

Schulz v Dattero

2011 NY Slip Op 30783(U)

April 1, 2011

Sup Ct, Suffolk County

Docket Number: 06-876

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 4-9-10
ADJ. DATE 12-8-10
Mot. Seq. # 007 - MotD
008 - MotD
009 - XMG

-----X		GLASS & GLASS
JOHN SCHULZ and PATRICIA FELLMAN,	:	Attorney for Plaintiffs
	:	72 East Main Street, Suite 3
Plaintiffs,	:	Babylon, New York 11702
	:	
	:	LAWRENCE, WORDEN, RAINIS & BARD
	:	Attorney for Defendants Dattero
- against -	:	225 Broad Hollow Road, Suite 105E
	:	Melville, New York 11747
	:	
	:	BLUMBERG, CHERKOSS, FITZGIBBONS,
	:	& BLUMBERG, LLP
ANTHONY DATTERO, NANCY DATTERO,	:	Attorney for Defendants Anderson
ANDERSON'S TREE SERVICE, INC., THE	:	330 Broadway, Suite 1
TOWN OF ISLIP, and EUGENE MURPHY, in	:	Amityville, New York 11701
his capacity as Commissioner of Planning and	:	
Development of the Town of Islip and Individually,	:	DEVITT SPELLMAN BARRETT, LLP
	:	Attorney for Defendants Town of Islip & Murphy
Defendants.	:	50 Route 111
-----X		Smithtown, New York 11787

Upon the following papers numbered 1 to 92 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 29; Notice of Cross Motion and supporting papers 30 - 62; 63 - 74; Answering Affidavits and supporting papers 75 - 77; Replying Affidavits and supporting papers 78- 80; 81 - 82; Other memoranda of law, 83, 84 - 91, 92; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by plaintiffs for summary judgment in their favor on the complaint and the counterclaim of defendants Anthony Dattero and Nancy Dattero is determined as follows; and it is further

ORDERED that the cross motion by defendants Town of Islip and Eugene Murphy for summary judgment dismissing the complaint against them is granted; and it is further

PR

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ORDERED that the cross motion by defendants Anthony Dattero and Nancy Dattero for summary judgment dismissing the complaint against them is determined as follows.

On November 24, 1998, Stephen Fellman entered into an agreement with defendants Anthony Dattero and Nancy Dattero for the creation of an easement over Mr. Fellman's property. On December 24, 1998, a Declaration Creating Access Easement ("Declaration"), granting the Datteros use of "a ten (10) foot portion" on the northerly portion of Stephen Fellman's property "for ingress and egress to and from the dock which is to be constructed in the area depicted on Exhibit A," was recorded with the Suffolk County Clerk. The easement runs along the entire length of the northerly property line of the grantor's premises, from the street to the Connetquot River in his backyard. The Datteros and Stephen Fellman also entered into an agreement ("Agreement") on December 3, 1998, which was not recorded. The Agreement states in relevant part that the Datteros have the right to install electric and water service to the dock by way of the easement, to landscape, erect a storage shed, and drydock a boat. It further states that the Datteros may treat the surface of the easement with a surface that is impervious, such as grass or gravel to allow access of a motor vehicle. In 2003, plaintiffs John Schulz and Patricia Fellman purchased the subject property from Stephen Fellman.

