C & J Cleaners v Gaco Fashioned Furniture, Inc.
2010 NY Slip Op 30920(U)
April 7, 2010
Supreme Court, Nassau County
Docket Number: 018958/07
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 20

X

C & J CLEANERS, d/b/a/ TURNPIKE CLEANERS, GARY NUDELMAN and the Estate of GEORGE NUDELMAN ,

Plaintiffs,

Index No. 018958/07
Motion Sequence...03, 04
Motion Date... 02/05/10

-against-

GACO FASHIONED FURNITURE, INC., GACO, INC., and JOHN ACERRA,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Notice of Cross-motion.....x
Reply Affirmation.....x
Reply Affirmation.....x

***Relief Requested*:**

The Defendants, John Acerra and Gaco Fashioned Furniture, Inc., move for the following forms of relief: the individual Defendant, John Acerra, moves pursuant to CPLR § 3212 for an order granting summary judgment, dismissing the entirety of the Plaintiff's complaint as asserted against him; the corporate Defendant, Gaco Fashioned Furniture, Inc., moves pursuant to CPLR § 3212 for an granting summary judgment dismissing the second,

fifth and sixth causes of action as asserted against it; and both Defendants move for an order partially dismissing the First, Fourth and Sixth causes of action to the extent that they seek the recovery of counsel fees (Sequence # 003).

The Plaintiffs cross-move for an order granting summary judgment on the complaint (Sequence #004).

The Parties:

The Plaintiff, Gary Nudelman, is the owner of C & J Cleaners, d/b/a Turnpike Cleaners which is located at 275 Hempstead Turnpike, West Hempstead, New York (*see* Plaintiff's Verified Complaint at ¶32). Co-Plaintiff, the Estate of George Nudelman, is the owner of the property located at 274 Hempstead Turnpike, West Hempstead, New York[1] [hereinafter the Nudelman Property] (*id.* at ¶33).

The individual Defendant, John Acerra, is the President and sole shareholder of corporate Defendant, Gaco Fashioned Furniture, Inc., [hereinafter Gaco], and is one of three tenants on the premises located at 284 Hempstead Turnpike, West Hempstead, New York [hereinafter 284] (*see* Acerra Affidavit at ¶1,7,10). The property situated at 284 is immediately adjacent to the property located at 274 Hempstead Turnpike and is presently owned by Concetta Acerra, a non-party and the mother of named Defendant herein, John Acerra (*id.* at ¶¶6; *see also* Exh. C).

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[1] Since the commencement of the within action, George Nudelman died and the owner of 274 Hempstead Turnpike became the Estate of George Nudelman. The caption was amended pursuant to a Stipulation so-ordered on March 20, 2009.

By way of relevant background, the property located at 284, was originally purchased in 1972 by Gaetano Acerra, the father of the Defendant, John Acerra, as well as the deceased husband of Concetta Acerra *(id.* at ¶3). At the time of the purchase, the property located at 284 was held in common ownership with the parcel located at 274 Hempstead Turnpike (*id.*). When the purchase was executed, Gaetano Acerra was granted an express easement with respect to a "ten-foot wide strip of land on 274 immediately adjoining 284" and permitted the owner of 284 the right to maintain a fuel oil line and a fuel oil tank within and under the right of way (*id.* at ¶4; *see also* Caffrey Affirmation in Support at Exh. B). In 1978, when George Nudelman, purchased the parcel located at 274 Hempstead Turnpike, he allegedly did so subject to the express easement (*see* Acerra Affidavit at ¶5; *see also* Caffrey Affirmation in Support at Exhibit B).

***The Subject Dispute*:**

At the center of the within controversy are two oil storage tanks located on the Nudelman property, one of which is above-ground and the other of which is underground (*see* Verified Complaint at ¶¶53,61). As alleged in the Verified Complaint, the Plaintiffs herein posit that when they acquired possession of the Nudelman property, the Defendants nonetheless retained title to both oil tanks via a prescriptive easement and thus remain within the exclusive custody and control thereof (*id.* at ¶¶54,62). The Plaintiffs contend that both tanks are in a defective condition and that the maintenance thereof by the Defendants is a violation of the laws of the Town of Hempstead (*see* Plaintiffs' Verified Complaint at ¶¶ 38-

42).

The Plaintiffs further contend that on or before June 9, 2006, an unknown hazardous and dangerous substance contained in these tanks was caused to illegally enter onto their property and notwithstanding being advised thereof by correspondence dated June 9 and August 4, 2006, the Defendants have failed to take remedial action (*id.* at ¶¶44-49). The Plaintiffs additionally allege that as a result of the Defendants inaction, they have suffered damages in the form of loss of value to their property, as well as being deprived of the exclusive possession and quiet enjoyment thereof (*id.* at ¶¶46,47,48).

The underlying action was commenced in October 2007 and contains six causes of action. The First cause of action alleges trespass as a result of dangerous substances allegedly emanating from the underground and above-ground tanks; the Second cause of action seeks a declaratory judgment with respect to the ownership of the underground tank; the Third cause of action similarly seeks declaratory relief as to the ownership of the above-ground tank; the Fourth cause of action alleges a private nuisance; the Fifth cause of action alleges violations of the Navigation Law; and the Sixth cause of action alleges trespass involving an air-conditioning unit (*id.* at ¶¶43-89).

Defendants' Motion for Summary Judgment:

Counsel for the Defendants initially argues that the within action cannot be maintained against the individual Defendant, John Acerra, as he is neither the owner of 284 nor a tenant thereof and thus the entirety of the action as asserted against Mr. Acerra must

be dismissed (*see* Defendants' Memorandum of Law at pp. 2-3, 5-7). Counsel asserts that the allegations as contained in the Verified Complaint which claim that the Defendant, Acerra is "in possession" of the property located at 284, are unequivocally disputed by the documentary evidence, which clearly demonstrates that the subject premises are owned by Concetta Acerra and that it is the corporate Defendant, Gaco, and not John Acerra, which is a tenant thereon (*id.* at pp. 6-7). Counsel provides the Town of Hempstead Tax Bill which still lists Gaetano Acerra as the owner of 284 and Concetta Acerra as the payor responsible for the tax payments (*id.* at Exhibit B). Counsel further provides the Last Will and Testament of Concetta Acerra, in which her ownership of the 284 property is recited and in which she leaves to John Acerra a portion of the interest therein (*id.* at Exhibits B,C).

In addition to the foregoing, counsel for the Defendants argues that the Second, Fifth and Sixth causes of action must be dismissed as against the corporate Defendant, Gaco (*id.* at pp. 7-11). The Second cause of action seeks a declaratory judgment "declaring the Defendants the owner of . . . the underground fuel line, oil storage tank and fuel oil fill cap" and "directing the Defendants as owner . . . to take all necessary actions to have the underground fuel line, oil storage tank and/or fuel oil fill cap comply with all relevant laws, rules and regulations of the Town of Hempstead, County of Nassau and the State of New York." (*see* Verified Complaint at ¶57). Counsel argues that the while the Plaintiffs predicate the Defendants' ownership of the underground tank upon the existence of a prescriptive easement, the testimony of the Plaintiff, Gary Nudelman, demonstrates that said

tank has not been used in at least twenty years thus defeating the existence thereof (*see* Defendants' Memorandum of Law in Support at pp. 8-9).

The Fifth cause of action alleges that as a consequence of the "Defendants actions and/or inactions in the ownership, operation, maintenance and repair of . . . [the] above ground fuel oil tank, fuel line, underground fuel line, oil storage tank and/or fuel cap" the Defendants are strictly liable under Navigation Law § 181 for all cleanup and removal costs, as well as counsel fees incurred in the commencement of the within action (*see* Verified Complaint at ¶¶79- 82). Counsel argues that this action must similarly be dismissed as the underground tank is not owned by the Defendants by way of a prescriptive easement and that said tank is located upon the Plaintiffs' property and thus within their possession and control (*see* Defendants' Memorandum of Law in Support at pp. 10-11).

The Sixth cause of action sounding in Trespass, alleges that on or before October 15, 2007, an air-conditioning unit was annexed to the wall of the property owned by the Defendants which abuts the property owned by the Plaintiff (*see* Verified Complaint at ¶84). The Plaintiffs allege that said unit "has entered upon the property of the Plaintiffs . . . without legal right to do so" (*id.* at ¶85). Counsel contends that said action should be dismissed as the air-conditioner does not serve the particular premises occupied by Gaco, and rather provides air-conditioning to a separate tenant at 284 and thus the Defendants are not liable in trespass to the Plaintiffs (*see* Defendants' Memorandum of Law at p. 11).

Finally, counsel for the moving Defendants argues that the First, Fourth, and

Sixth causes of action herein should be dismissed to the extent that they seek to recover attorney fees, as the Plaintiffs have failed to allege either the existence of an agreement or a statute upon which such fees may be recovered (*id.* at p. 12-13).

