

Landsman v Schaefer Enters. of Deposit, Inc.
2008 NY Slip Op 31172(U)
April 10, 2008
Supreme Court, New York County
Docket Number: 0103049/2006
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEMENT.

WALTER B. TOLUB

PART 15

ymc

Index Number : 103049/2006

LANDSMAN, JONATHAN M.

VS.

SCHAEFER ENTERPRISES OF DEPOSIT, INC

SEQUENCE NUMBER : # 003

SUMMARY JUDGMENT

Justice

INDEX NO. 103049-06

MOTION DATE 1.28.08

MOTION SEQ. NO. #003

MOTION CAL. NO. _____

e read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 22 2008

COUNTY CLERK'S OFFICE
NEW YORK IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

2

RECEIVED

APR 15 2008

IAS MOTION
SUPPORT OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/10/08

4

WALTER B. TOLUB.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

MVA

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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JONATHAN M. LANSDSMAN,

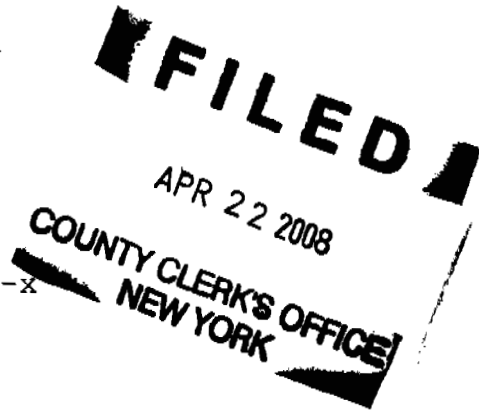
Plaintiff,

Index No. 103049/06
Mtn Seq. 003

-against-

SCHAEFER ENTERPRISES OF DEPOSIT, INC.,
SCHAEFER LOGGING, INC., SCHAEFER TIMBER
AND STONE, LLC, LARRY SCHAEFER, GUSTIN
STONE SUPPLY, PAUL R. GUSTIN and
MICHAEL D'ELIA

Defendants.
-----x



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WALTER B. TOLUB, J.:

This is an action to recover damages for the removal of a fieldstone wall which plaintiff claims was wrongfully taken from his property. By this motion, defendants Schaefer Enterprises of Deposit, Inc., Schaefer Logging, Inc., Schaefer Timber and Stone, LLC, and Larry Schaefer (collectively, the Schaefer defendants) move, pursuant to CPLR 3212, for summary judgment and dismissal of plaintiff's complaint. Plaintiff, an attorney appearing *pro se*, cross-moves for summary judgment against the Schaefer defendants on all issues of liability and for a trial on damages. Alternatively, plaintiff seeks a declaration that the wall was a border fence or wall between plaintiff's property and the neighboring property which should not have been removed.¹

¹The court notes that although plaintiff's cross-motion seeks "partial summary judgment" on this issue, the relief sought, in actuality, is declaratory in nature.

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Background

Plaintiff is the owner of real property located in Hancock, New York ("the property"). Plaintiff's property is bordered to its immediate west by a parcel of property owned by Maria Bacon (the "Bacon property"). Prior to April, 2005, these properties, were separated at one common point, by a free standing fieldstone stone wall ("the stone wall") of approximately 160 feet in length and four feet in height. Plaintiff discovered that this stone wall, which plaintiff claims sat upon his property, was removed on or about April 4, 2005.

The Bacon property has a history of selling its natural resources through the Schaeffer Defendants. In the 1990's, defendant Schaeffer Logging, Inc. ("Schaeffer Logging") harvested timber from the Bacon property. In June of 2002, defendant Schaefer Enterprises of Deposit, Inc. ("Schaeffer Enterprises"), entered into a sublease and agreement with Maria Bacon which entitled them to access a stone quarry ("the quarry") and harvest bluestone² from the property. The quarry is located roughly 1,000 feet from the stone wall at issue (see, Notice of Motion, Affidavit of Larry Schaefer, Exhibit A).

Schaeffer Enterprises, pursuant to the lease, began removing "premium bluestone" from the quarry. After stripping the quarry of

²Bluestone is a "layered sedimentary bluish-colored stone" (see, Notice of Motion p.2).

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the more commercially valuable stones, Schaeffer Enterprises, pursuant to industry practice, allowed independent individuals onto the Bacon property to collect the "quarry rubbish" or "colonial bluestone" for resale.³ The individuals who gather the broken stone for resale, pay a percentage of their sales as royalties to the property owner and to the company leasing the quarry (id.).⁴ Defendant Michael D'Elia was one of the individuals who was allowed onto the Bacon property for this purpose. The rubble collected by Mr. D'Elia was sold to defendant Gustin Stone Supply ("Gustin Stone"), which then paid royalties, in accordance with industry practice, to Maria Bacon and Schaefer Enterprises (Notice of Motion, Affidavit of Larry Schaefer, p. 4).

In April 2005, plaintiff claims that he learned that a fieldstone wall had been removed, without his permission, from his property. The instant action followed. The complaint, comprised of four causes of action, asserts claims of property damage and negligence, including negligent hiring and supervision of Mr. D'Elia; conversion; unjust enrichment; and trespass.

³ The terms "quarry rubbish" and "colonial" bluestone, refer to the broken stone in the quarry left after the premium stone is stripped. Since the collection quarry rubbish commands far less value at resale, it is not often harvested by the primary company stripping the quarry.

⁴ The industry standard percentage for this, according to the Schaefer defendants, is between 3 and 5 percent payable to both the land owner and the quarry lessee(id.)

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The court notes that while there is no dispute that there is indeed a missing fieldstone wall, the parties' accounts differ as to what has or may have happened. Plaintiff claims that Schaefer Enterprises hired Mr. D'Elia and instructed Mr. D'Elia to remove the stone wall off of plaintiff's property (Notice of Cross-Motion, Amended Complaint, ¶ 22-24; Notice of Cross-Motion, Exhibit 16). The Schaefer defendants, while they concede that a wall was removed from the area, claim that they neither removed the wall nor authorized its removal, and call into question whether the wall sat upon the Bacon property or upon Plaintiff's property. The Schaefer defendants further assert that Mr. D'Elia was never an employee of Schaefer Enterprises, or any of the other Schaefer entities, and if Mr. D'Elia is responsible for the removal of the stone wall at issue, he acted alone (Notice of Motion, Affidavit of Larry Schaefer, p. 4). Mr. D'Elia has stated that he was never an employee of Schaefer Enterprises, and claims that the stone he did take from the Bacon property did not come from the stone wall at issue (Affidavit of Michael D'Elia).

Discussion

As with any motion for summary judgment, success is predicated upon either the moving party's presentation of admissible evidence sufficiently demonstrating an absence of triable issues of fact (see, Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v. New York University Medical Center, 64 NY2d

851, 853 [1985]). See generally, Barr, Altman, Lipshie and Gerstman; New York Civil Practice Before Trial, [James Publishing 2007] §37:91-92) or, the opponent's presentation of admissible evidentiary proof establishing the existence of material issues of fact requiring trial (Zuckerman v. City of New York, 49 NY2d 557 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient for either purpose (id.).

Plaintiff's complaint is comprised of four causes of action which, for the most part, rise or fall on one single issue. This issue requires him to prove that the missing fieldstone wall actually sat on his property (see, Zelnick Realty, Inc. v. York, 170 AD2d 926 [3rd Dept 1991]; Adams v. Warner, 209 AD 394 [3rd Dept 1934]). In support of the contention that the wall belongs to him, plaintiff submitted the affidavit of William Rasmussen, a licensed land surveyor who was hired to review survey maps prepared by Marco Lanzoni in 1971 (Notice of Cross-Motion, Exhibit 9). Plaintiff also submitted an uncertified copy of what is claimed to be the 1971 survey map (id., Exhibit 10) which accompanies the affidavit of Mark Jacobs, who while not a land surveyor, is the grandson, and custodian of Mr. Lanzoni's records (id.). In opposition, the Schaeffer defendants present the affidavit of Kenneth B. Shields, a surveyor hired for the purposes of this litigation. Mr. Shields affidavit is accompanied by copies of both the deeds to plaintiff's property and the Bacon property.

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Having reviewed the two property deeds and the submitted survey map, this court does not question these documents. They identify the respective properties in metes and bounds, and note the existence of particular landmarks, such as a driveway and a natural spring. What is lacking in all three documents however, is any reference to a stone wall. It is therefore impossible for this court, without more, to determine where the wall actually was located prior to its removal, and to whom damages may or may not be owed. As such, at this juncture, the portion of the motion for summary judgment advanced by the Schaeffer defendants which seeks to dismiss plaintiff's claims of property damage, conversion, unjust enrichment, and trespass claims is denied. The portion of plaintiff's cross-motion, which seeks summary judgment on issues of liability predicated upon the aforementioned is also denied.

However, the portion of the motion advanced by the Schaeffer defendants which seeks summary judgment and dismissal of plaintiff's claims of negligent hiring and negligent supervision, as well as the portion of the motion which seeks summary judgment and dismissal of plaintiff's complaint as it pertains to defendant Larry Schaeffer, individually, are granted.

As a preliminary matter, the sublease for the quarry was made between Maria Bacon and Schaefer Enterprises. The document was signed by Maria Bacon and by Larry Schaeffer, who signed for the corporation as its president. Inasmuch as there is no evidence

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that Mr. Schaeffer purported to bind himself individually, he cannot be held liable on the contract entered into on behalf of his corporation (Ridgeline Constructors, Inc. v. Elmira Glass Tech. Corp., 183 AD2d 1041 [3rd Dept 1992]). Accordingly, the action must be, and is dismissed as to defendant Larry Schaeffer.

As a secondary matter, even if this court were to accept plaintiff's contention that a valid employer-employee relationship existed as between Schaefer Enterprises and Mr. D'Elia, which it does not,⁵ a necessary element of a claim for negligent hiring is a demonstration that the employer either knew or should have known of the employee's propensity for the conduct causing the injury (State Farm Insurance v. Central Parking Systems, Inc., 18 AD3d 859 [2nd Dept 2005; Guacci v. Odgen Brothers, 39 AD3d 308 [1st Dept. 2007])). Review of the record in this case reveals nothing to support plaintiff's claim that the Schaeffer defendants, had they hired Mr. D'Elia, either knew or should have known that Mr. D'Elia would later steal a fieldstone wall based on his history of alcohol related criminal convictions. Nor is there anything in the record that would support a claim for negligent supervision inasmuch as

⁵ In support of this claim, the Schaeffer defendants have testified that they never hired Mr. D'Elia. Mr. D'Elia has submitted a sworn statement that he was never an employee of any of the Schaeffer Entities. Plaintiff's opposition, which consists of a handwritten, unsigned, and unauthenticated note which plaintiff claims is a "contract" (Notice of Cross-Motion, Exhibit 16) does not change this (see, Zuckerman, 49 NY2d 557).

there is no evidence that the Schaeffer defendants supervised anyone collecting quarry rubble on the Bacon property once the quarry had been stripped (see, Preldakaj v. Alps Realty of NY Corp., 47 AD3d 511 [1st Dept 2008]). As such, the portion of plaintiff's complaint which seeks to recovery damages from the Schaeffer defendants on the basis of negligent hiring and/or negligent supervision are dismissed.

The portion of plaintiff's complaint which seeks punitive damages is also dismissed. Again, even if this court later determines that the fieldstone wall was taken by any or all of the remaining defendants in this action, there is nothing contained within the record that demonstrates that the removal of the wall was motivated by "'egregious and willful conduct" that is morally culpable, or is actuated by evil and reprehensible motives'" (Munoz v. Poretz, 301 AD2d 382, 384 [1st Dept 2003]; quoting Senayeve v. Hudson Moving & Storage, 261 AD2d 168, 169 [1st Dept 1999]). In the absence of this showing, punitive damages are not warranted.

Lastly, the balance of plaintiff's cross-motion which seeks declaratory relief is denied as it is improper on a motion. If plaintiff wishes to seek declaratory relief, it must be done in a plenary action (see, CPLR 3001; Fensterheim v Fensterheim, 96 Misc2d 108, 113 [Sup Ct, NY Co, 1978]; Kallman v Kallman, 60 AD2d 863 [2d Dept 1978]). Accordingly, it is

ORDERED that the portion of the motion for summary judgment

advanced by defendants Schaefer Enterprises of Deposit, Inc., Schaefer Logging, Inc., Schaefer Timber and Stone, LLC, and Larry Schaefer is granted solely to the extent of dismissing the action in entirety as it pertains to Larry Schaefer, individually, and dismissing those causes of action against the Schaefer defendants predicated upon the claim of negligent hiring and negligent supervision, the balance of the motion for summary judgment being denied; and it is further


ORDERED that the plaintiff's cross-motion is denied in entirety; and it is further

ORDERED that the clerk of court enter judgment accordingly.

Counsel for the remaining defendants are directed to appear for a Pre-Trial Conference in IA Part 15, Room 335, 60 Centre Street, New York, New York, on June 20, 2008 at 11:00 a.m. at which time this matter will be set down for trial.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/10/08


HON. WALTER B. TOLUB, J.S.C.

FILED
APR 22 2008
COUNTY CLERK'S OFFICE
NEW YORK