On February 25, 2005, the Datteros made an application to defendant Town of Islip for a land clearing permit to clear the easement area. The application was rejected because it was determined that the Datteros were not the owner of the property. The Datteros allegedly sought plaintiffs' permission to clear a path in the easement area for ingress and egress to the dock. Plaintiffs claim they gave permission to clear the underbrush and remove eight medium to large trees. The Datteros submitted a second application to the Town of Islip to clear the subject area. The second application, which was signed by plaintiffs, sought permission to clear an area of land 10' x 400' for purposes of "ingress and egress." Furthermore, under the section entitled "Brief Description of the Project," the application states "to clear 10' x 350/400' approximately 8 medium to large trees and its underbrush." The land clearing permit granted by the Town, dated August 8, 2005, approved the Datteros' application to the extent that they were permitted to clear 7' x 490' and that "all trees 4' +/- south of the northern property line are to remain." The permit states that a "three foot (3') buffer strip shall remain natural along the northern property line." Plaintiffs claim that they never were provided with a copy of the permit. The Datteros appealed to the Town, requesting permission to clear a pathway with a width of 10 feet. On November 1, 2005, a second permit was issued which describes the approved project as "Clear 10' x 490' easement area on northern side of lot 0500-401.00-4.00-003.001 being 275 Great River Road, Great River. Replant area for screening purposes as per New York State Department of Environmental Conservation and Town of Islip Department of Planning and Development specifications." On November 7, 2005, a dispute arose when the Datteros advised plaintiffs they were going to clear the entire easement area and plaintiffs revoked their permission to clear trees and underbrush. Defendant Eugene Murphy, who at the time was Acting Commissioner of the Department of Planning and Development of the Town of Islip, allegedly arrived at the scene and advised the Datteros and their contractors that they could proceed with the plans to clear the easement area.

The complaint alleges causes of action for breach of contract, waste and injury to real property, trespass, conversion, nuisance, and negligence against the Datteros. In addition to seeking damages, the "wherefore" clause of the complaint seeks an injunction limiting the Datteros' use of the easement to a

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pedestrian walkway to access the dock and permanently enjoining them from damaging, grading, filling, planting, installing an apron, using motor vehicles, mooring a boat in the easement area. The complaint against the Town of Islip and Eugene Murphy, in his capacity as Commissioner of Planning and Development of the Town of Islip and individually (hereinafter "the Town defendants"), alleges causes of action for violation of plaintiffs' rights under 42 USC §§1983 and 1985(3), negligence, waste and injury to real property, conversion, and nuisance. The Datteros' answer interposes a counterclaim against plaintiffs for attorney's fees.

Plaintiffs now move for an order granting summary judgment in their favor on their complaint. While plaintiffs concede that the Datteros are the owners of an easement running along the northerly portion of plaintiffs' property, and that defendants may use such easement to gain access to the dock located in the back of plaintiffs' property, they argue that the Datteros' easement rights are restricted to ingress and egress to the dock. Plaintiffs argue that they are not bound by the Agreement, because it was not recorded, and that the Declaration must be strictly construed according to its terms. In support of their motion, plaintiffs submit, among other things, copies of the pleadings, the December 1998 Agreement, the Declaration, the land clearing permit application, the permits issued by the Town, an affidavit of John Schulz, and a memorandum written by Eugene Murphy.

The Datteros oppose plaintiffs' motion, arguing that the rights detailed in the Agreement are enforceable and that plaintiffs signed off on the land clearing permit application. The Datteros also cross-move for a declaration that their rights under the easement are set forth in both the Declaration and the Agreement. The Datteros submit, among other things, copies of the Declaration, the Agreement, the applications for the land clearing permit, the land clearing permit, and letters written by Anthony Dattero. They submit an excerpt of the deposition testimony of Anthony Dattero, transcripts of the deposition testimony and 50-h hearing of plaintiffs, and transcripts of the deposition testimony of Nancy Dattero, Chris Anderson, Eugene Murphy, Stephen Fellman, Sean Colgan, Gina Fanelli, and Daniel Dollman. They also submit an expert affidavit of Charles Bowman and an affidavit of Brian Griffin.

The Town defendants also oppose plaintiffs' motion and cross-move for summary judgment dismissing the complaint against them, arguing they are entitled to governmental immunity. They submit transcripts of the deposition testimony of John Schulz and Eugene Murphy; the Declaration and the Agreement; excerpts of the deposition testimony of Anthony Dattero and Patricia Fellman; a letter from Anthony Dattero to Eugene Murphy; and a copy of a permit issued to Anthony Dattero by the New York State Department of Environmental Conservation.

