

R.D. Best Land Constr. Corp. v Gallipoli

2010 NY Slip Op 33141(U)

November 3, 2010

Supreme Court, Suffolk County

Docket Number: 08-14207

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MD

COPY

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R.D. BEST LAND CONSTRUCTION CORP.,	:	SCHEYER & JELLENIK
	:	Attorney for Plaintiff R.D. Best Land Construction
Plaintiff,	:	Corp. & Third-Party Defendant Robert Dalcamo
	:	110 Lake Avenue South, Suite 46
- against -	:	Nesconset, New York 11767
	:	
TRUST UNDER THE WILL OF NICK	:	MELTZER, LIPPE, GOLDSTEIN &
GALLIPOLI, RALPH GALLIPOLI, NANCY	:	BREITSTONE, LLP
GALLIPOLI, "JANE" GALLIPOLI (first name	:	Attorney for Defendants/Third-Party Plaintiff
being unknown), "JOAN" GALLIPOLI (first name	:	190 Willis Avenue
being unknown), and G & M DEGE, INC.,	:	Mineola, New York 11501
	:	
Defendants.	:	
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TRUST UNDER THE WILL OF NICK	:	
GALLIPOLI,	:	
	:	
Third-Party Plaintiff,	:	
	:	
- against -	:	
	:	
ROBERT DALCAMO,	:	
	:	
Third-Party Defendant.	:	
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 11; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12-18; Replying Affidavits and supporting papers 19-20; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this pre-note of issue motion (001) by the defendant/third-party plaintiff, Trust Under the Will of Nick Gallipoli, and defendant G&M Dege, Inc. pursuant to CPLR 3211 (a)(1) and (7) dismissing the complaint, and pursuant to and CPLR 3212 for summary judgment dismissing the complaint as to all defendants; and granting summary judgment to the third-party plaintiff the Trust Under the Will of Nick Gallipoli on liability on its first and third counterclaims against R.D. Best Land Construction Corp.; and on liability on its first and third causes of action against third-party defendant Robert Dalcamo, is treated as a motion pursuant to CPLR 3212 for summary judgment and is denied without prejudice to renewal upon the completion of discovery and the filing of the Note of Issue.

This is an action wherein the plaintiff, R.D. Best Land Construction Corp. (R.D. Best) claims it was wrongfully denied and deprived access to fill and its byproducts for resale which it stored on property owned by the defendants, Trust Under the Will of Nick Gallipoli (Trust) and G & M Dege, Inc. (Dege). The plaintiff claims it was a lawful tenant occupying a one-acre portion of the premises owned by the defendant Trust under an oral month-to-month leasing agreement for the purpose of screening and storing fill and its byproducts for resale, for an agreed-upon rent of \$2,200 per month. In or about July 2006, the plaintiff leased an additional acre from the defendant Trust at an additional rent of \$1,000 per month. In or about May 2007, the plaintiff leased an additional acre from the defendant Trust at an additional rent of \$1,400 per month. On or about August 2, 2007, the defendant Trust commenced an action to prevent the plaintiff from continuing the operation of its business on the subject premises, and shortly thereafter threatened to evict the plaintiff from the property as a hold-over tenant. On or about August 15, 2007, the plaintiff voluntarily removed itself from the premises, however, the plaintiff claims that it had prepaid rent on the subject property up to and through August 31, 2007. On the first cause of action the plaintiff asserts that it owned approximately 100,000 cubic yards of clean fill for which it had a buyer to purchase for \$300,000 and that the defendants prevented and hindered the plaintiff from removing the fill despite the plaintiff's demands causing the plaintiff to be damaged in the amount of \$300,000. On the second cause of action, the plaintiff claims that upon voluntarily vacating the defendants' premises, it left behind a screening plant (equipment) which the defendants, despite the plaintiff's demands, refused to return causing the plaintiff to be damaged in the amount of \$80,000. On the third cause of action, the plaintiff claims that because the defendants have failed to return the screening plant that the plaintiff has sustained loss of income and profits in an amount to be determined.

