Andris v Townsend

2010 NY Slip Op 31496(U)

June 14, 2010

Supreme Court, Nassau County

Docket Number: 186/08

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

PAUL ANDRIS,

Plaintiff(s),

- against -

ALICE J. TOWNSEND and A.B. McROBERTS,

Defendant(s).

ALICE J. TOWNSEND and A.B. McROBERTS,

Third Party Plaintiffs,

- against -

INCORPORATED VILLAGE OF MUTTONTOWN,

Third Party Defendant.

TRIAL/IAS PART 7

INDEX NO. 186/08

MOTION SEQUENCE
NO. 2 & 3

MOTION SUBMISSION
DATE: March 24, 2010

The following papers read on this motion:

Notice of Motion	X
Notice of Cross Motion	X
Affirmation in Opposition	X
Reply Affirmation	XX
Memorandum of Law	X

Upon the foregoing papers, the motion by the Third Party Defendant Incorporated Village of Muttontown for an Order pursuant to CPLR §3212, granting summary judgment to third party defendant Incorporated Village of Muttontown on liability grounds and dismissing the third party plaintiffs' complaint in its entirety and the cross motion by the Defendants/Third Party Plaintiffs for an Order pursuant to CPLR 3212 granting summary judgment to Defendants/Third Party Plaintiffs, Alice J. Townsend and A.B. McRoberts, dismissing the complaint against them by plaintiff, Paul Andris and any and all cross-claims by third-party defendant, Incorporated Village of Muttontown, on the ground that the undisputed facts on the record establish that plaintiff, Paul Andris, was not the owner of th property for which he seeks damages and

as such plaintiff lacks standing to bring the instant lawsuit for the alleged damages to said property, are both determined as hereinafter provided:

This property damage action arises out of an alleged incident that occurred on December 23, 2006 at approximately 1:45 a.m. when a vehicle driven by the defendant .A.B. McRoberts and owned by the defendant Alice J. Townsend on Dorchester Drive, Muttontown, New York struck two trees on the plaintiff's property located at 6 Dorchester Drive, Muttontown, New York. Subsequent to the accident in issue, the Third Party Defendant Village of Muttontown after investigation determined that the respective trees should be removed and pursuant to a February 27, 2008 directive of the Village of Muttontown were in fact removed. The Third Party defendant contends that the trees lie within a Village right of way. The Court notes that this contention is not disputed by the respective parties to the action.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The Court initially observes that the Defendants/Third Party Plaintiffs incorporate and adopt the Third Party Defendant Village of Muttontown's contentions in support of said defendant's instant application. In pertinent part, the Defendants/Third Party Plaintiffs through counsel set forth:

> "6. Defendants/Third-Party Plaintiffs, Alice J. Townsend and A.B. McRoberts, now move for summary judgment dismissing the complaint against them by plaintiff, Paul Andris, and any and all cross-claims of third-party defendant, Incorporated Village of Muttontown, on the ground that undisputed facts on the record establish that plaintiff, Paul Andris, was not the owner of the property for which he seeks damages and as such plaintiff lacks standing to bring the instant lawsuit for the alleged damages to said property.
>
> 7. Rather than reiterate the factual, as well as legal basis for defendants/third-party plaintiffs' entitlement to summary judgment in this matter, your affirmant, respectfully submits to this Court that I have read and reviewed the application instituted on behalf of Third-Party Defendant, Incorporated Village of Muttontown, which seeks summary judgment on the ground that plaintiff, Paul Andris, was not the owner of the property for which

he seeks damages and that the property in question, the two (2) trees located within two (2) feet of the curb line of Dorchester Drive, were part of the right-of-way belonging to the third-party defendant, Incorporated Village of Muttontown."

In support of the Third Party Defendant's application, the Third Party Defendant submits an affidavit of Tony Toscano, the Superintendent of Public Works for the Village of Muttontown. Mr. Toscano sets forth:

"1. I am employed as the Superintendent of Public Works for the Incorporated Village of Muttontown. As Superintendent of Public Works, my job duties include overseeing the maintenance of Village roadways.