At his examination before trial, John Schulz testified that when plaintiffs purchased the subject property from Stephen Fellman in April 2003, they were informed that there was an easement in favor of the Datteros. He testified that he was told that the Datteros had the right to traverse the easement to access the dock, but that he was not given a copy of the Agreement. He testified that the easement area was densely wooded, and that the Datteros would walk on the area outside of the easement to access the dock. He testified that in the summer of 2005, Anthony Dattero said that he wanted to clear the entire easement to put in a path, and showed him the Agreement which plaintiffs had not seen. Schulz testified that he agreed to let the Datteros cut down some trees to create a foot path, and that Anthony Dattero gave him the Town permit application to sign on July 19, 2005. He testified that he never saw the land

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clearing permit that was issued by the Town, but that it was his understanding that eight medium to large trees and the underbrush were to be cleared. He testified that on the morning that the clearing was scheduled to take place, he and his wife went with Anthony Dattero to mark trees which plaintiffs wanted to keep. He further testified that a disagreement ensued and that Anthony Dattero stated that he was going to clear the entire easement. He testified that a police officer and Eugene Murphy came to the scene. He testified that Murphy yelled at him and his wife, telling them that because the Datteros owned the property, they can do whatever they want. He further testified that he told Murphy that he owned the property, and that he was revoking his permission to cut down any trees. He testified that Murphy instructed the police officer to let the trucks and men in to clear the subject area.

At his examination before trial, Anthony Dattero testified that his application for a land clearing permit from the Town, submitted on February 25, 2005, was rejected as it needed the property owner's signature. He testified that on July 19, 2005, he went to plaintiffs for their signature on the application. He stated that he received a permit from the Town of Islip approving the application, but requiring that a three foot buffer strip remain natural along the northerly property line. Dattero testified that he was seeking to clear the full 10 feet of the easement width, because his daughter suffers from a disability and he wanted to access the easement via a golf cart. He testified that he wrote a letter to Murphy and spoke with him about obtaining permission for the 10-foot clearing. Dattero testified that on October 13, 2005, Murphy came over to his house, and that they went to look at the easement. He testified that he received a second land clearing permit from the Town of Islip in November 2005. He testified that prior to the time the land clearing was scheduled to take place, he met with plaintiffs and a disagreement arose as to which trees could be removed.

At his examination before trial, Murphy stated that in 2005 he was Acting Commissioner of the Department of Planning and Development, and that he first became familiar with the subject premises when Anthony Dattero sent a letter requesting an adjustment to a land clearing permit. He testified that he made a visit to the Datteros' house and met Mr. Dattero and his daughter. He explained that he inspected the easement area and observed that the vegetation loss would not be significant if a 10-foot clearing was permitted. Murphy testified that he returned to the easement area on November 1, 2005 with Sean Colgan, a planner in the department, to inspect the conditions and to identify areas where there could be supplemental planting. He stated that he decided that the full 10 feet could be cleared in the easement area based upon his review and inspection. Murphy further testified that on the day of the clearing, he was informed that there was a volatile situation involving the subject land. He testified that he went to the site and that plaintiffs requested that the work not be allowed to continue. He testified that he told the police officer that the clearing should be allowed to proceed.

On a motion for summary judgment the movant bears the initial burden and must tender evidence in admissible form sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such a showing has been made, the burden then shifts to the opposing party to demonstrate that there are material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). Further, the court's function on a motion for summary judgment is to determine whether issues of fact exist, not

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to resolve issues of fact or to determine matters of credibility (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

“An easement appurtenant occurs when the easement is (1) conveyed in writing, (2) subscribed by the creator, and (3) burdens the servient estate for the benefit of the dominant estate” (*Corrarino v Byrnes*, 43 AD3d 421, 422, 841 NYS2d 122 [2007]). Generally, the extent of an easement is determined by the language of the grantor (*see Ciano v Smolan*, 225 AD2d 727, 640 NYS2d 195 [1996]; *Phillips v Jacobsen*, 117 AD2d 785, 499 NYS2d 428 [1986]). An easement granted in general terms must be construed to include any reasonable use to which it may be devoted, provided the use is lawful and is one contemplated by the grant (*see Missionary Soc. of Salesian Congregation v Evrotas*, 256 NY 86, 175 NE 523 [1931]; *Somers v Shatz*, 22 AD3d 565, 802 NYS2d 245 [2005]).

