

Blachley v Mousouroulis

2009 NY Slip Op 32015(U)

August 26, 2009

Supreme Court, Nassau County

Docket Number: 1356/08

Judge: Michele M. Woodard

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
ANNE BLACHLEY, PETER BLACHLEY, JOHN
McCARTHY and MARY McCARTHY,

Plaintiffs,

-against-

GEORGE MOUSOUROULIS and KATHLEEN T.
WALSH,

Defendants.

-----X
GEORGE MOUSOUROULIS and KATHLEEN T.
MOUSOUROULIS s/h/a KATHLEEN T. WALSH,

Third-Party Plaintiffs,

-against-

STEPHEN C. MEEHAN d/b/a S. MEEHAN LANDSCAPE
ARCHITECT, ANTHONY MOGAVERO d/b/a EASTERN
LANDSCAPE CONTRACTOR, EASTERN LANDSCAPE
CONTRACTOR & MAINTENANCE INC., and POOL
PROFESSIONALS INC.,

Third-Party Defendants.

-----X
STATE FARM FIRE & CASUALTY COMPANY a/s/o
ANNIE BLACHLEY and MARY McCARTHY,

Plaintiffs,

-against-

GEORGE MOUSOUROULIS,
Defendant.

-----X
GEORGE MOUSOUROULIS and KATHLEEN T.
MOUSOUROULIS s/h/a KATHLEEN T. WALSH,
Plaintiffs,

-against-

ANTHONY MOGAVERO d/b/a EASTERN
LANDSCAPE CONTRACTOR, EASTERN LANDSCAPE
CONTRACTOR & MAINTENANCE, INC.,
Defendants.

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.: 1356/08
Motion Seq. No.: ~~4~~ 4, 56
DECISION AND ORDER**

**Action No. 1
Index No.: 001356/08**

**Action No. 2
Index No.: 11063/08**

**Action No. 3
Index No.: 012911/08**

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Plaintiffs in action one move in motion sequence number four (4) for an order pursuant to CPLR § 3212(c) granting Plaintiffs partial summary judgment on the issue of Defendants' liability and directing an immediate hearing on Plaintiffs' damages, directing Defendants to maintain their real property in accordance with applicable building codes and to erect and maintain a retaining wall on Defendants' real property in conformity with applicable building codes, and granting Plaintiffs' summary judgment pursuant to CPLR§ 3212 permanently enjoining and restraining Defendants from trespassing upon Plaintiffs' real property and directing Defendants to abate the nuisance on Plaintiffs' real property. Defendants-Third-Party Plaintiffs George Mousouroulis and Kathleen T. Walsh cross-move in motion sequence number five (5) for an order dismissing the third cause of action sounding in private nuisance and the sixth cause of action sounding in trespass. In motion sequence number six (6) the Plaintiffs move for leave to serve a second amended bill of particulars.

Plaintiffs and Defendants are adjoining property owners. The two property owners share a common boundary line. The Defendants' property line is located at a higher level than the Plaintiffs' property. A segmental retaining wall existed on Defendants' property in the vicinity of the boundary line of the two properties. The retaining wall held back the earth of Defendants' property that sloped

upward from the property line. On the morning of July 18, 2007, at which time there was a heavy rainfall, Defendants' retaining wall collapsed. As a result of the retaining wall collapse, approximately 275 cubic yards of earth and debris fell onto Plaintiffs' property.

The Defendants allegedly hired Third-Party Defendant Stephen Meehan ("Meehan") who designed and planned a segmental concrete block retaining wall. Meehan allegedly engaged Third-Party Defendant Anthony Mogavero d/b/a Eastern Landscape Contractor (Mogavero) to construct the segmental concrete block retaining wall allegedly in accordance with the Meehan plans.

Plaintiffs allege the falling of soil, debris and other materials on their property constituted a nuisance and trespass. Plaintiffs' motion (seq. No. 4) seeks summary judgment on the issue of liability, an immediate hearing on damages and an injunction directing the immediate restoration of the retaining wall. Defendants have cross moved (seq. No. 5) requesting summary judgment dismissing the causes of action sounding in private nuisance and trespass. Plaintiffs have also moved (seq. No. 6) for permission to serve a second amended bill of particulars to amplify the amount of damages allegedly sustained.

In support of their motion the Plaintiffs assert that for over two years since the collapse of the retaining wall, they have resided in their home under difficult conditions. It is not disputed that the rear and side portions of their house and yard remain in substantial disrepair. The outdoor deck is destroyed. Moreover, Plaintiffs assert they cannot repair and restore the premises or replace the outdoor deck, or gain access to the rear of their property to repair same until Defendants put in a new retaining wall, and remove the earth and debris from the prior collapse.

In opposition to the Plaintiffs' motion for summary judgment on the issue of liability the Defendants state that in 1999 they hired Third-Party Defendants to design and/or construct the retaining wall. At the time Defendants procured the requisite building permits from the Town of North

Hempstead. Defendants assert that from 1999 until July 18, 2007, the date of the collapse and a severe rainstorm, the retaining wall functioned without incident. To date the Defendants have failed to construct a new retaining wall.