2. In the Incorporated Village of Muttontown, the Village maintains a right of way which, on Dorchester Drive, extends fourteen feet from the roadway curbline onto the adjacent properties. If a private property owner wishes to remove trees from Village right of ways on their property, permission must be obtained from the Village and a permit must be issued for the removal of said trees.

3. In or about January 2008, the Incorporated Village of Muttontown retained Bowne AE&T Group to investigate the viability of two large trees located within the Village right of way along Dorchester drive, near 6 Dorchester Drive. By letter dated January 28, 2008, the Director of Traffic Engineering at Bowne AE&T, Robert Bornholdt, advised the Village that the trees were located within two feet or less of the edge of the road, mid-way through a sharp horizontal curve. The letter stated that both trees appeared to have been hit by vehicles losing control negotiating the horizontal curve, and Mr. Bornholdt opined that both trees should be removed. A true copy of said letter is annexed to this affidavit.

4. By notice dated February 27, 2008, the Incorporated Village of Muttontown advised the homeowners along Dorchester Drive that the Village intended to remove the two trees in the curved area along the curb line of Dorchester Drive on March 3, 2008. A true copy of said letter is annexed to this affidavit.

5. On or about March 3, 2008, the Village did remove the two trees in the curved area along the curb line of Dorchester Road. Both of the trees were within the Village's right of way, as both were located within two feet of the curbline of Dorchester Road. In addition, the trees were removed at the direction of the Village Board, after a determination was made by the board based, in part, upon Bowne AE&T's recommendations and upon consideration of the safety of motorists traveling on the curved section of the roadway where the trees were located."

The report of Robert Bornholdt provides:

"Dear Mr. Toscano:

Pursuant to your letter of January 14, 2008, and out field meeting, we have investigated the viability of the two large trees, located in the Village right-of-

way along Dorchester Drive. The two trees in question are located within two feet or less of the edge of road, mid-way through a sharp horizontal curve. According to two traffic accident reports obtained from the Old Brookville Police both trees appear to have been hit by vehicles that lost control negotiating the horizontal curve. The Village speed limit is 35 mph and the curve is posted with advisory signs for 20 mph. Due to the close proximity of the trees to the travel way of Dorchester Drive, it is our opinion that they should be removed.

In addition, in order to provide greater driver awareness, we recommend that Village consider the curve be posted with a series of (at least 3) W1-8 chevron warning signs to provide increased visibility of the horizontal curvature of the roadway.

If the Village decides to install the W1-8 signs and requires any assistance in placing the, please let us know."

The Court observes that the plaintiff's Verified Complaint was verified by the plaintiff. A Verified Complaint may be used as an affidavit of the facts constituting the claim (see, **Triangle Properties #2, LLC v Narang**, ___AD3d___, ___NYS2d___, 2010 WL 1999532 (Second Dept., 2010). In this regard, the plaintiff's First and Second Causes of Action in the Verified Complaint allege:

"AS AND FOR A FIRST CAUSE OF ACTION

5. Plaintiff repeat realleges each and every allegation contained in paragraphs "1" through "4" above as if fully set forth herein.

6. On December 23, 2006 Defendant, A.B. McRoberts without leave, permission or licenses from the plaintiff did unlawfully and wrongfully entered upon the parcel of land owned by plaintiff.

7. On December 23, 2006 Defendant, A.B. McRoberts was operating a motor vehicle, a 2003 Chevy SVU bearing plate BBN 5942 New York, owned by defendant Alice J. Townsend.

8. On December 23, 2006, Defendant, A.B. McRoberts did unlawfully and wrongfully entered upon Plaintiff's property, as described above, while operating the motor vehicle owned by Defendant. Alice J. Townsend.

