a substantial need for the report and is unable without undue hardship to obtain its substantial equivalent by other means (CPLR 3101[d][2]; *Marziano v. City of Yonkers*, 105 A.D.2d 832 [2d Dept 1984]). Here, the defendants' response, which states that the expert will testify as to the value of the land before and after the incident based upon an extensive appraisal, satisfies the requirements of CPLR § 3101 and that part of the plaintiff's motion is denied.

Finally, the plaintiff claims that defendants' disclosure is deficient because it fails to identify the expert's specific knowledge and/or expertise for the defendant to render an opinion concerning the restoration of the trees and the costs thereof. The defendants' response was that "The experts' opinion is based upon his knowledge, expertise and physical inspection of the property in question and of the restoration of the trees and the cost thereof. This response also satisfies the provisions of the CPLR, therefore that aspect of the plaintiff's motion is denied.

Accordingly, it is hereby:

ORDERED, that motion number 1 seeking leave to amend the answer to include four additional affirmative defenses is granted; and it is further

ORDERED, that motion number 2 seeking to quash the notice of deposition and subpoena served upon the plaintiff's expert is granted; and it is further

ORDERED, that motion number 3 seeking summary judgment in favor of the plaintiff on liability only is granted; and it is further

ORDERED, that motion number 4, seeking to compel the defendants to serve a supplemental 3101(d) response concerning their expert is granted to the extent that the defendants are to serve a supplemental 3101 inclusive of the expert's name within 30 days; and it is further

ORDERED, that all parties return to DCM 3 at 9:30AM on **August 28, 2007** for a compliance conference.

ENTER,

DATED: August 21, 2007

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Joseph J. Maltese  
Justice of the Supreme Court