Here, it is undisputed that plaintiffs signed the Dattero defendants' land clearing permit application. While plaintiffs contend that the Dattero defendants cleared more trees than were allowed under the permit, they failed to submit sufficient evidence substantiating this allegation. Furthermore, it is undisputed that the recorded easement grants the Dattero defendants a 10-foot wide portion of plaintiffs property along the northerly boundary property line to access the dock. The Declaration conveys an easement for “ingress and egress to and from the dock which is to be constructed.” The Court finds that the clearing of the easement constituted a reasonable use of the Dattero defendants' interest in the land (*see Sassouni v Krim*, 68 AD3d 968, 892 NYS2d 119 [2009]; *Albrechta v Broome County Indus. Dev. Agency*, 274 AD2d 651, 710 NYS2d 709 [2000]; *Phillips v Jacobsen*, *supra*). Moreover, the Datteros submitted sufficient evidence to establish that the land clearing work performed in the easement area was within the scope of the permit granted by the Town of Islip. Chris Anderson, whose company removed the trees on the day of the clearing, testified at his deposition that he removed less than six trees and a number of shrubs and underbrush. The affidavit of the Datteros' expert, Charles Bowman, states that six to eight mature trees were removed from the easement area during the clearing process. The Court finds plaintiffs' testimony was too speculative and conclusory to raise a triable issue of fact as to whether the Datteros' clearing of the easement area was outside the scope of the permit. Accordingly, the claims against the Datteros for breach of easement and for negligence relating to the clearing of the easement are dismissed.

The application by plaintiffs for injunctive relief and to enjoin the Datteros from certain activities in easement area is denied, as is the application by the Datteros for a declaration of their rights under the easement. The Court notes that while plaintiffs and the Datteros seek injunctive relief and a declaratory judgment, respectively, in their moving papers, they both failed to interpose such claims for relief in their pleadings.

Pursuant to RPAPL § 861(1), if any person, without the consent of the owner, “cuts, removes, injures or destroys, or causes to be cut, removed, injures or destroyed, any underwood, tree or timber on the land of another,” the owner of the property may bring an action against such person for “treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation.” The term “stumpage value” is defined by the statute as “the current fair market value of a tree as it stands prior to the time of sale, cutting or removal,” and is assessed using one or more of the methods set forth

therein (RPAPL § 861 [3]). The remedy created by RPAPL § 861, however, “extends only to the actual owner of the property allegedly harmed; the possession of or the right to possess the property is insufficient” (*Cornick v Forever Wild Dev. Corp.*, 240 AD2d 980, 980, 659 NYS2d 914 [1997]; see *Lordon v Courduff*, 141 AD2d 803, 529 NYS2d 874 [2d Dept], *lv dismissed* 73 NY2d 809, 537 NYS2d 434 [1988]). Furthermore, if the defendant establishes by clear and convincing evidence that when he or she committed the violation he or she had cause to believe the land belonged to him or her, or that he or she had an easement or right of way across the land that permitted such action, treble damages may not be recovered by the owner (see RPAPL § 861 [2]).

Here, the admissible evidence establishes that the Datteros had an easement across the land where the land clearing took place. It also shows plaintiffs signed the application the defendants submitted to the Town for permission to clear trees from the easement area. Moreover, the evidence reveals that while the Town issued the land clearing permit, it was not involved in the actual clearing of the easement. Accordingly, the claims arising out of RPAPL § 861 are dismissed as to all defendants.

