

Carlson v Zimmerman
2007 NY Slip Op 32797(U)
September 4, 2007
Supreme Court, Suffolk County
Docket Number: 0005272/2000
Judge: Robert W. Doyle
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This action and a related action (*Zimmermann v. Carlson*, Index No. 00-14170)¹ arise out of certain excavations performed by plaintiffs on their parcels of property. Defendants claim that the excavations performed by plaintiffs caused damage and erosion on defendants' property which required defendants to perform certain restoration work. In this action, plaintiffs contend, *inter alia*, that in performing this restoration work, defendants trespassed on plaintiffs' property and seek an award of damages for that trespass as well as injunctive relief.

In support of their motion, plaintiffs allege that there is no factual dispute involving the trespass since defendants do not deny that they entered onto plaintiffs' land without consent. Plaintiffs further assert that several of the defenses interposed are without merit as a matter of law and others are unsupported by any evidence to support defendants' claims. They point to the undisputed evidence regarding the ownership of the parcels and to defendants' acknowledged entry onto plaintiffs' property.

In opposition to plaintiffs' motion, defendants argue that the actions they undertook were to repair and maintain their own properties, which were damaged by plaintiffs' actions, and to reconstruct the common roadways and easements. Defendants further note that they replaced soil that had been removed by plaintiffs on or adjacent to their respective properties so that they would not further erode. According to defendants, they only acted to shore up their own properties when it became apparent to them that plaintiff Henry Carlson would do nothing to remedy the situation. Defendants contend that they acted to the minimum extent necessary to restore their property.

It is hornbook law that consent as a defense to an action in trespass must be given by the owner or possessor of the premises (61 NYJur., *Trespass*, § 31). Although consent may be implied from custom, usage or conduct, it may not be extended by inference to justify the unlicensed entry of others (75 AmJur2d *Trespass*, § 41). An actionable trespass must necessarily involve a wrongful or unjustifiable entry upon the land of another or the performance of some improper, careless, wrongful or unnecessary act thereon (*see*, 61 NYJur, *Trespass*, § 11). "Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces the unlawful invasion and the intrusion must at least be the immediate or inevitable consequence of what he willfully does or which he does so negligently as to amount to willfulness." (*Phillips v. Sun Oil Co.*, 307 NY 328, 331, 121 NE2d 249, 250 [1954]).

In a prior decision in this action, upon application of plaintiffs for a preliminary injunction preventing defendants trespass upon plaintiffs' property, this Court noted that "(t)here can be no doubt, and defendants do not deny, that entering upon plaintiffs' property without their consent

In the related action, defendants assert that plaintiffs caused certain excavations to be made upon their own property which caused damage and erosion on defendants' property. In order to prevent further damage and erosion, defendants entered upon plaintiffs' property and performed certain restoration work. In their complaint in this related action, defendants (who are plaintiffs in the related action) allege that plaintiffs have benefitted from this restoration but have not paid defendants for the work performed.

and dumping materials thereon constitutes a trespass (MacDonald v. Parama, 15 AD2d 797, 224 NYS2d 854, 856; Stewart v. State of New York, 248 Ad2d 761, 669 NYS2d 723).” Nothing contained in the papers submitted in opposition to the present motion, compels the Court to reach a different result. The fact that defendants entered onto plaintiffs’ property only to rectify the damage done by plaintiffs’ illegal mining operation is not a defense to trespass (Ligo v. Gerould, 244 AD2d 852, 665 NYS2d 223). A person who enters upon the land of another, without the owner's permission, “ ‘whether innocently or by mistake, is a trespasser’ ” (Golonka v. Plaza at Latham, 270 AD2d 667, 669, 704 NYS2d 703, quoting 104 NY Jur.2d, *Trespass* § 10, at 454; see Ward v. City of New York, 15 AD3d 392, 789 NYS2d 539). Claims by defendants that they had a prescriptive easement over a portion of the property upon which they are alleged to have trespassed is unsupported by any proof to establish such an easement (see, Chlystun v. Kent, 185 AD2d 525, 586 NYS2d 410). Moreover, such a claim, even if it were established, is no defense to the alleged trespass on the balance of plaintiffs’ property. Finally, defendants have failed to adduce proof that plaintiffs somehow accepted defendants’ trespass. In fact, the evidence establishes that as early as December 1997, plaintiffs sent defendants a letter in which they expressly declared that defendants had no authority to trespass on plaintiffs’ property.

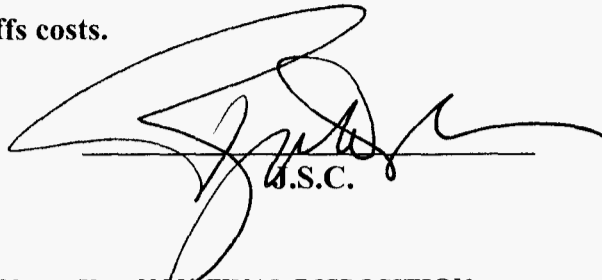
Accordingly, the motion by plaintiffs for partial summary judgment on the issue of liability on their first and second causes of action in which they seek damages for trespass and a permanent injunction with respect to such trespass, is granted. The determination of damages on plaintiffs’ first cause of action shall await the trial of the remaining causes of action.

With respect to that portion of plaintiffs’ motion which seeks summary judgment dismissing plaintiffs’ counterclaims as untimely, that application is granted as well. In support of their motion, plaintiffs argue that the actions which form the basis of defendants’ counterclaims occurred in the 1980's or earlier and are barred by the applicable statutes of limitations (see, CPLR 212 and 214). In response to plaintiffs’ application to dismiss the counterclaims, defendants argue that CPLR 203 (d) provides that where a counterclaim “arose from the transactions or occurrences or series of transactions or occurrences upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.” While CPLR 203 (d) does allow that “counterclaims which would otherwise be barred by the Statute of Limitations are not barred so long as they arise from the same transaction or occurrences as the primary claim,” such counterclaims in this instance are not part of the same transaction. In Messinger v. Mt. Sinai Medical Center (279 AD2d 344, 720 NYS2d 13), it was held that an assault, which was not part of the alleged medical malpractice but only the result of it, did not qualify for revival under CPLR 203(d). The Court noted that “the alleged assault and battery of defendant treating physicians by plaintiff and the defendants on the counterclaim, which occurred immediately upon hearing of decedent's death, cannot be considered as arising from the same occurrence. The assault was not a part of the alleged malpractice but arguably only a result of it. The two actions are related, but there is no common thread tying the two together to warrant revival of the assault counterclaim under CPLR 203(d).” In this instance, the fact that the allegations contained in the counterclaims may involve the same parties and are related to actions with respect to the same properties, does not allow the Court to conclude that they arise from the same transaction or occurrence as plaintiffs’ claims.

Accordingly, the motion by plaintiffs for summary judgment dismissing defendants' counterclaims as untimely is granted.

The Court declines to award plaintiffs costs.

Dated: SEPTEMBER 4, 2007



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