9. On December 23, 2006, while Defendant, A.B. McRoberts was wrongfully and unlawfully operating the Defendant, Alice J. Townsend's vehicle upon Plaintiff's property he did cause the automobile to strike and damage trees owned by Plaintiff.

10. During such time period as alleged above, the Defendants, individually and jointly wilfully and wantonly with the Plaintiff's consent entered upon the parcel land of the Plaintiff and damaged the timber and trees causing damage to the Plaintiff's property and cause Plaintiff to suffer damages in the sum of $22,482.00.

AS AND FOR A SECOND CAUSE OF ACTION

11. Plaintiff repeat realleges each and every allegation contained in paragraphs "1" through "10" above as if fully set forth herein at length.

12. During the time period as alleged above, the Defendant individually and jointly have so damage the trees of Plaintiff and so despoiled and have so cause damage to the parcel of land of the Plaintiff in the amount of $22,482.00 and the Defendants have no rights or privileges legal or equitable to damage the trees and the parcel of land owned by Plaintiff and the Defendants are liable to the Plaintiff for treble damages of $67,446.00 pursuant to NY RPAPL Law §801 at ACQ and NY RPAPL Law §861 as amended and the Plaintiff herein specifically pleads §861 and demand treble damages from the Defendants individually and jointly in the amount of $67,446.00."

In examining the issue of whose property a tree is, the Court of Appeals in **Dubois v Beaver**, 11 E.P. Smith 123, NY 123, 1862 WL 4733 (1862) set forth:

"The action was in form to recover treble the amount of damages which should be assessed by the jury for the trespasses complained of; but upon the trial, the plaintiff only claimed to recover single damages: the action was treated as an ordinary action of trespass, and the plaintiff has only taken judgment for single damages. The question was not made, upon the trial, which is attempted to be made here, that trespass for cutting line trees, or trees standing upon the division line between the plaintiff and defendant, was not within the statute giving treble damages for willfully cutting down timber or trees on the land of any other person, without the consent of the owner. The plaintiff could waive his claim for treble damages, under the statute, and if he did so, or if it appeared, upon the trial, that the trespass was casual or involuntary, or that the defendant had reason to believe that the land on which the trespass was committed was his own, the verdict would necessarily be, as it was in this case, for single damages, or for a single trespass. To have entitled the plaintiff to treble damages, the jury must have found the defendant guilty of the trespass alleged, and assessed the single value of the timber or trees cut, and the court, on motion, would have trebled the damages *(3 R. S., 5th ed., 624; Newcomb v Butterfield, 8 J. R., 264).* The reference, therefore, to the statute may be regarded as out of the complaint; and the right of the plaintiff to recover for the cutting of the line trees be considered as if the action was in form, as it was in fact as tried and determined, a simple action of trespass quam clausum fregit.

It is no necessary to determine whether the parties were technically tenants-in-common of the trees growing upon the boundary line separating their respective farms, with all the ordinary rights and incidents of such an estate. The trees thus growing are called, in the case, "line trees." By this, I understand, is meant, not trees marked and set apart by the parties as evidences or monuments of the division line, but trees deriving their nourishment from roots extending on both sides of the line, and with bodies

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> so directly over the line, and necessarily on both sides of that line, that it could not be determined upon which side of the line the tree was originally planted; as was the case in *Holder v Coates (1 Moody & Malin, 112).* Different opinions have been held, as to the rights of the owners of adjoining estates in trees planted, and the bodies of which are wholly upon one, while the roots extend and grow into the other; some holding that, in such cases, the tree, by reason of the nourishment derived from both estates, becomes the joint property of the owners of such estates (*Waterman v Soper, I Ld. Raym, 737; Griffin v Bixby, 12 N.H. 454; 2 Bouv. Inst., 158)*; while others, with better reasons, as it seems to me, hold that the tree is wholly the property of him upon whose land the trunk stands. (*Holder v Coates, supra; Lyman v Hale, 11 Conn., 177; Masters v Pollie, 2 Roll. R., 141; Crabbe on Real Property §96).*"