Further, it is well settled that a person entering upon the land of another without permission, whether innocently or by mistake, is a trespasser (*Burger v Singh*, 28 AD3d 695, 698, 816 NYS2d 478, 480 [2006]). However, an action for trespass over the lands of one property owner may not be maintained where the purported trespasser has acquired an easement of way over the land in question (see *Krosky v Hatqipetros*, 150 AD2d 344, 541 NYS2d 22 [1989]). The Datteros and the Town defendants are not liable for the alleged trespass on the subject area, as the Datteros hold an easement granting them the right to access such land. However, it is undisputed that the Datteros entered upon the land owned by plaintiffs outside the easement area prior to the land clearing. An entry onto the land of another constitutes a trespass even though damages are slight or there is no damage. Accordingly, plaintiffs are entitled to an assessment of the damages arising from the trespass of the Datteros. The claims of trespass against the Town defendants are dismissed, as there is no allegation that they entered onto land of plaintiffs other than on the easement area.

Liability for a private nuisance arises from conduct which invades another’s interest in the private use and enjoyment of land, and the invasion is either intentional, negligent or related to abnormally dangerous activities (see *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 394 NYS2d 169 [1977]; *Kaplan v Inc. Vill. of Lynbrook*, 12 AD3d 410, 784 NYS2d 586 [2004]). However, where a nuisance arises solely from negligence, there is generally a single wrong which may be characterized as either a nuisance or negligence (see *Haire v Bonelli*, 57 AD3d 1354, 870 NYS2d 591 [2008]). Further, conversion is the unauthorized “exercise of dominion over or interference with” a specific identifiable piece of property in defiance of the owner’s rights” (*Petty v Barnes*, 70 AD3d 661, 662, 894 NYS2d 85 [2010]; see *Hoffman v Unterberg*, 9 AD3d 386, 780 NYS2d 617 [2004]; *Gilman v Abagnale*, 235 AD2d 989, 653 NYS2d 176 [1997]). Tangible personal property or specifically identified money must be involved in a conversion action (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 452 NYS2d 599 [1982]; *Independence Discount Corp. v Bressner*, 47 AD2d 756, 365 N.Y.S.2d 44 [1975]). As the Court has found that the clearing of the easement was consented to by plaintiffs, and that the Datteros were within their rights to clear the easement, the plaintiffs’ actions sounding in nuisance and conversion are dismissed.

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As to the remaining claims against the Town defendants, it is well settled that when the action of a government official involves the conscious exercise of discretion of a judicial or quasi-judicial nature, such office is entitled to absolute immunity. This entitlement is based on “sound reasons of public policy” in allowing government officials to execute their duties free from fear of vindictive or retaliatory damage suits (*Haddock v City of New York*, 75 NY2d 478, 554 NYS2d 439 [1990]; see *Tango v Tulevech*, 61 NY2d 34, 471 NYS2d 73 [1983]; *Kelleher v Town of Southampton*, 306 AD2d 247, 760 NYS2d 235 [2003]; *Rottkamp v Young*, 21 AD2d 373, *aff’d* 15 NY2d 831 [1965]). Further, it is well settled that the decision whether to issue a permit is a discretionary determination and the actions of the government in such instances are immune from lawsuits based on such decisions (*City of New York v 17 Vista Assocs.*, 84 NY2d 299, 618 NYS2d 249 [1994]; *Matter of Parkview Assocs. v City of New York*, 71 NY2d 274, 525 NYS2d 176 [1988]; *F.A.S.A. Constr. Corp. v Village of Monroe*, 14 AD3d 532, 789 NYS2d 175 [2004]).