By way of the defendants' answer dated July 3, 2008, the defendants have asserted a first counterclaim in which it is claimed that R.D. Best, by and at the direction of Robert Dalcamo (Dalcamo), illegally dumped or caused to be dumped onto the Trust's property approximately 100,000 cubic yards of dirt, debris and semi-contaminated material, constituting a series of tortuous acts against the Trust's property causing the defendants to expend not less than \$7,000,000 in remediation liabilities. By way of a second counterclaim the defendant Trust seeks common law indemnification against the defendants for breach of the duty owed to the Trust by R.D. Best and Dalcamo which breach caused the Trust to expend environmental remediation expenses and liabilities. In its third counterclaim, the Trust asserts that R.D. Best's and Dalcamo's actions created a public nuisance on the Trust's property wherein Dalcamo and R.D. Best are responsible to reimburse the Trust for all expenses and liabilities caused by the nuisance and need to remove approximately 100,000 yards of unclean fill and debris from the Trust's property pursuant to DEC supervision and/or approval.

The Trust Under the Will of Nick Gallipoli, the individually named defendants, and G&M Dege, Inc. seek summary judgment dismissing the complaint; granting them summary judgment on the first and third counterclaims; and on liability on the first and third causes of action against third-party defendant Robert Dalcamo on the basis that R.D. Best and Dalcamo violated numerous environmental laws and regulations by their activities on the Trust's property; never obtained the necessary permits or registration for the processing facility on the premises; because they never obtained the necessary permits or registration they could not legally remove, sell or transport the pile of dirt and debris on the premises; the Trust did not receive the Order on Consent until April 7, 2008 until a few days before R.D. Best filed its complaint against the defendants; and the Trust did not receive the DEC approval to remove any portion of the pile until April 17, 2009 but could not remove the pile without a Soil Clean-Up Plan (SCUP) being submitted to DEC which was not submitted until May 2009.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman*

v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

In support of the motion, defendant/third-party plaintiff, Trust Under the Will of Nick Gallipoli, and defendant G&M Dege, Inc., has submitted, inter alia, an attorney’s affirmation; affidavit of Nancy Gallipoli-Barrie; copy of check dated November 7, 2006; copies of checks; copy of Registration form for Solid Waste Management Facility; Record of Compliance dated October 20, 2006; photographs; affidavit of Ralph Gallipoli dated May 28, 2010; affidavit of Louann Gallipoli-Tuzza dated May 28, 2010; affidavit of Angela Gallipoli-Newham dated May 28, 2010; Order on Consent dated March 27, 2008; summons and complaint, answer; 30-day Notices to Tenant with exhibits dated December 29, 2006 and March 27, 2007, July 30, 2007; Order on Consent undated and unsigned; letter dated April 17, 2009; copy of Order to Show Cause and exhibits; copy of letter dated September 18, 2007; verified third-party complaint, verified third-party answer; reply to counterclaims; and copy of letters dated May 28, 2009 and August 20, 2008.

In opposing this motion, Robert Dalcamo has submitted his affidavit dated July 7, 2010 and an attorney’s affidavit.

Further affidavits in Reply have been submitted by Nancy Gallipoli-Barrie dated August 2, 2010 and Ralph Gallipoli dated August 2, 2010.

NANCY GALLIPOLI-BARRIE

Nancy Gallipoli-Barrie avers in her affidavit dated May 28, 2010 to the effect that she is the secretary and treasurer of G&M Dege, Inc. (Dege) and a Trustee of the Trust Under the Will of Nick Gallipoli (Trust). The Trust owns real property along Strongs Road between the intersection of Orchard Road and Strongs Road, East Patchogue, New York. Ralph Gallipoli is her brother and co-trustee of the Trust and President of Dege. She and her brother are the only defendants in this action with the authority to make property management decisions on behalf of the Trust. Louann Gallipoli-Tuzza and Angela Gallipoli-Newham are her sisters and are both Dege’s vice presidents. Dege is a corporation involved in the underground gas station fuel tank replacement business, replacing gas station fuel pumps and tests and replacing underground fuel tanks for gas stations. She avers that at no time did Dege manage or otherwise make any decisions regarding the Trust’s real property; Dege maintains separate finances from the Trust and has no interest in the premises other than that of a tenant, and paid the Trust rent.

In or about April 2006, the Trust entered into a verbal agreement with R.D. Best through its president, Robert Dalcamo for a month-to-month tenancy on the part of the premises for which R.D. Best paid rent to the

Trust, never to Dege, on a monthly basis pursuant to the verbal agreement. Pursuant to that agreement, R.D. Best and Dalcamo were only permitted to screen rock and dirt at the premises and were not to receive or dump concrete, asphalt, or construction and demolition of any kind on the premises. She later learned that Dalcamo and R.D. Best operated a construction and demolition (C&D) processing facility without the registrations or permits required by the New York State Department of Environmental Conservation (DEC). At the time the Trust leased the premises to R.D. Best and Dalcamo, she was unaware that Dalcamo had pled guilty on June 4, 1991 to three criminal counts of endangering the environment and illegal dumping and did not learn of the same until August 16, 2007. She did not know that R.D. Best and Dalcamo were required to register with the DEC and hold permits before they could bring material onto the premises.

