

Greco v Incorporated Vil. of Freeport

2011 NY Slip Op 31383(U)

May 16, 2011

Sup Ct, Nassau County

Docket Number: 3672-02

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
VINCENT GRECO and REGINA GRECO,

Plaintiff,

-against-

**THE INCORPORATED VILLAGE OF
FREEPORT,**

Defendant,

-----x

**TRIAL PART: 14
NASSAU COUNTY**

INDEX NO: 3672-02

MOTION SEQ. NO:6,7

SUBMIT DATE:04/15/11

The following papers having been read on this motion:

- Notice of Motion.....1**
- Cross Motion.....2**
- Opposition.....3**
- Memorandum of Law.....4**

Motion pursuant to CPLR § 3212 by the defendant the Incorporated Village of Freeport for summary judgment dismissing the complaint.

Motion pursuant to CPLR§ 3212 by the plaintiffs Vincent and Regina Greco for summary judgment and for further relief: (1) striking the defendant’s answer pursuant to CPLR§ 3126; and (2) for the imposition of sanctions pursuant to 22 NYCRR § 130-1.1

The plaintiffs Vincent and Regina Greco own residential property and a commercial marina within close proximity to a municipal power plant owned and operated by the defendant Incorporated Village of Freeport [“the Village”]. In mid-2002, the plaintiffs commenced the within nuisance/negligence action against the Village, claiming, in substance, that the plant had been operated in an unsafe, dangerous and negligent fashion (Gross Aff., Exh., “A”).

More specifically, the plaintiffs allege, *inter alia*, that the Village negligently operated the formerly diesel-fueled, “power plant 2” with knowledge of its purportedly unsafe condition; that the plant emitted noxious gases, odors and generated excessive noise and damaging vibrations; that the

Village failed to take proper steps to remediate and/or correct the unsafe conditions which existed; and that as a result, the plaintiffs were deprived of their ability to quietly enjoy their property (Cmplt., ¶¶ 17-19, 23, 29, 33, 39). The plaintiffs further allege that the operation of the plant caused physical damage to their properties and also negatively affected their “mental health and [physical] well-being” (Cmplt., ¶¶ 22-27, 38-39; 45; V. Greco, Dep., 16-17, 32-37).

By prior order dated June 11, 2007, this Court (Palmieri, J.) granted stated portions of the Village’s first motion for summary judgment by dismissing, as time-barred, the plaintiffs’ negligence cause of action (Cmplt., ¶¶ 38-42). The Court similarly dismissed as untimely, those portions of the plaintiffs’ trespass/nuisance (first and second) causes of action which were predicated on wrongful incursions occurring more than one-year and 90 days prior to the commencement of the action (Order at 5-6; Cmplt., ¶¶ 12-37).

With respect to the latter portion of the Court’s June 11 holding (relating to the surviving nuisance and trespass causes of action), Justice Palmieri noted that (1) the Village had acknowledged that there was some usage of the diesel plant before it was later decommissioned in 2004; and (2) in light of this acknowledgment, the Village failed to make a *prima facie* case for dismissal of these specific claims (Order at 6). Lastly, the Court dismissed the plaintiff’s mandatory injunction (third) cause of action as academic, since the diesel-powered engines were no longer operational by the time the motion was made (Order at 7; Cmplt., ¶¶ 38-42).

By decision dated October 20, 2009, the Appellate Division, Second Department later affirmed in all respects, Justice Palmieri’s June 11, 2007 order (*see, v. Incorporated Village of Freeport*, 66 AD3d 836).

Prior thereto, in December of 2007, the Village again moved for summary judgment arguing among other things that: (1) the plant’s allegedly *de minimis* usage during certain relevant time periods could not, as a matter of law, cause a substantial threat to the public or to the plaintiffs; (2) there was no intentional, substantial and unreasonable interference with their property so as to support a private or public nuisance theory of recovery; and (3) in any event, the plaintiffs submitted

no evidence competently documenting their property damage and physical injury claims (*e.g.*, Edwards [April 3, 2008] Reply Aff., ¶¶ 13-39).

