

**Blackthorne Corp. v Sangavi**

2011 NY Slip Op 31324(U)

May 19, 2011

Supreme Court, Greene County

Docket Number: 10-352

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

THE BLACKTHORNE CORPORATION  
and GUY NORBURY,

Plaintiffs,

-against-

**DECISION and ORDER**  
**INDEX NO. 10-352**  
**RJI NO. 19-10-4907**

ASHA SANGAVI and RICHARD GARVIN  
d/b/a ERINS MELODY,

Defendants.

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Supreme Court Greene County All Purpose Term, May 11, 2011  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Plaintiffs commenced this nuisance action, seeking damages and an injunction, based upon Defendants alleged failure to supervise / control tenants who reside on their property and their alleged wrongful sewage discharge. Issue was joined by Defendants, who set forth a counterclaim against The Blackthorne Corporation (hereinafter "Blackthorne") premised upon their characterization of this action as an "action involving public petition and participation." (see Civil Rights Law §§76-a and 70-a). Discovery in this action is complete and a trial date certain has been set for July 18, 2011.

Defendants now move for summary judgment dismissing the complaint and granting their counterclaim. Plaintiffs oppose the motion. Because Defendants failed to demonstrate their entitlement to judgment as a matter of law, their motion is denied.

Although Defendants claim that CPLR §3212(h)'s reduced burden applies to their motion for summary judgment dismissing the complaint, they set forth no proof to substantiate such position. CPLR §3212(h) applies only where “the moving party has demonstrated that the action... subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law.” In turn, Civil Rights Law §76-a(a) defines an action involving public petition and participation as “an action... for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.” (emphasis added).

On this record, Defendants set forth no proof that either Plaintiff is a “public applicant or permittee.” Relative to Plaintiff Norbury, Defendants make no allegation that he is a “public applicant or permittee” effectively conceding that he is not. Defendants similarly failed to set forth sufficient proof of Blackthorne's “public applicant or permittee” status. Defendants' attorney's speculative and conclusory statement that Blackthorne is the alter ego of Weldon House, Inc., is of no probative value. Likewise, the Defendants' allegations of Blackthorne and Weldon House, Inc.'s common ownership, is insufficient to demonstrate that Blackthorne is a “public applicant or permittee.” Nor did defendants proffer sufficient proof to establish that this action is “materially related” to their efforts challenging a public application. As such, on this record, Defendants failed to make the necessary preliminary showing for CPLR §3212(h) to

apply.<sup>1</sup>

Because CPLR §3212(h) does not apply to this summary judgment motion, “defendant bears the initial burden of demonstrating its entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form... [, which] burden may not be met by pointing to gaps in plaintiff’s proof.” (DiBartolomeo v. St. Peter’s Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Dow v. Schenectady County Dept. of Social Services, 46 AD3d 1084 [3d Dept. 2007]; Antonucci v. Emeco Industries, Inc., 223 A.D.2d 913, 914 [3d Dept.1996]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

To demonstrate their entitlement to judgment as a matter of law, Defendants must establish, with admissible proof, that “they [did not] interfere[] with [Plaintiffs’] right to use and enjoy land, [or that their purported interference was neither] substantial in nature, intentional or negligent in origin, unreasonable in character, [nor] caused by the [their] conduct” (Spellburg v. South Bay Realty, LLC, 49 AD3d 1001, 1002 [3d Dept. 2008], quoting Kaplan v Incorporated Vil. of Lynbrook, 12 AD3d 410 [3d Dept. 2004][internal quotation marks omitted]).

On this record, Defendants failed to proffer the necessary proof to establish their lack of nuisance liability for the alleged acts of their tenants. To the extent that Defendants’ allege that Plaintiffs lack any proof for their claims, such allegations merely point to “gaps in proof” and are irrelevant in affirmatively demonstrating their initial burden. Similarly irrelevant are Defendants

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<sup>1</sup> Due to such failure of proof, Defendants’ motion for summary judgment on their counterclaim is unsupported and denied.

speculative allegations about Plaintiffs' motives for commencing this action, as Defendants failed to demonstrate the applicability of CPLR §3212(h). Nor did Defendants submit Plaintiff Norbury's deposition testimony in admissible form to be considered in support of their motion. Rather, Defendants only admissible proof in support of this portion of their motion is their denial of responsibility for their tenants' acts. Such proof is wholly unavailing. (*see* Restatement [Second] of Torts §838 Comment *b*).

Defendants similarly failed to proffer sufficient proof to demonstrate their entitlement to dismissal of Plaintiffs' wrongful waste water discharge cause of action. On this record, Defendants offer no allegations or proof affirmatively demonstrating that their waste water system did not wrongfully discharge contaminated effluent. Rather, they rely solely upon Defendant Sangavi's unsupported, speculative and conclusory allegation that her waste water system did not produce any odors or harm Norbury's property. She also failed to proffer, on her initial motion, any documentation to support her minimization/characterization of her admitted DEC permit violation.<sup>2</sup> Defendant Garvin similarly failed to allege non interference with Norbury's property rights, or the nonexistence of any other element of a nuisance cause of action. As such, Defendants failed to establish their entitlement to judgment as a matter of law.

Accordingly, Defendants' motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to

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<sup>2</sup> To the extent that Defendants' Reply offers some documentary proof relative to their DEC violation, such submission cannot be considered in support of their initial burden. (Crawmer v. Mills, 239 AD2d 844 [3d Dept.1997]; Albany County Dept. of Social Services v. Rossi, 62 AD3d 1049 [3d Dept. 2009]; E.W. Tompkins Co., Inc. v. State University of New York, 61 AD3d 1248 [3d Dept. 2009]).

the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: May 19, 2011  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated April 6, 2011; Affirmation of Gerald Bunting, dated April 6, 2011; Affidavit of Asha Sangavi, dated April 6, 2011; Affidavit of Richard Garvin, dated April 16, 2011, with attached Exhibits A-F.
2. Affidavit of Guy Norbury, dated May 4, 2011, with attached Exhibit 1; Affidavit of Dale Handel, dated May 4, 2011, with attached Exhibit 2; Affirmation of Robert Gagen, dated May 4, 2011, with attached Exhibits 3-4.
5. Affirmation of Gerald Bunting, dated May 11, 2011; Affidavit of Asha Sangavi, dated May 12, 2011; with attached Exhibits G-J.