R.D. Best and Dalcamo allowed multiple companies to dump C&D on the premises amounting to over 100,000 cubic yards of C&D and dirt. After the neighbors complained about the pile, the Town of Brookhaven issued a summons upon the Trust on or about June 7, 2006 for no certificate of occupancy or site plan for the pile. In late September 2006, she received a call from the Town of Brookhaven regarding complaints that mud had washed from the premises onto Strongs Road, and an individual from DEC visited the premises about the same and about the failure of Dalcamo to register his operation. On or about October 2006, Dalcamo personally handed her a copy of a Registration Form for a Solid Waste Management Facility, however, it was signed by "Marek Roiek" as president. She therefore refused to complete the site owner section of the registration form. Dalcamo, at the same time, gave her a copy of the Record of Compliance-Permit Application Supplement also signed by Marek Roiek. She believes Dalcamo used the pseudonym Marek Roiek to avoid restrictions imposed upon him as a result of his prior criminal sentence.

In early December 2006, the Trust requested Dalcamo to remove the pile from the premises. On or about December 14, 2006, the Assistant Town Attorney handling the Town tickets informed the Trust that the pile located adjacent to the wetlands was the subject of complaints to the Town and that the proximity of the pile to the wetlands was an environmental concern. On December 14, 2006, she entered a guilty plea to trespassing on behalf of the Trust in the Sixth District Court of Suffolk County based upon the advice of counsel. She accepted certain Conditions of Discharge imposed by the Court, including the condition that the pile on the premises adjacent to the wetlands be removed within ninety days of December 14, 2006. On December 18, 2006, Dalcamo was advised of the Conditions of Discharge and was given a copy of the same.

On or about December 29, 2006, a 30-day Notice to Tenant was served requiring R.D. Best and Dalcamo to vacate the premises by February 1, 2007, but Dalcamo did not vacate the premises and continued to accept truckloads of debris, allowing the pile to grow. By letter to the Town of Brookhaven dated March 13, 2007, her attorneys sought and obtained an extension of the time to comply with the Conditions of Discharge from March 14, 2007 to April 13, 2007. Another 30-day Notice to Tenant was served upon R.D. Best and Dalcamo requiring them to leave by May 1, 2007, however, they did not vacate the premises. Another extension was obtained from the Town to May 13, 2007 to permit the Trust to comply with the Conditions of Discharge. At no time did she or the Trust consent to Dalcamo's or R.D. Best's dumping activities at the premises.

On or about May 25, 2007, the Trust received a letter dated May 23, 2007 from Craig Elgut, Acting DEC Regional Attorney, enclosing a proposed Order on Consent, copied to Dalcamo indicating the processing facility was illegal as it lacked DEC authorization and was not in compliance with applicable DEC operating requirements. During the week of July 2, 2007, the Trust observed approximately twenty to twenty-five truckloads of dirt being brought onto the premises which Gallipoli-Barrie states she objected to Dalcamo about.

On or about July 18, 2007, erosion from the pile washed onto Strongs Road and into the wetlands. The

Trust bore the cost of removing the dirt from the pile that had washed onto Strongs Road and erected a barrier along Strongs Road to prevent further erosion onto the road and adjacent wetlands and eventually, in accordance with a DEC directive, moved the entire pile away from Strongs Road.

On July 31, 2007, another 30-day Notice to Tenant was served on R.D. Best and Dalcamo giving them until September 1, 2007 to leave the premises. On or about August 1, 2007, approximately eighteen truckloads of dirt and other material were seen being brought onto the premises but no removal was occurring, therefore Dege closed the gates and told Dalcamo no additional trucks would be allowed on the premises. Dalcamo advised they had the legal right to crash the gates with trucks and the Trust therefore opened the gates. In August 2007, an Order to Show Cause was filed seeking to permanently enjoin R.D. Best and Dalcamo from bringing additional truckloads of material onto the premises. R. D. Best and Dalcamo voluntarily abandoned the premises on or about August 15, 2007, leaving behind screening equipment and piles of dirt and debris, without advising the Trust of any intent to return to collect the screening equipment. The Trust at no time interfered with R.D. Best or Dalcamo's possession of the screening. At no time did R.D. Best or Dalcamo advise the Trust that they allegedly had a buyer for 100,000 cubic yards of dirt and debris left behind when they abandoned the premises.

On or about April 7, 2008, the Trust received an executed Order on Consent from the DEC, but the Trust could not remove the pile until the Trust submitted a site clean up plan (SCUP) which was submitted after the Order was executed and the clean up plan was approved. Dalcamo was not named as a respondent. The clean-up plan was still being revised after R.D. Best commenced its action against the defendants and the DEC did not approve the final SCUP until late 2009 after requiring the Trust to conduct extensive sampling. R.D. Best and Dalcamo never provided the Trust with documents they were required to maintain pursuant to DEC regulations and none were disclosed during the negotiation of the Order on Consent.

It is claimed that the Trust has been unable to rent the property to new tenants after R.D. Best and Dalcamo vacated the premises, depriving the defendants of rental income, and the Trust had been caused to expend tremendous monies in connection with remediating and removing the pile, with an estimate of over \$5 million dollars for the cost of removal. The Trust has also incurred liability for environmental damage and violations associated with the pile on the premises and has significantly lessened the Trust interest in the premises.

RALPH GALLIPOLI

Ralph Gallipoli has set forth in his affidavit that he is a trustee of the Trust and an individual defendant in this action and avers that at no time did G&M Dege manage or make any decisions regarding the Trust's real property and that Dege is a tenant of the Trust and pays the Trust rent. In the fall of 2006, the Trust learned of complaints of noise and the pile on the premises from the neighbors, and in early December 2006, the Trust requested that Dalcamo remove the pile. Dalcamo did not indicate that it would be a problem to remove the pile. At no time did he consent to Dalcamo's or R.B. Best dumping concrete, asphalt, or C&D at the premises.

On or about July 2, 2007, he personally spoke to Dalcamo to inform him the Trust objected to the operation on the premises as violating applicable environmental laws as well as the Order on Consent with the DEC. After the July 2007 30-day Notice to Tenant was served on Dalcamo, he advised Dalcamo that neither he nor R.D. Best could bring additional C&D onto the premises, but on August 1, 2007, he observed approximately eighteen truckloads of dirt or other materials being brought onto the premises, but did not observe any removal. He closed the gate to the premises and told Dalcamo that no additional trucks would be permitted onto the premises. Dalcamo told him he had a legal right to crash the gates with his trucks, so he allowed the gates to be opened to avoid the danger he foresaw. In or about August 2007, R.D. Best and Dalcamo vacated the premises.

At no time did R.D. Best or Dalcamo advise him or the Trust that they had a purchaser for the 100,000 cubic yards of dirt, debris and C&D they left behind on the premises.

LOUANN GALLIPOLI-TUZZA

Louann Gallipoli-Tuzza set forth in her affidavit that she is an individually named defendant in this action and vice president of G&M Dege. At no time did she consent to Dalcamo's or R.D. Best's dumping activities at the site and was not aware they were illegally conducting their business without the necessary permits or registrations or that they were violating New York State DEC regulations.

ANGELA GALLIPOLI-NEWHAM

Angela Gallipoli-Newham set forth in her affidavit that she is an individually named defendant and vice-president Of G&M Dege. At no time did she consent to Dalcamo's or R.D. Best's dumping activities at the site and was not aware they were illegally conducting their business without the necessary permits or registrations or that they were violating New York State DEC regulations.

The defendant/third-party plaintiff's exhibit D is a copy of a Registration Form for a Solid Waste Management Facility for the facility known as R.D. Best Land Construction Corp. at 250 Orchard Road, East Patchogue, with the same name as the facility owner's name, but located at 4 Mooring Drive, Bellport. The solid waste and/or materials to be accepted are listed as soil, rock, brick and concrete, for 40,000 to 60,000 yards. Checked off is the box which provides "Processing Facilities Receiving Only Recognizable Uncontaminated Concrete, Asphalt, Pavement, Brick, Soil or Rock." The certification sets forth in part, under the penalty of perjury that Marek Roiek, as president of R.D. Best Land Con. Corp. affirms that he has read the applicable regulations and will abide by all conditions of the registration requirements, and is aware that a false statement is punishable as a Class A misdemeanor pursuant to Section 210.45 of the Penal Law. The form is dated October 20, 2006. The Record of Compliance-Permit Application Supplement is also signed by Marek Roiek on October 20, 2006 and affirms negatively with regard to the question of whether the applicant was found in an administrative, civil or criminal proceeding to have violated any provision of the Environmental Conservation Law within the past ten years; or convicted of a criminal offense involving environmental statutes or regulations, or fraud, bribery, perjury, theft or an offense against public administration as set forth on the form.