Dean Prosser in his treatise on torts (2d ed., p. 389) states: “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ ” “To constitute a nuisance the use of property must interfere with a person’s interest in the use and enjoyment of land (see *Domen Holding Co. v Aranovich*, 1 NY3d 117, 123 [1st Dept 2003]). The term ‘use and enjoyment’ encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance” (see *Domen Holding Co. v Aranovich*, *supra*, citing Restatement [Second] of Torts § 821D, Comment b; see also *Nussbaum v Lacopo*, 27 NY2d 311, 315.; *Christenson v Gutman*, 249 AD2d 805 (3d Dept 2005). No perfect definition of nuisance exists. Each case must be decided on its own facts. See *Metropolitan Life Ins. Co. v Moldoff*, 187 Misc 458, (App. Term, 1st Dept 1946, per curium); *Pamak Realty Corp. v Bush*, 101 Misc2d 101, (Civ Ct, NY County 1979).

In *Buchanan, et al. v Cardozo*, 24 AD2d 620, *aff’d*, 16 NY2d 1029 (1965), a stone retaining wall collapsed. Defendant refused to repair the wall or to remove the debris from Plaintiffs’ property. The Plaintiffs in *Buchanan, supra*, commenced an action alleging three causes of action—trespass, negligence and nuisance. Plaintiffs demanded damages for each cause of action and equitable relief requiring the Defendant to abate the nuisance.

In *Buchanan, supra* at 632, the Appellate Division, Second Department opined that

Special Term held that the presence of the debris on Plaintiffs’ land constitutes a continuing trespass and that such trespass, together with the condition of the wall remaining, constitutes a nuisance. Among other things, Defendant was directed to remove the debris from Plaintiffs’ land, to repair his wall and to maintain it in a safe condition. In our opinion, the

proof before Special Term wholly failed to show a voluntary, affirmative act by the Defendant which directly caused the collapse of the retaining wall on Plaintiffs' land (*see Phillips v Sun Oil Co.*, 307 NY 328; 1 Restatement, Torts, § § 158, 166). Nor can the presence of the debris on Plaintiffs' land be said to be a continuing trespass, since its initial entry was not a trespass and since it was not placed thereon pursuant to a license or other privilege which the Plaintiffs had thereafter terminated (1 Restatement, Torts, § § 160, 161). However, the proof before Special Term showed that the present dangerous condition of the wall creates a risk of future, substantial damage to Plaintiffs' property which amounts to a present serious interference with Plaintiffs' enjoyment of their land and therefore constitutes a nuisance (Prosser, Torts [2d ed.], § 70; 1 Am Jur 2d, Adjoining Landowners, § 17).

In *Buchanan*, the court granted summary judgment with respect to the cause of action sounding in nuisance, ordered the Defendant to remove the debris and to construct and maintain the retaining wall in a safe condition, and directed an assessment of damages.

Applying the principles set forth in *Buchanan, supra*, this Court finds as a matter of law for the Plaintiffs on the issue of nuisance, but in favor of the Defendants on the issue of trespass. Plaintiffs' motion (seq. No. 4) for summary judgment on the issue of liability based on nuisance is **granted**. Defendants' cross-motion dismissing the third cause of action sounding in nuisance is **denied** and the sixth cause of action sounding in trespass is **granted**. Defendants are directed to construct and maintain a new retaining wall. Plaintiffs' application for an immediate hearing on the issue of damages is **denied** in light of Plaintiffs' motion to serve an amended supplemental bill of particulars. Moreover, this action is not certified ready for trial.

Plaintiffs request permission (motion seq. No. 6) to serve an amended bill of particulars to amplify the alleged damages. Defendants would consent to same upon condition that the Plaintiffs submit to a further deposition. The Plaintiffs do not object to a further deposition. The Defendants also request that the itemization of damages be more specific. The Plaintiffs shall furnish a line-by-line

itemized estimate to enable Defendants to properly evaluate the Plaintiffs' claims so as to avoid surprise at trial. *Allen v Crowell-Collier Pub. Co.*, 21 NY2 403, 406 (1968). The attorneys for the Defendants allege that "the Plaintiffs did not have a vinyl fence, sprinkler system, front yard drywell, Trex decking, Unilock paving stone walk, the plants described in Plaintiffs' Exhibit "9", and numerous other items which are now being included in Plaintiffs' list of damages" (Affirmation in Opposition dated June 15, 2009). Indubitably, the Defendants are only responsible for damages actually sustained from the collapse of the retaining wall. *See McCarty v Natural Carbonic Gas Co.*, 189 NY 40, 49 (1907). Plaintiffs' motion to serve a second amended bill of particulars is **granted**. The second verified amended bill of particulars, a copy of which is annexed to the Notice of Motion (Exhibit 10) is deemed served. It is hereby

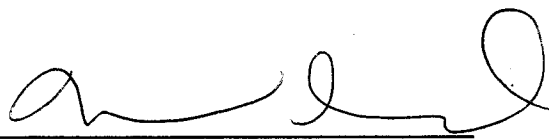
ORDERED, that no later than 30 days from today's date Defendants may depose Plaintiffs as to the damages alleged in the second amended bill of particulars. It is further

ORDERED, that the Certification Conference scheduled for September 18, 2009 is adjourned to October 29, 2009 to allow for the completion of the deposition.

This constitutes the Decision and Order of the Court.

DATED: August 26, 2009
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

ENTERED

AUG 28 2009

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