In disposing of the Village's motion, the Court held in the first instance that the application violated the prohibition against successive summary judgment motions, particularly since, *inter alia*, the motion relied upon deposition testimony and an expert inspection which were both in existence prior to the Village's first summary judgment application (*see generally*, *Ferguson v. Shu Ham Lam*, 74 AD3d 870, 872; *B & N Properties, LLC v. Elmar Associates, LLC*, 51 AD3d 831, 832; *Soto v. City of New York*, 37 AD3d 589)(Order at 4-5).

The Court observed that even apart from the successive motion rule, the Village's submissions failed to establish its entitlement to judgment as a matter of law, since the expert report submitted with its supporting papers was unsworn and therefore lacking in probative import (Order at 5-7). Additionally, Justice Palmieri held that discovery was not yet complete with respect to those claims which survived the prior motion, *i.e.*, the claims predicated on the nuisance and/or trespass theories which were not time-barred pursuant to the Court's prior, June 11, 2007 order (Order at 5-6).

Both the plaintiffs and the Village now move for, *inter alia*, summary judgment on their respective claims. The motions should be denied.

"It is well settled that successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment" (*Capuano v. Platzner Intern. Group, Ltd.*, 5 AD3d 620, 621 *see also*, *Essex Street Corp. v. Tower Ins. Co. of New York*, 81 AD3d 516, 517; *Ferguson v. Shu Ham Lam*, *supra*, 74 AD3d 870; *Jones ex rel. Cline v. 636 Holding Corp.*, 73 AD3d 409; *Sutter v. Wakefern Food Corp.*, 69 AD3d 844; *Soto v. City of New York*, *supra*, 37 AD3d 589).

A review of the evidentiary submissions and dismissal arguments currently advanced by the Village confirms that they effectively rehash and repeat the same factual and legal theories previously made in support of its first and second motions for summary judgment – both of which

were denied, *i.e.*, claims that, *inter alia*, the plant was operated in a *de minimis* fashion during the applicable time periods; that the plaintiffs failed to submit proof substantiating their damage claims; and that, based upon the foregoing, the remaining trespass and nuisance claims are legally and factually defective as a matter of law (*compare*, Edwards [April 3, 2008] Reply Aff., ¶¶ 4-53 [2nd Village Motion], *with*, Gross Aff., ¶¶ 56-98 [current motion]).

Moreover, Justice Palmieri had already denied that branch of the Village's original motion which was to dismiss the surviving portions of the plaintiffs' nuisance/trespass claims. Specifically, in its affirmed, June 11, 2007 order which resolved the first Village motion, the Court held that the Village failed to make a *prima facie* showing as to these claims because it had conceded that "there was some use of the subject power plant through 2004 * * *" (June, 2007 Order at 6). The Court went further, however, concluding that even if a *prima facie* case had been made, the motion would have been denied anyway on the merits, "[b]ased on the plaintiffs' [opposing] submissions" – submissions which mirror those made by the plaintiffs in response to both the second and latest Village motion (June, 11, 2007 Order at 6 [Palmieri, JJ]). Indeed, Justice Palmieri denied the second Village motion on the ground that it too was improperly successive with respect to the first Village application (*see*, Order of Palmieri, J., dated May, 8, 2008 at 4-5).

In any event, upon the parties' hotly disputed and conflicting factual assertions – and considering Justice Palmieri's previously issued orders – the Court finds that the Village has failed to eliminate all triable issues of fact with respect to its claims and contentions (*B & N Properties, LLC v. Elmar Associates, LLC, supra*, 51 AD3d 831, 832 *Capuano v. Platzner Intl. Group, supra*, 5 AD3d 620, 621; *Klein v. Auerbach*, 1 AD3d 317, 318).