In his affidavit submitted in opposition to this motion, Robert Dalcamo sets forth to the effect that he is the president of R.D. Best Land Construction Corp. He states he has not violated any environmental laws or regulations by reason of the subject tenancy. He avers that he gave his registration for the operation of his business to Nancy Gallipoli to complete, but Ms. Gallipoli never executed the same nor forwarded the application to the DEC. Dalcamo does not explain why the purported application for registration with the DEC is not in his name or what the relationship of Marek Roiek is to the corporation or who Marek Rioek is, as the DEC application indicates Marek Roiek is the president of the corporation. In his affidavit, Dalcamo states he is the president of R.D. Best and gave the application to Nancy Gallipoli to be completed.

Dalcamo states he believed his operation to be legal and he never received any DEC violations. He further claims that he vacated the premises in August 2007 and obtained a new work site, but was barred by the defendants/third-party plaintiffs from re-entering the property to access the fill, preventing him from selling the entire accumulation of fill on the property to the State of New York which was to purchase the entire amount. No proof has been submitted by Dalcamo to support his claim that the entire fill was to be purchased by the State of

New York, or that it was found to be acceptable by the State.

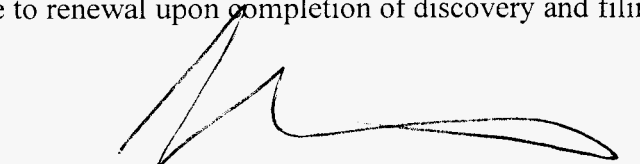
Here, there are many factual issues precluding summary judgment. Although the supporting affidavits provide this court with some information concerning an agreement between the Trust and Dalcamo, which agreement Dalcamo does not dispute, the terms and conditions or restrictions have not been set forth. It is not known if the agreement limited the amount of fill on the premises and if there was any procedure set up for inspection of the fill or premises, or if the defendants/third-party plaintiffs inspected the premises, or if Dalcamo advised them as to the type of dirt he was stockpiling on the premises. It is not known if there were other tenants on the premises bringing in fill and how it was ascertained that the offending dirt was R.D. Best's. It is claimed by the plaintiff that the State of New York agreed to purchase the entire pile and that the defendants/third-party plaintiffs prevented the removal, however, the defendants/third-party plaintiffs deny they were made aware of the same and the plaintiff's conclusory assertion is unsupported. There are factual issues concerning whether or not the State of New York would have been prevented from removing the dirt due to the lack of a clean up plan and whether the DEC would have permitted the dirt to be removed from the premises. Requirements and findings by the DEC have not been provided. There has been no proof submitted that R.D. Best had the legal authority to remove the C&D from the premises, whether it was registered or obtained the necessary permits for the operation of a processing facility. Additionally, the Order on Consent is not signed by any of the parties, is not a certified copy, and is not in admissible form.

Further, Dalcamo believes that the application by the defendants/third-party plaintiff is unsupported by an affidavit from a party to the proceeding as there were no party affidavits "annexed" to the Notice of Motion. It is noted that neither Dalcamo nor his counsel dispute that they received the affidavits which counsel for Dalcamo sets forth in his affirmation were referenced to in the moving papers. Both Dalcamo and his counsel claim the supporting affidavits were not "annexed" to the moving papers. The affirmation of Monica M.C. Leiter, Esq. has been submitted with copies of the affidavits of service for the original affidavits which Robert Dalcamo claims were not "annexed" to the moving papers. It is noted that the party affidavits supporting the motion were served with the moving papers but were not "annexed" and all were received by this court on June 7, 2010. Counsel does not set forth any reason why he did not notify the moving party that he did not receive the referenced affidavits so proper response to the motion could be made.

R. D. Best claims that discovery is incomplete and depositions have not yet been conducted.

Accordingly, motion (001) is denied without prejudice to renewal upon completion of discovery and filing of the Note of Issue.

Dated: November 3, 2010



HON. JOSEPH C. PASTORESSA

FINAL DISPOSITION NON-FINAL DISPOSITION