

Cullen v Neuman

2008 NY Slip Op 30058(U)

January 11, 2008

Supreme Court, Suffolk County

Docket Number: 0006567/2004

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 6-20-07 (007)
7-30-07 (008 & 009)
ADJ. DATE 8-28-07
Mot. Seq. # 007 - MG # 008 - MG
009 - XMG; CASEDISP

-----X
MONICA CULLEN and TERRENCE CULLEN, :
 :
 :
 Plaintiffs, :
 :
 :
 - against - :
 :
 LISA NEUMAN, as Executrix of the Estate of :
 MARK NEUMAN, DECEASED, and PETE :
 MONDELLO, individually, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 91 read on these motions for summary judgment and cross motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; 19 - 44; Notice of Cross Motion and supporting papers 45 - 61; Answering Affidavits and supporting papers 62 - 77; 78 - 84; 85 - 87; Replying Affidavits and supporting papers 88 - 89; 90 - 91; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purposes of this determination the motions by defendants Mondello and Neuman for summary judgment are consolidated and decided together with the cross motion by plaintiffs for partial summary judgment; and it is further

ORDERED that this motion by defendant Mondello for summary judgment dismissing the complaint against him is granted; and it is further

ORDERED that this cross motion by defendant Lisa Neuman, as the Executrix of the Estate of Mark Neuman, deceased, for summary judgment dismissing the complaint against her is granted; and it is further

ORDERED that this cross motion by plaintiffs for summary judgment in their favor on the complaint as against defendant Neuman is denied.

This action has its genesis in the construction of an addition to a residence owned by defendant Neuman's deceased husband, Mark Neuman, located on South Ocean Avenue in Bayport, New York. Plaintiffs are the owners of a residence on an L - shaped parcel of real property adjoining the Neuman property on its northern and eastern borders. Both properties are situated in a residential zoning district within the Town of Islip. Mark Neuman obtained from the Town of Islip Board of Appeals two area variances to construct additions on his residence. At its inception, this action was brought against the Town of Islip, defendant Peter Mondello in his individual capacity and as a building inspector for the Town, and against Lisa Neuman for a judgment permanently enjoining defendant Neuman from maintaining the construction in violation of the area variances, and directing defendant Neuman to remove all portions of the construction which are in violation of the variances and/or the Town Code. As against the municipal defendants the complaint sought a judgment directing the Town to take action to against plaintiffs for such violations. The complaint also sought monetary damages for "conspiracy" and nuisance.

By order, dated December 8, 2004 (Costello, J.), the Court granted a motion by the Town of Islip and Peter Mondello to dismiss the complaint to the extent that the Court dismissed the complaint against the Town in its entirety and dismissed that portion of the complaint as against defendant Mondello in his capacity as a Town building inspector. The Court permitted the action to continue as against defendant Mondello in his individual capacity. In November 2005, plaintiffs served an amended and supplemental verified complaint. The complaint, as it now stands, asserts claims by plaintiffs, as landowners, which sound in a private right of action to enjoin defendant Neuman's activities which allegedly violate the zoning ordinance and in private nuisance. Plaintiffs also alleged that the Neumans never applied for or received a permit for their driveway in violation of the Code; that the Neumans created an illegal basement apartment and illegally constructed a fence at the end of South Ocean Avenue which is 4' into the Town roadway and which prevents a turn around for cars at the dead end. As a result of the foregoing, plaintiffs claim to have suffered the existence of a dangerous condition, that the saleability and rentability of their property has been and will continue to be diminished, and further, that they have suffered and will continue to suffer the loss of use, privacy, light, air, view and enjoyment of their property. Plaintiffs also allege that the construction complained of constitutes a nuisance which has damaged plaintiffs in the amount of \$100,000. In addition, plaintiffs allege that defendant Mark Neuman illegally removed the boundary monuments between the two properties.

As against defendant Mondello it is alleged that he was aware of the fact that the Neumans were not in compliance with the permits and variances but he intentionally, knowingly and/or negligently approved the work and authorized the issuance of a completion certificate or a certificate of occupancy. It is also alleged that defendant Mondello conspired with Mark Neuman to approve the construction knowing that it was in violation of the variances and permits. A second cause of action is asserted as against defendant Mondello alleging that he breached his public trust, duties and obligations by failing or refusing to place a violation upon the Neuman property or to otherwise take action to enforce the Town's code, ordinances and variances after notice of the violation was given by plaintiffs.

Plaintiffs maintain that the Neumans did not construct the addition in accordance with the area variance and permits granted thereon. Specifically, plaintiffs cite the following deviations:

There is a 3' covered porch exceeding the variance on three sides of the house leaving only 2' from the property line; the foundation has permanent cement window well entrances exceeding 3' from the permitted variance leaving a 2' side yard; the driveway and cobblestone walkways are on and exceed the property line and encroach on plaintiff's property; the air conditioning units are on permanent cement pads and are 2' beyond the variance granted; the outdoor lights and underground wiring and window openings are 2' beyond the variance granted; the entire house is 6" beyond the variance granted ; and the electrical lines are temporary and not permanent.