Similarly, that branch of the plaintiffs' motion which is for summary judgment in connection their remaining causes of action should also be denied. The plaintiffs have not established their entitlement to judgment as matter of law with respect to, *inter alia*, the surviving portions of trespass and the public/private nuisance claims. Private nuisance analysis in particular, entails the "balancing of risk-utility considerations" (*Little Joseph Realty, Inc. v. Babylon*, 41 NY2d 738, 744-745 [1977]),

and “except for the issue of whether the plaintiff has the requisite property interest, each of the other elements is for the jury, unless the evidence is undisputed” (*Broxmeyer v. United Capital Corp.*, 79 AD3d 780, 782-783, quoting from, *Weinberg v. Lombardi*, 217 AD2d 579 see generally, *Kahona Beach LLC v. Santa Ana Restaurant Corp.*, ___ Misc3d ___, 2010 WL 4054473, at 5 [Supreme Court, New York County 2010] cf., *Agoglia v. Benepe*, 77 AD3d 927, 932; *Aristides v. Foster*, 73 AD3d 1105, 1106-1107; *Hoover v. Durkee*, 212 AD2d 839, 840).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, “[e]ven the color of a triable issue forecloses the remedy” (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489).

To the extent that the plaintiffs have attempted to revisit, *inter alia*, the statute of limitations holdings made by the Court in its prior orders, their claims are lacking in merit. In any event, those matters and others have already been resolved by Justice Palmieri (*e.g.*, *Romagnolo v. Pandolfini*, 75 AD3d 632) – whose June 11, 2007 order has been affirmed in all respects by the Appellate Division, Second Department (*see, Greco v. Incorporated Village of Freeport, supra*, 66 AD3d 836).

Lastly, those branches of the plaintiffs motion which are (1) to strike the Village’s answer based on, among other things, its alleged failure to produce a sufficiently knowledgeable deposition witness; and (2) for sanctions pursuant to 22 NYCRR § 130-1.1, are denied.

It is settled that, “[t]he drastic remedy of striking a pleading must be supported by a clear showing that there was both a failure to comply with discovery demands and that such failure was willful and contumacious” (*Step-Murphy, LLC v. B & B Bros. Real Estate Corp.*, 60 AD3d 841, 843 see, *Nunez v. Long Island Jewish Medical Center Center-Schneider Children's Hosp.*, 82 AD3d 724, 725; *Palomba v. Schindler Elevator Corp.*, 74 AD3d 1037, 1038). Additionally, “strong public policy” favors the resolution of cases on the merits (*Di Mascio v. Friedman*, ___ AD3d ___, 2011 WL 1605406 [2nd Dept. 2011]; *Santiago v. Nyack Hosp.*, 68 AD3d 845).

Whether a discovery sanction should be imposed rests in the sound discretion of the Court

(*Euba v. Euba*, 78 AD3d 761, 762; *148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486; *Provident Life and Cas. Ins. Co. v. Brittenham*, 284 AD2d 518).

With these principles in mind and, upon the exercise of its broad discretion in supervising disclosure (*Euba v. Euba, supra*, 78 AD3d 761, 762), the Court finds that the plaintiffs have not shown that the Village's conduct was willful and contumacious so as to warrant the draconian remedy sought (e.g., *Palomba v. Schindler Elevator Corp., supra*, 74 AD3d 1037, 1038 see also, *McDermott v. Bahnatka*, ___AD3d___, 2011 WL 1631616 [2nd Dept. 2011] cf., *Pezhman v. Department of Educ. of City of New York*, 79 AD3d 543, 544).

Similarly, and in its discretion, the Court finds that the imposition of sanctions pursuant to 22 NYCRR § 130-1.1 is unwarranted (see generally, *Hegazi, v. Palmieri*, ___AD3d___ 2011 WL 1817439 [2nd Dept. 2011]; *Lane v. Smith*, ___AD3d___, 2011 WL 1733956 [2nd Dept. 2011]).

The Court has considered the parties' remaining contentions and concludes that they do not support the granting of relief sought in the respective motions.

Accordingly, it is,

ORDERED that the motions by the defendant Incorporated Village of Freeport and the plaintiffs Vincent and Regina Greco are denied.

The foregoing constitutes the decision and order of the Court

DATED: May 16, 2011

ENTER

ENTERED

MAY 19 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE



HON. ARTHUR M. DIAMOND

J. S.C.

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