When official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice (see *Tango v Tulevech*, 61 NY2d 34, 471 NYS2d 73 [1983]). Conversely, when the action is exclusively ministerial, the officer will be liable if it is otherwise tortious and not justifiable pursuant to statutory command (*McLean v City of New York*, 12 NY3d 194, 878 NYS2d 238 [2009]; *Lauer v City of New York*, 95 NY2d 95, 711 NYS2d 112 [2000]). Even where an act is ministerial, to sustain liability against a municipality the duty breached must be more than that owed the public generally (see *McLean v City of New York*, *supra*; *Lauer v City of New York*, *supra*). A duty to exercise reasonable care toward the plaintiff is born of a special relationship between the plaintiff and the governmental agency (see *McLean v City of New York*, *supra*; *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111 [2004]). To form a special relationship by voluntarily assuming a duty to an injured person, plaintiff must demonstrate (1) an assumption by the municipality through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking (see *McLean v City of New York*, *supra*).

It is determined as a matter of law that the Town defendants have governmental immunity for the issuance of a land clearing permit, as such act involves a discretionary governmental function, and the exercise of which may not form the basis for liability (see *Broncati v City of White Plains*, 6 AD3d 476, 774 NYS2d 573 [2004]; *Rickson v Town of Schuylers Falls*, 263 AD2d 862, 694 NYS2d 213 [1999]). Moreover, there is no evidence of a special relationship in this case which would support plaintiffs’ claims against the Town defendants. The record does not show that there was an assumption by the municipality through promises or actions which would give rise to a duty to act on plaintiffs’ behalf. Furthermore, while plaintiffs point to the memo prepared by Murphy stating that there were negotiations between the Town employees and plaintiffs regarding the first permit issued, the deposition testimony of the parties demonstrate that there was no direct contact between the municipality’s agents and plaintiffs. Accordingly, it is determined as a matter of law that there was no special relationship between the Town defendants and plaintiffs, and that the claims sounding in negligence cannot be sustained.

Finally, as to plaintiffs federal and constitutional claims against the Town defendants, 42 USC §

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1983, in the land use context, “protects against municipal actions that violate a property owner’s rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution” (*Bower Assocs. v Town of Pleasant Valley*, 2 NY3d 617, 626, 781 NYS2d 240 [2004], citing *Town of Orangetown v Magee*, 88 NY2d 41, 49, 643 NYS2d 21 [1996]). However, 42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations (*Bower Assocs. v Town of Pleasant Valley*, *supra*). To state a claim under the Equal Protection Clause, a plaintiff must allege that (1) compared with others similarly situated, the plaintiff was selectively treated adversely; and (2) such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith or intent to injure a person (*see Miner v Clinton County*, 541 F3d 464 [2008]; *Bizzarro v Miranda*, 394 F3d 82 [2005]; *see also Seymour’s Boatyard, Inc. v Town of Huntington*, 2009 WL 1514610 [2009]). Alternatively, instead of alleging that the selective treatment was based on an impermissible consideration, a plaintiff may establish that there was no rational basis for the selective treatment (*see Village of Willowbrook v Olech*, 528 US 562 [2000]; *see also Seymour’s Boatyard, Inc. v Town of Huntington*, *supra*).

Due process has both a procedural and substantive component. In a procedural due process claim, the deprivation by a municipality of a constitutionally protected interest in property is not in itself unconstitutional; rather what is unconstitutional is the deprivation of such interest without due process of law (*see Zinermon v Burch*, 494 US 113 [1990]). Procedural due process requirements are generally satisfied where the denial of a plaintiff’s request is preceded by notice and a hearing and followed by a written explanation (*Natale v Town of Ridgefield*, 170 F3d 238 [1999]). Substantive due process rights are violated only by conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority (*Natale v Town of Ridgefield*, *supra*; *see Bower v Town of Pleasant Valley*, *supra*).