All parties now move for summary judgment. Defendants are correct in pointing out that plaintiffs' motion for summary judgment made more than 120 after the filing of the note of issue in this action is untimely. An untimely cross-motion for summary judgment may nevertheless be considered as long as it involves issues related to a timely pending summary judgment motion (*see*, CPLR 3212 [a]; **James v Jamie Towers Hous. Co.**, 294 AD2d 268, 743 NYS2d 85 [2002], *affd* 99 NY2d 639, 760 NYS2d 718 [2003]; *see also*, **Bressingham v Jamaica Hosp. Med. Ctr.**, 17 AD3d 496, 793 NYS2d 176 [2005]). Under the instant circumstances the issues raised by plaintiff's untimely motion are already properly before the Court and thus, the nearly identical nature of the grounds may provide the requisite good cause to review the untimely cross motion on the merits. Notably, the court, in the course of deciding the untimely motion is in any event, entitled to search the record and award summary judgment to the nonmoving party (**Ellman v Village of Rhinebeck**, 41 AD3d 635, 838 NYS2d 641 [2007]; **Grande v Peteroy**, 39 AD3d 590, 833 NYS2d 615 [2007]).

In support of her request for summary judgment defendant Neuman has submitted, among other things, the affidavit of Hope Larson, who avers that she is the Deputy Commissioner of the Town's Department of Planning and Development/Building Division and that she reviewed the files maintained in the Town's Building Division pertaining to the Neuman property. The records reflect that in May, 2005, defendant Lisa Neuman or her representative requested that the Town close the open building permit issued for her property. In August, 2005, Ken Weeks, a Town Building Inspector visited the Neuman property in order to conduct an inspection. Ms. Larson also avers that she advised Mr. Weeks to go through the entire house and obtain the as-built plans which had been previously requested of Ms. Neuman. Ms. Larson further states that on August 17, 2005, she reviewed the file generated for the Neuman property and that based upon the documentation contained therein, including the "as-built" survey obtained by Mr. Weeks from Ms. Neuman, that the Neuman home is in full compliance with the Town requirements. Based upon Ms. Larson's affidavit defendant Neuman has made a prima facie showing that there are no zoning violations on the subject property.

A property owner who can demonstrate special damages by virtue of a violation of a zoning law possesses standing to seek to enjoin such activities, as well as for damages (*see*, **Cord Meyer Development Co. v Bell Bay Drugs, Inc.**, 20 NY2d 211, 282 NYS2d 259 [1967]; **Futerfas v Shultis**, 209 AD2d 761, 618 NYS2d 127 [1994]; **Santulli v Drybka**, 196 AD2d 862, 602 NYS2d 151 [1993]; **Haddad v Salzman**, 188 AD2d 515, 591 NYS2d 193 [1992]). As a threshold demonstration, however, a plaintiff must provide specific detailed evidence of a diminution in his property value by virtue of the illegal activity (*see*, **Futerfas v Shultis**, *supra.*, **Santulli v Drybka**, *supra.*, **Guzzardi v Perry Boats**, *supra.*).

Plaintiffs have failed to submit any evidentiary proof in admissible form to substantiate their claim that the Neuman residence is in violation of the Town Code. The surveys and building plans submitted by plaintiffs have not been authenticated. Notably absent from plaintiffs' submissions is any expert opinion to support plaintiffs' claim that the Neuman property fails to comply with the requirements of the code. The affidavit of Mr. Cullen wherein he opines that the additions to defendant's residence were not constructed according to code is rejected as Mr. Cullen has not demonstrated that he possesses the requisite skill, training, education, knowledge or experience to render a reliable opinion (*Pignataro v Galarzia*, 303 AD2d 667, 757 NYS2d 76 [2003]). Moreover, the report of James M. Carney, a certified residential appraiser, wherein he represents that plaintiffs' property estimated to worth \$2.5 million suffers a negative impact of 4 to 5 % (\$100,000 to \$125,000) as a result of the zoning violations on defendant Neuman's property, is similarly defective in that it does not establish Mr. Carney's qualifications as an expert (*id.*; *Hofman v Toys "R" Us-NY Limited Partnership*, 272 AD2d 296, 707 NYS2d 641 [2000]) and, in any event, does not constitute competent evidence because it is unsworn (*Orelli v Showbiz Pizza Time, Inc.*, 302 AD2d 440, 753 NYS2d 737 [2003]; *Ritts v Teslenko*, 276 AD2d 768, 715 NYS2d 418 [2000]; *Woodard v City of New York*, 262 AD2d 405, 692 NYS2d 407 [1999]). Plaintiffs' unsupported assertions are insufficient to demonstrate the existence of special damages and plaintiffs therefore lacked standing to maintain a private action to enjoin the claimed violations of the zoning code (*Marlowe v Elmwood, Inc.*, 12 AD3d 742, 784 NYS2d 206 [2004]; *Santulli v Drybka*, *supra*). Defendant Neuman's request for summary judgment dismissing plaintiffs' claims for injunctive relief and monetary damages arising from the alleged zoning violations on the Neuman property is, therefore, granted and plaintiffs' corresponding request for summary judgment on this claim is denied.