Dubois v Beaver, supra at 125-126

Dubois v Beaver, supra was cited with approval by the Court of Appeals in **Hoffman v Armstrong**, 3 Sickels 201, 48 NY201, 1872 WL 11666 (1872) wherein the Court states:

> "Although different opinions have been held as to the rights of owners of adjourning land in trees planted, the bodies of which are wholly upon that on one, while the roots extend and grow into that of the other and derive nourishment therefrom, it was considered by Allen, J., in giving the opinion of the court in *Dubois v Beaver (25 NY Re., 123, etc.),* that the tree is wholly the property of him upon whose land the trunk stands. This principle is sustained in *Masters v Pollie (2 Rol. Rep. 141), Holder v Coates (1 Moody & Malkin, 112) 22 E. C.L.R., 264."*

Hoffman v Armstrong, supra at 203

The Third Party Defendant Village of Muttontown premises said defendant's requested relief upon the ground that the trees in issue lie within the Village's right of way. In pertinent part, the Third Party Complaint asserted against the Village sets forth:

> "10. If plaintiff Paul P. Andris, sustained the damage as alleged in the Verified Complaint, which the defendant/third-party plaintiff specifically denies, same was due to Incorporated Village of Muttontown's own negligence and conduct in removing said trees without the permission and consent of the plaintiff, thus damaging plaintiff.
>
> 11. By virtue of the foregoing, third-party defendant, Incorporated Village of Muttontown, is primarily liable for any damages sustained by plaintiff, Paul P. Andris, herein, and will be required to indemnify the defendant/third-party plaintiff for any damages it may suffer as a result of this accident."

The Third-Party Defendant cites to the holding in **Stevens v State of New York**, 21 Misc2d 79, 197 NYS2d 111, wherein the Court stated:

> "However, the abutting owner has no proprietary interest which prevents the public authority, State or municipal, from improving the street to its entire width. *Donahue v Keystone Gas Co., 1905, 181 NY 313, 73 NE 1108, 70*

> *LRA 761; In re Nassau County, 1936, 159 Misc, 52, 288 NYS 538.* And where the public owns the fee of the street the abutting owner has no proprietary right which defeats the purpose of the public authorities in removing the trees, in their discretion. But that discretion must not be abused *1 Lewis, Eminent Domain 3rd Ed., §190 p. 347-349,* and cases cited.."
>
> **Stevens v State of New York, supra at 112**

Based upon the investigation of the condition of the trees by engineer Robert Bornholdt (supra), the Village properly exercised its discretion in the removal of the trees to which no compensation is due to the plaintiff (*see report of Robert Bornholdt, supra*) (*also see Nichols on Eminent Domain §5.03(5)(a).* As such, the Third Party Defendant's application for an Order pursuant to CPLR §3212, granting summary judgment to third party defendant Incorporated Village of Muttontown on liability grounds and dismissing the third party plaintiffs' complaint in its entirety, is **granted**.

Based upon the fact that the plaintiff is the owner of the trees in issue rather the Third Party Defendant as contended by the Defendants/Third Party Plaintiffs (supra) the issue as to the damage done to the plaintiff's trees if any by the Defendants/Third Party Plaintiffs necessitating the removal by the Third Party Defendant still remains. As such, the Defendants/Third Party Plaintiff's application for an Order pursuant to CPLR 3212 granting summary judgment to Defendants/Third Party Plaintiffs, Alice J. Townsend and A.B. McRoberts, dismissing the complaint against them by plaintiff, Paul Andris and any and all cross-claims by third-party defendant, Incorporated Village of Muttontown, on the ground that the undisputed facts on the record establish that plaintiff, Paul Andris, was not the owner of th property for which he seeks damages and as such plaintiff lacks standing to bring the instant lawsuit for the alleged damages to said property, is **denied**.

SO ORDERED.

DATED: 6/4/2010

Roy S. Mahon J.S.C.

ENTERED

JUN 11 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE