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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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VINCENT GRECO and REGINA GRECO,

INDEX NO.:3672/02

Plaintiff,

MOTION DATE:1-18-08
-against- **SUBMIT DATE:4-16-08**
SEQ. NUMBER- 004

THE INCORPORATED VILLAGE OF FREEPORT, **MOTION DATE: 2-4-08**
SUBMIT DATE: 4-16-08
Defendants. **SEQ. NUMBER - 005**

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The following papers have been read on this motion:

Notice of Motion (def.), dated 12-28-07..... 1
Amended Notice of Motion (pltfs.), dated 12-30-07..... 2
Memorandum of Law (plft.), undated.....3
Affirmation in Opposition (def.), dated 2-5-08.....4
Reply Affirmation (pltfs.), dated 3-6-08.....5
Memorandum of Law in Op. Further Support (pltfs.), dated 3-6-08.....6
Reply Affirmation (def.), dated 4-3-08.....7

The motion by the defendant pursuant to CPLR 3212 for summary judgment is denied. Its request for alternative relief limiting the scope of plaintiffs' examination of defendant pursuant to CPLR 3103 is granted to the extent indicated in this order. Those branches of the motion by the plaintiffs that are for an order striking the answer and to preclude, or, in the alternative to compel defendant to answer questions as posed by counsel are considered under

CPLR 3126 and CPLR 3124, and are granted to the extent that defendant shall appear for a continued deposition by Donald A. Perkins, who shall appear and answer questions in accord with this order, and are otherwise denied. That branch of the plaintiffs' motion that is for costs and sanctions is considered under 22 NYCRR 130-1.1 and is denied. The request for recusal of this Court by the plaintiffs is denied.

Initially, the Court addresses the request by plaintiffs' counsel that the undersigned recuse himself from this matter on the basis of prejudice against the plaintiffs and their attorney. Although not formally set forth in the amended notice of motion, a conference order dated January 9, 2008 recites that the defendant Village of Freeport waived any potential procedural objection to the application. It therefore will be considered.

The request is denied. The primary basis appears to be prior rulings of the Court, especially the decision and order dated June 11, 2007, granting in part the defendant's motion for summary judgment for the running of the statute of limitations. Counsel for the plaintiff asserts that in view of the submissions made this determination demonstrates prejudice. However, the remedy for any alleged error in such ruling lies in an appeal to the Appellate Division, which is currently pending.

Secondarily, counsel for plaintiff states that this Court "allowed the defendant to circumvent the law" with regard to an alleged curtailment of her questions of defendant's witness at a deposition. There is in the record a copy of a letter from this Court's Law Secretary to counsel, dated August 8, 2007, which was sent in response to correspondence from the Village Attorney complaining of a deposition witness list served on the Village by

plaintiffs' counsel. This letter appears to have been written in response to the undersigned's directions at a conference held on the record on July 24, 2007, asking that objections be referred to the Court. In any event, the Court's response to the Village's correspondence was to direct the production of Mr. Perkins for an examination before trial, but did not make any ruling on whether any other witnesses would be compelled to testify over the Village's objection, reserving this for a time after the Perkins EBT.

However, the letter also contained the sentence, "As you know, the initial responsibility of the defendant is to produce a witness with knowledge of the facts relevant to the suit, as narrowed by the Court's last order." The last clause of this sentence did no more than refer to the lawsuit itself, and the obvious fact that certain claims had been dismissed and that the temporal duration of the remaining claims had been limited. It seems that both parties read too much into this clause – the defendant apparently believing that nothing that happened prior to the time referred to in the 2007 would be considered material or relevant for purposes of discovery, the plaintiff apparently believing that the Court was unfairly limiting discovery on their remaining claims.

In reality the Court had not been asked to rule, and did not rule, on any specific line on inquiry, but responded only to the Village's request that it not be compelled to produce persons other than Mr. Perkins for depositions, as indicated above. There had been no permission granted to the Village to refuse to respond to any particular question posed to Mr. Perkins. This present order is the first time the Court has taken up the permissible scope of the examination by plaintiffs' counsel, and thus no ruling on the subject adverse to her clients

had even been made.

Absent a legal basis for disqualification under the Judiciary Law, the trial judge is sole arbiter of whether recusal is appropriate. *Matter of Lucille H.,* 39 AD3d 547 (2d Dept. 2007); *Kupersmith v Winged Foot Golf Club, Inc.,* 38 AD3d 847 (2d Dept. 2007). Here, and as indicated above, there is no basis for a recusal. Indeed, this matter was previously transferred to this Court as a result of the recusal of another Justice, has now been pending in this Part for some time, and is familiar to the undersigned. Another recusal and transfer would serve neither the interests of the parties nor the goal of judicial economy. Under these circumstances this Court would be doing little more than shirking its duty by recusing itself.

The Court now turns to the merits of the applications before it. The central allegations of this case have been discussed in the prior order and will not be repeated here.

The motion by the defendant for summary judgment is denied. As its counsel acknowledges, this is the second motion for summary judgment advanced to the Court. It is true that successive summary judgment motions, while disfavored, are not absolutely barred by any rule or decisional law, as defendant contends, and may be considered as a matter of discretion. *See, Oppenheim v Village of Great Neck Plaza,* 46 AD3d 527 (2d Dept. 2007). Nevertheless, a court should be able to point to some sound basis for doing so. *See, e.g., Carreras v Weinreb,* 33 AD3d 953 (2d Dept. 2006) [motion based on documents, only matters of law to be determined]. Here, however, it appears that the key factual bases for the motion lie in the deposition of plaintiffs pursuant to General Muncipal Law § 50-h, which occurred in 2001, and on a report by a structural engineer completed in 2003, both well before the submission of the first summary judgment motion, decided in 2007. Further, the deposition

of defendant's witness has not been completed. These are circumstances that militate against consideration of the second summary judgment motion.

It would have been denied in any event. Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). In reviewing the record, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

In attempting to demonstrate that the plaintiffs suffered no damage to their premises as a result of the operation of the electric generating facility, but rather that any problems they may have experienced were caused by normal wear and tear, the Village submits the report of a Professional Engineer, Neil B. Schmelkin. However, the engineering report is not signed or sworn to, and absent the affidavit form is inadmissible as proof on this motion. *1212 Ocean Ave. Housing Dev. Corp. v Brunatti,* _AD3d_, 2008 WL 1903994 (2d Dept. 2008); *Ellis v Willoughby Walk Corp. Apts.,* 27 AD3d 615 (2d Dept. 2006). Accordingly, no *prima facie* case has been made out that the plaintiffs sustained no property damage caused by the defendant's generating plant, requiring that the motion be denied without regard to the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr., supra.*

Further, with regard to this and the other allegations raised in the complaint, as now limited by the Court's prior order, the plaintiffs have not had a sufficient opportunity to pursue discovery. CPLR 3212(f). As noted in the prior decision, and without making any finding as to the quality of its operation or the effects thereof, the plant was in use during the period covered by this suit, as set forth in that order. Plaintiffs' remaining claims contain one for private nuisance. In order to make out such a claim, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in character, and caused by the defendant's conduct. *Kaplan v Incorporated Vil. of Lynbrook,* 12 AD3d 410 (2d Dept. 2004). Although the negligence cause of action itself is time-barred for the reasons stated in the prior decision, the plaintiffs will still have the burden of proving that the interference was intentional or negligent in character in order to make out their nuisance claims, be they private or public in nature. *Copart Inds. v Consolidated Edison Co.*

of N.Y., 41 NY2d 564, 569 (1977); *see also, Placide v Yadid, LLC,* 24 AD3d 529, 530 (2d Dept., 2005); *Chenango, Inc. v County of Chenango,* 256 AD2d 793 (3d Dept. 1998). [1] Accordingly, the absence of a full examination before trial of defendant's witness, whom plaintiffs' counsel wished to examine on this issue, serves as an additional basis for denying the motion for summary judgment.

The defendant's request for the alternative relief limiting the scope of the examination before trial of its witness, Donald Perkins, as well as the plaintiffs' motion to strike and for other relief is decided as follows.

Initially, the Court disagrees with the plaintiffs to the extent they urge that the recently promulgated court rule on examinations before trial (22 NYCRR Part 221) effectively eliminates the possibility of any objection by the defending attorney and a ruling by a court with regard to the scope of an examiner's inquiry. Court rules do not trump Article 31 of the CPLR, and pursuant to CPLR 3103(a) "[t]he court may at any time on its own initiative, or on motion of any party... make a protective order denying, limiting, conditioning or regulating the use of any disclosure device."

Nevertheless, the Court agrees with the plaintiffs that their attorney has not been given sufficient freedom to conduct her examination. As noted above, the law of nuisance requires plaintiffs to prove at trial that the alleged interference with their property rights was either

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[1] This is not to say that at trial all evidence of negligent acts prior to the period covered by the plaintiffs' remaining claims will be admissible, but this is a matter for the trial judge. *See, Cippitelli v Town of Niskayuna,* 203 AD3d 632 (3d Dept. 1994). It is clear, however, that, at minimum, some proof of negligence in the operation and/or maintenance of the plant will be required, and the implications for pretrial discovery are discussed below.

intentional or negligent in character. Plaintiffs therefore are entitled, for example, to inquire as to how the defendant's plant was supposed to operate and actually was operated by the defendant, and any other facts material to the tort, whether or not these questions refer to periods of time not covered by the remaining claims. The fact that nuisance damages are available only for the period identified in this Court's prior order therefore does not foreclose inquiry as to how those damages came about.

The corollary, however, is also true: that the plaintiffs cannot expand their inquiry into areas that clearly are beyond what they must show to prove their nuisance and trespass claims, or to defeat defenses to those claims. For example, they should not be permitted an extensive exploration of the very construction of the plant itself, unless the Village itself had a hand in building it, because it is only the character of the Village's use and operation of the plant that is material to plaintiffs' claims. Nor would specific occurrences alleged to have adversely affected the plaintiffs or their property be relevant if they occurred before the period established in this Court's prior order, as opposed to inquiry as to methods of plant operation that may have been established beforehand, which would be. However, and in accord with 22 NYCRR § 221, any doubt about materiality or relevance under this order should be resolved in favor of answering a question asked.

The same guidelines expressed here should also be applied to document requests that have already arisen or may arise during the course of the continued deposition, which would include erring on the side of production. However, should counsel be unable to resolve a dispute the Court will not rule on the propriety of any such request until after the deposition

is concluded.

Accordingly, the defendant's request for alternative relief, and the plaintiffs' motion are both granted to the extent that Mr. Perkins will (re)appear at the location previously agreed by counsel for his continued deposition consistent with this Decision and Order, at such time as counsel may agree, or, if there is no agreement, on May 28, 2008, at 10:00 a.m, and continue until completed.

The balance of the relief requested by the plaintiffs is denied. The Court finds that the behavior of the Village and its counsel do not merit sanctions, nor do their actions constitute "frivolous conduct" as that term is defined by 22 NYCRR § 130-1. This is especially true in view of the letter from this Court's Law Secretary, which, though it may have been interpreted more generously in favor of defendant than was warranted, provided a good-faith basis for its actions at the deposition of its witness.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 8, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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