With regard to plaintiffs' claims alleging private nuisance, to recover damages based upon the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by defendant's conduct (*see, Copart Industries, Inc. v Consolidated Edison Co.*, 41 NY2d 564, 394 NYS2d 169 [1977]; *Mangusi v Town of Mount Pleasant*, 19 AD3d 656, 799 NYS2d 67 [2005]).

Here, the Court finds, as a matter of law, that plaintiffs have failed to establish that defendants' use of their property interferes substantially, or otherwise, with plaintiff's use and enjoyment of their own property. "To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient" (*Campbell v Seaman*, 63 NY 568, 577). The disturbances to plaintiff must not be "fanciful, slight or theoretical, but certain and substantial, and must interfere with the physical comfort of the ordinary reasonable person" (*Dugway, Ltd. v Fizzinoglia*, 166 AD2d 836, 563 NYS2d 175 [1990]). Plaintiffs have failed to adduce evidence that their use and enjoyment of their land has been substantially and unreasonably interfered with (*see, Ruscito v Swaine, Inc.*, 17 AD3d 560, 793 NYS2d 475 [2005], *Kaplan v Inc. Village of Lynbrook*, 12 AD3d 410, 784 NYS2d 586 [2004]; *Adams v Berkowitz*, 212 AD2d 557, 622 NYS2d 565 [1995]). Nor have plaintiffs provided any proof, in admissible form, of the monetary damages they claimed to have sustained as a result of the claimed nuisance (*see, Camarda v Vanderbilt*, 147 AD2d 607, 538 NYS2d 16 [1989]; *Guzzardi v Perry's Boats, Inc.*, *supra*). Consequently, defendant Neuman's

Cullen v Neuman
 Index No. 04-6567
 Page No. 5

request for summary judgment dismissing plaintiffs' private nuisance claim is granted and plaintiffs' corresponding request for summary judgment on this claim is denied.

Defendant Mondello seeks summary judgment contending that plaintiffs have failed to establish that he breached his duty as a public officer by not citing the claimed violations evident in the construction of the additions on defendant Neuman's property and by not issuing any stop work orders while the construction was in progress. In support, defendant submits his personal affidavit in which he avers that he properly performed his duties as a building inspector in reviewing the ongoing construction on the Neuman property and, in fact, advised the Neumans that he could not complete his inspections, until such time as they submitted an "as-built" survey reflecting the changes they had made in the course of the construction. Defendant Mondello points to the fact that the Neuman construction was ultimately inspected and approved by the Town years after his retirement. He relies upon the statements made by Ms. Larson in her affidavit confirming that the construction the Neuman residence complied with the requirements of the Town Code.

In opposition, plaintiffs contend Mondello conspired with his long time friend Peter Neuman by to allow construction on the Neuman property which violated the code enabling the Neuman to improperly obtain a certificate of completion, and that defendant Mondello also conspired with the Neumans to harass the plaintiffs as well.

New York does not recognize civil conspiracy as an independent cause of action (*see, Plymouth Drug Wholesalers v Kirschner*, 239 AD2d 479, 658 NYS2d 64 [1997]). Allegations of conspiracy are permitted "only to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander, Inc. v Fritzen*, 68 NY2d 968, 969, 510 NYS2d 546, 547 [1986]). Inasmuch as plaintiffs' claim for civil conspiracy stands or falls with the underlying tort, plaintiffs' claim for conspiracy as against defendant Mondello is rendered legally deficient as a result of the plaintiffs' failure to establish their nuisance claims (*see, Ward v City of New York*, 15 AD3d 392, 789 NYS2d 539 [2005]). Other than the conclusory and unsubstantiated claims of corruption contained in Terrence Cullen's personal affidavit, plaintiffs have submitted no proof of evidentiary fact, in admissible form, that defendant Mondello violated the public trust in the performance of his duties as building inspector. Summary judgment is, therefore, granted to defendant Mondello dismissing the complaint against him.

Accordingly, defendants' motions for summary judgment are granted and plaintiffs' cross motion for partial summary is denied. Plaintiffs' complaint is dismissed in its entirety.

Dated: 1/11/08

Emily Pines
 J.S.C.
HON. EMILY PINES

FINAL DISPOSITION NON-FINAL DISPOSITION