Plaintiffs' Opposition:

The Plaintiffs oppose the application and cross-move for an order granting summary judgment on the complaint against all of the Defendants. As to the individual Defendant, John Acerra, Plaintiffs' counsel argues that inasmuch as the evidence as adduced herein clearly demonstrates that Mr. Acerra has sole authority over the operation of Gaco and that he was made personally aware of leakage emanating from the underground tank he may be held personally liable under Navigation Law § 181[5] as is alleged in the Fifth cause of action (*id.* at ¶23,24). Counsel provides the annexed Affidavit of Gary Nudelman, the owner and operator of C & J Cleaners (*see* Nudelman Affidavit at ¶2). Mr. Nudelman avers that "On or around February or March 2006, I began to notice that the blacktop in the parking lot of C& J Cleaners and GACO began turning different colors due to a oily substance that was seeping from the fill cap of an underground oil tank" (*id.* at ¶4). Mr. Nudelman further states that "an unknown hazardous and dangerous substance from the underground fuel oil tank. . . began to seep and enter upon the property of C & J Cleaners" and while "he attempted to resolve the issue with John Acerra and Gaco Fashioned Furniture, Inc." such attempts were to "no avail" (*id.* at ¶¶6,7).

With particular respect to the corporate Defendant, Gaco, counsel argues that

in accordance with the 1972 contract of sale and the Rider relevant thereto, the Defendant, Gaco is responsible for the repair and maintenance of the underground fuel oil line and fuel tank (*see* Murphy Affirmation in Support at ¶¶16,18). Counsel argues that while the Defendants were aware of a potential leak in the underground tank, they failed to take any action to remedy the situation and thus the within application seeking dismissal of the complaint should be denied (*id.*).

Counsel additionally contends that in accordance with a report issued by Miller Environmental Group, Inc[2]., the underground tank is physically connected to the Defendants' property and place of business and, as a result, the Court may reasonably conclude that the tank is the property, as well as a fixture of the Defendants' property, which warrants the granting of summary judgment on the First cause of action alleging trespass as to the underground tank, the Second cause of action seeking a declaratory judgment as to the ownership of underground tank, the Fourth cause of action alleging Nuisance and the Fifth cause of action alleging violations of the § 181 of the Navigation Law (*id.* at ¶¶21, 25,26; *see also* Exhibit G).

Regarding the third cause of action seeking a declaratory judgment as to the ownership of the above-ground tank, Plaintiffs' counsel contends that the Plaintiffs are entitled to summary judgment thereon (*id.* at ¶31). Specifically, counsel argues that while

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[2] The studies undertaken by Miller Environmental Group, Inc. and the results thereof are recited in two voluminous reports annexed as exhibits to the Plaintiffs' moving papers. Said reports are unsworn and unaccompanied by any affidavits attesting to the findings with respect to the subject oil tanks and whether any contamination is emanating therefrom. (*see* Murphy Affirmation at Exhs. G).

the tank is located within an easement on the Plaintiffs' property, it is connected to the Defendants' land and was installed thereby without having undergone any governmental inspections to insure that the installation was done in accordance with prevailing safety standards (*id.*).

As to the Sixth cause of action sounding in Trespass, counsel again contends that the Plaintiffs are entitled to judgment thereon, arguing that an air-conditioner, which is attached to the wall of the Defendants property located at 284, protrudes onto the property owned by the Plaintiffs (*id.* at ¶28). Finally, with respect to the recoupment of legal fees, counsel asserts that the Plaintiffs can recover same as "indirect damages" under § 181 the Navigation Law (*id.* at ¶29).

Decision:

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957]; *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 [1986]; *Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980]; *Bhatti v Roche*, 140 A.D.2d 660 [2d Dept. 1998]). To obtain summary judgment, the moving party must establish it's claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 [1979]). Such evidence may

include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v. Farrell Lines,* 64 N.Y.2d 1092 [1985]).

If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980], *supra*).

A motion for summary judgment is the procedural equivalent of a trial, and when entertaining such an application, the Court is not to determine matters of credibility, but rather is to confine it's inquiry to determining whether material issues of fact exist (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338 [1974]; *Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957], *supra*).

First, Second and Fourth Causes of Action:

The Court initially addresses the Plaintiffs' FIRST, SECOND and FOURTH causes of action. In reviewing the record relative thereto, the Court finds that the Defendants have demonstrated entitlement to judgment as a matter of law, in opposition to which the Plaintiffs have failed to demonstrate the existence of any material issues of fact (*Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 [1986], *supra*). With respect to said causes of action, the underlying theory upon which the Plaintiffs predicate the liability of all of the named defendants, is their purported ownership of the underground tank either by way of a

prescriptive easement, or as a function of their alleged responsibility to maintain same in accordance with the 1972 contract of sale.

In order to establish a prescriptive easement as to the underground tank, the Defendants would be required to demonstrate, by clear and convincing evidence, that the use of the tank was adverse, open, continued and uninterrupted for the prescriptive period (*Walsh v. Ellis*, 64 A.D.3d 702 [2d Dept 2009]; *315 Main Street Poughkeepsie, LLC v. WA 319 Main Street, LLC*, 62 A.D.3d 690 [2d Dept 2009]). However, in the instant matter, the Plaintiff, Gary Nudelman, clearly testified that underground tank has not be utilized by anyone for at least "twenty years" (*see* Caffrey Affirmation in Support at Exhibit D at p.22). Thus, there can be no ownership by the Defendants of the underground tank as a function of a prescriptive easement (*id.*).

Additionally, the 1972 contract of sale and rider, upon which the Plaintiffs rely as evidence that the Defendants are responsible for the underground tank, states the following:

> "THE Seller represents that the Purchaser shall have access to the fuel oil fill line and cesspool, which serve the subject premises, and shall have access to the boiler room door of the subject premises at such times as will be necessary for use, repair, and maintenance thereof or thereat, it being acknowledged that said fuel oil fill line and cesspool presently are located on the premises owned by the Seller immediately to the east of the subject premises."

It is a well established rule of contract interpretation, that the terms contained in the instrument will be given their plain meaning where the intent of the parties thereto is

clearly and unambiguously articulated (*South Road Associates, LLC v. International Business Machines Corp.*, 4 N.Y.3d 272 [2005]; *Vermont Teddy Bear Co., Inc., v. 538 Madison Realty Co.*, 1 N.Y.3d 470 [2005]). Here, neither John Acerra nor Gaco were parties to the agreement, and rather Kathryn MacLean, as Seller, and Gaetano Acerra, as Purchaser, executed the contract and rider (*see* Murphy Affirmation at Exhibit B). Moreover, there is nothing in the language therein which evinces an intent on the part of the parties to bestow either ownership of the underground tank to John Acerra or Gaco or to charge said Defendants with the responsibility for maintenance thereof (*id.*).

Thus, based upon the foregoing, the Defendants' application for summary judgment which seeks dismissal of the Plaintiffs' FIRST, SECOND and FOURTH causes of action as asserted against John Acerra is hereby **GRANTED** and same are hereby **DISMISSED** against said Defendant, and that branch of the Defendants' application which seeks summary judgment dismissing the SECOND cause of action against Gaco, is similarly **GRANTED** and the action is **DISMISSED** as against the corporate Defendant.

At this juncture, the Court notes that inasmuch as the SECOND cause of action seeks declaratory relief, it is improper to merely dismiss the Plaintiffs' action and rather it is incumbent upon this Court to declare the rights of the parties (*Lanza v. Wagner*, 11 N.Y.2d 317 [1962]; CPLR §3001). Therefore, this Court hereby declares that, on the record as herein developed, the Defendants do not own the underground oil storage tank by way of a prescriptive easement or as a consequence of the terms of the 1972 contract and

rider.

Third Cause of Action:

As to the Plaintiffs THIRD cause of action which seeks a declaratory judgment stating that the Defendants herein own the aboveground tank, the Court finds that the Defendants have failed to demonstrate their entitlement to judgment as a matter of law (*Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980], *supra*). While, it is conceded that the above-ground tank is on the Plaintiffs' property within the scope of an express easement, the Defendant, John Acerra testified that it was he who purchased the above ground tank and had it installed by his own plumber. Having reviewed the entire record, is it unclear whether Mr. Acerra owns the tank in his individual capacity or whether the tank is an asset of the corporation. Thus, inasmuch as there are material issues of fact as to the precise ownership of the above-ground tank, as well as whether any hazardous substances are indeed leaking therefrom, the Defendants' application which seeks summary judgment dismissing the THIRD cause of action against individual Defendant, John Acerra, is hereby **DENIED** as is the Plaintiffs' Cross-motion seeking summary judgement thereon.

Fifth Cause of Action:

With respect to the Plaintiffs' Fifth cause of action alleging violations of Navigation Law §181, the Court finds that the Defendants have demonstrated their entitlement to judgment as a matter of law (*Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957], *supra*). The Court notes that with respect to the Fifth cause of action, both the

Defendants and the Plaintiffs confine their respective arguments exclusively to the underground tank (*see* Defendants' Memorandum of Law at pp. 10-11; *see* Plaintiffs' Affirmation in Support of Motion for Summary Judgment at ¶¶13-24).

Navigation Law § 181[1] provides the following in pertinent part: "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained". Here, the Defendants contend that as John Acerra is not the owner of either the underground tank or 284 Hempstead Turnpike, he may not be found liable under the statute.

It has been held that within the purview of the statute, liability as a discharger of petroleum is predicated "upon conduct, not status" and thus an individual may be held liable under the statute regardless of whether he or she is an owner of the property from which the petroleum is alleged to have emanated (*Whitesell v. Walchli*, 237 A.D.2d 953 [4th Dept. 1997];*Berens v. Cook*, 263 A.D.2d 521 [2d Dept. 1999]). Thus, the Defendants' respective status as owners or non-owners of the underground tank would not necessarily be dispositive of the matters herein raised (*id.*). However, as adduced herein, the Defendant, John Acerra, is the President and sole shareholder of corporate Defendant, Gaco. "[I]n order to hold a corporate stockholder, officer or employee personally liable under the Navigation Law for a discharge occurring at a site owned or operated by the corporation, that individual must, at a minimum, have been directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to go unabated" (*State v.*

Markowitz, 273 A.D.2d 637 [3d Dept. 2000]; *see also Golovach v. Bellmont L.M., Inc.*, 4 A.D.3d 730 [3d Dept. 2004]). In the matter sub judice, the deposition testimony of Gary Nudelman clearly states that the underground tank has not been utilized for twenty years, and thus there is no competent evidence which demonstrates that either of the moving Defendants knowingly engaged in any activity, culpable or otherwise, which permitted an oil spill to emanate from the underground tank (*id.*).

Based upon the foregoing, the application interposed by the Defendants' which seeks summary judgment dismissing the FIFTH cause of action as asserted against both Defendant, John Acerra, as well as Defendant, Gaco is hereby **GRANTED**.

Sixth Cause of Action:

As to the Plaintiffs' Sixth cause of action alleging Trespass resulting from an air-conditioner, the Court finds that the Defendants have demonstrated their entitlement to judgment dismissing same, in opposition to which the Plaintiffs have failed to raise a triable issue of fact (*Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957], *supra*). The Plaintiff once again predicates this cause of action upon the air-conditioner being affixed to the property owned by the Defendants. However, as noted above, the Defendants are not the owners of 284 and in addition, are not even the tenants in said building that are utilizing the particular air-conditioning unit.

Accordingly, the Defendants application is hereby **GRANTED** and the SIXTH cause of action is hereby **DISMISSED** against both the individual Defendant, John Acerra,

and the corporate Defendant, Gaco.

Counsel Fees:

Finally, with respect to the Defendants' application which seeks partial dismissal of the Plaintiffs' First, Fourth and Sixth causes of action to the extent that they seek counsel fees, said application is hereby **GRANTED** in accordance with the following.

As a general proposition, "attorney's fees may not be awarded absent an agreement between the parties or a statute or court rule" which authorizes them (*Bloom v. Jenasaqua Realty Holding Co.*, 174 A.D.2d 644 [2d Dept. 1991]). In the instant matter, the Plaintiffs have not articulated a recognized basis upon which such fees may be recovered and thus the application is **GRANTED** as to the FIRST and FOURTH causes of action and **DENIED** as moot as to the SIXTH cause of action, given this Court's dismissal thereof against all the named Defendants.

Accordingly, it is,

ORDERED, that the Defendants' application seeking dismissal of the complaint in its entirety as against the individual Defendant, John Acerra, is hereby **GRANTED** as to the FIRST, SECOND, FOURTH, FIFTH AND SIXTH causes of action and **DENIED** as to the THIRD; and it is further,

ORDERED, the that Defendants' application seeking dismissal of the SECOND, FIFTH and SIXTH causes of action as asserted against the Defendant, Gaco, is hereby **GRANTED**; and it is further,

ORDERED, that the Defendants' application which seeks partial dismissal of the Plaintiffs' FIRST, FOURTH and SIXTH causes of action is **GRANTED** as to the FIRST and FOURTH causes of action and **DENIED** as moot with respect to the SIXTH cause of Action.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
April 7, 2010

Hon. Randy Sue Marber, J.S.C.

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