Here, it is clear that the actions taken by the Town defendants were under color of state law. Plaintiffs’ have failed to allege facts demonstrating that the Town defendants actions were wholly without legal justification or that there was an impermissible motive not related to legitimate governmental objectives (*Bower Assoc. v Town of Pleasant Val.*, *supra*; *Sonne v Board of Trustees of Vill. of Suffern*, 67 AD3d 192, 887 NYS2d 145 [2009]). As to plaintiffs’ procedural due process claim, it cannot be established that they were deprived of their interests without due process of the law, as they signed the land clearing application consenting to the clearing of the easement.

“In order to survive a motion to dismiss on a § 1983 conspiracy claim, the plaintiff must allege (1) an agreement between two or more state actors, (2) concerted acts to inflict an unconstitutional injury, and (3) an overt act in furtherance of the goal” (*Carmody v City of New York*, 2006 WL 1283125 [2006], citing *Ciambriello v County of Nassau*, 292 F3d 307, 324-335 [2nd Cir 2002]; *see Crippen v Town of Hempstead*, 2009 WL 803117 [2009]). Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed (*see Ciambriello v County of Nassau*, *supra*; *Crippen v Town of Hempstead*, *supra*). A plaintiff is not required to list the place and date of defendants’ meetings and the summary of their conversations when he pleads conspiracy, but the pleadings must present facts tending to show agreement and concerted action (*Fisk v Letterman*, 401 F Supp2d 362, 376 [2005]; *see Crippen v Town of Hempstead*, *supra*). Here, plaintiffs’ complaint contains conclusory and general allegations that defendants conspired together in violation of plaintiffs’ rights under the

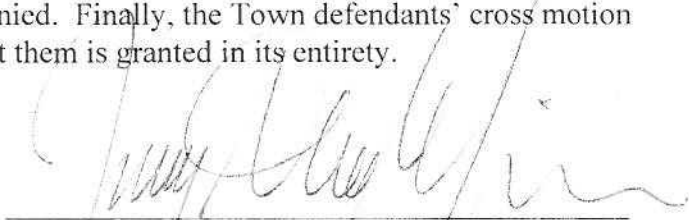
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Constitution and is insufficient to state a cause of action pursuant to 42 USC § 1983 (see *Scarfone v Village of Ossining*, 23 AD3d 540, 806 NYS2d 604 [2005]; *Morpurgo v Incorporated Village of Sag Harbor*, 697 FSupp2d 309 [2010]). Other than the allegations in plaintiffs complaint, the record does not contain any evidence that such a conspiracy took place. Thus, the branch of the Town defendants' motion for summary judgment dismissing the federal and constitutional claims against them is granted.

As to the Datteros' application for summary judgment on their counterclaim for attorney's fees, the law is settled that a civil litigant may not recover attorney's fees in the absence of contractual or statutory authority (see *Obas v Kiley*, 149 AD2d 422, 539 NYS2d 767 [1989]; *Rahabi v Morrison*, 81 AD2d 434, 440 NYS2d 941 [1981]). Here, the Declaration states that "[if] any action or proceeding is commenced by either parcel owner against the other parcel owner to interpret or enforce this Declaration, to recover damages, enjoin any violation or enforce any other remedy available under this Declaration or under applicable law, then the prevailing party in such action or proceeding shall be entitled to its reasonable attorneys' fees and disbursements in connection therewith." While the Declaration includes a provision for the recovery of attorneys' fees, the Datteros failed to submit any evidence or an accounting of their attorney's fees. Thus, their application for summary judgment on their counterclaim for attorney's fees is denied.

Accordingly, the motion by plaintiffs for summary judgment in their favor against the Datteros is denied as to each cause of action, except for the cause of action for trespass. The cross motion by the Datteros is granted to the extent plaintiffs' claim against them for breach of contract, negligence, waste and injury to real property, conversion, and nuisance are dismissed. Plaintiffs' claim for trespass, however, is severed and continued against them. The branch of the Datteros' cross motion for summary judgment on their counterclaim for attorney's fees is denied. Finally, the Town defendants' cross motion for summary judgment dismissing the complaint against them is granted in its entirety.

Dated: APR 01 2011



J.S.C.
HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION