

Pearl v McDonough

2011 NY Slip Op 31538(U)

May 24, 2011

Sup Ct, Nassau County

Docket Number: 16171/09

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
JUDSON W. PEARL,

Plaintiff,

-against-

Motion Seq. No.: 04, 05 & 06

RICHARD McDONOUGH d/b/a McDONOUGH
ELECTRIC and the INCORPORATED VILLAGE
OF ROCKVILLE CENTRE,
Defendants.

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 16171/09**

DECISION AND ORDER

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In motion number four, defendant McDonough Electric, Inc., s/h/a Richard McDonough Electric d/b/a McDonough Electric, Inc. (McDonough) moves by notice of motion for an order pursuant to CPLR §3212 granting summary judgment. In motion sequence number five, defendant Incorporated Village of Rockville Centre (Village) moves for an order of summary judgment dismissing the

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complaint and any cross-claims asserted against said defendants.

In motion sequence number six, defendant McDonough moves by order to show cause for leave to file a late demand for a jury trial pursuant to CPLR §4102(3).

The facts underlying this trespass action and the respective positions of the parties *vis-a-vis* these facts are set forth in detail in the decision and order of this court dated July 7, 2010 whereby plaintiff's motion for summary judgment and various injunctive relief against defendant McDonough¹, and defendant McDonough's cross-motion to dismiss the complaint pursuant to CPLR §3211(a)(7), were denied based, *inter alia*, on the existence of a triable issue of fact as to whether or not defendant McDonough trespassed onto plaintiff's property. The court declined to dismiss the complaint finding that plaintiff has sufficiently pled his case. In the same decision, plaintiff's application pursuant to CPLR §601 to consolidate action no. 1 (under No. 09-016717) with a second action brought by plaintiff against McDonough Electric, Inc. under index no. 09-0207036 was granted.

Briefly stated, plaintiff alleges that defendant McDonough trespassed onto his property at 95 Andover Road, Rockville Centre, and, without his permission, excavated his property, buried electrical and other wires/lines underground and installed three metal pipes in the northeast corner of said property adjacent to the utility pole located thereon. The pipes or conduits and wiring were installed to provide electrical service to plaintiff's rear yard neighbors at 102 Arrandale Road, who wished to bury their electrical and other utility lines. The buried lines were connected to the overhead electrical power lines by an employee of defendant Village on June 16, 2009. In making this connection, plaintiff alleges defendant Village committed a trespass on his property.

¹McDonough Electric was hired by the owners of 102 Arrandale Road to upgrade the electrical service at the premises from 220 amp overhead service to 400 amp underground service and to rewire the entire house.

Plaintiff maintains that neither defendant McDonough nor the rear yard neighbor has a right, either by easement or otherwise, to enter onto his property. He contends that the offending structures should be removed and his property restored to its original condition. Plaintiff further maintains that none of the various recorded easements granting defendant Village the right to install utility poles and telephone poles in the Village of Rockville Centre, and to attach electrical and telephone wires thereto, affords defendant McDonough or defendant Village the right to come onto his property, excavate his land, bury electrical and other lines on the property and install three metal pipes. When defendant McDonough and defendant Village refused to remove the trespassing structures and electrical connections, which plaintiff alleges constitute a cloud on his title, devalue his property and interfere with his use and enjoyment thereof, this lawsuit ensued.

Richard McDonough is the principal of McDonough Electric, Inc., and a licensed electrician performing electrical work in defendant Village for over 30 years. According to McDonough, the plaintiff's trespass action must be dismissed as the contractor's entry on plaintiff's property was pursuant to authority granted by Rockville Centre Electric Department in accordance with the assignment of New York Telephone Company's expressed and implied easement rights to Rockville Centre Electric Department. Defendant McDonough contends that the easement rights include the installation of underground wiring, pipes and conduits.

Defendant Village opposes defendant McDonough's motion for summary judgment on the grounds that the pipes (conduits) at issue were installed by defendant McDonough without any approval, involvement or authorization from/ by the defendant Village. As such, defendant Village maintains that, as a matter of law, it may not be held liable for plaintiff's claims and is itself entitled to summary judgment dismissing the complaint. Further, the defendant Village asserts that the branch of

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defendant McDonough's cross-motion which seeks summary judgment dismissing the defendant Village's cross-claim for contribution and indemnification by defendant McDonough should be denied as defendant McDonough has failed to make a *prima facie* showing that it was free from fault in connection with the alleged trespass.

ANALYSIS

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 [2d Dept 2006]. The essence of trespass is the invasion of a person's interest in the exclusive possession of land. Nominal damages are presumed from a trespass even where the owner of property has suffered no actual injury to his possessory interest. *Burger v Sing, supra* at p. 698. An action for trespass over the land of a property owner may not be maintained, however, where the purported trespasser has acquired an easement of way over the land in question. *Kaplan v Incorporated Village of Lynbrook*, 12 AD3d 410, 412 [2d Dept 2004].

The extent and nature of an easement must be determined by the language contained in the grant, aided where necessary by any circumstances tending to manifest the intent of the parties. *Town of Elmira v Hutchinson*, 53 AD3d 939, 940 [3rd Dept 2008]; *Raven Indus., Inc. v Irvine*, 40 AD3d 1241, 1242 [3rd Dept 2007] (internal quotation marks and citation omitted). Relevant to the determination of the extent of an easement is “any reasonable use to which it may be devoted, provided the use is lawful and is one contemplated by the grant.” *Town of Elmira v Hutchinson, supra* at p. 940. Whether the actions taken by defendant in installing metal pipes/conduits and underground wires on plaintiff's property, and the actions of the defendant Village in connecting said wires to the telephone pole located thereon, fall within the language of the recorded easements on which defendants McDonough and

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Village rely is a factual issue which cannot be resolved on the basis of the parties' submissions.

According to the testimony of the Deputy Village Administrator and Village Engineer² of Rockville Centre, at the time of the alleged trespass, no approvals were requested of, nor granted by, defendant Village or its Electric Department *vis-a-vis* the metal pipes and underground wires installed on plaintiff's property. The defendant Village maintains that it has been improperly dragged into this dispute between plaintiff, his neighbor and his neighbor's electrical contractor, inasmuch as defendant Village did not give defendant contractor permission to enter plaintiff's property and install the pipes at issue. Rather, defendant Village argues that its role was limited to inspecting the pipes/conduit and electrical wires installed by defendant McDonough and insuring that the installation complied with electrical code requirements, and connecting the wires at the top of the telephone pole in the easement areas. Defendant Village maintains that all of its actions fall within the authority granted to it by the express recorded easements permitting attachment of electrical service wires to the telephone pole located in plaintiff's backyard.

In light of the contradictory assertions of the parties, factual issues exist as to whether defendant McDonough was given permission by defendant Village to proceed as it did and whether McDonough's installation of the offending structures – and the actions of defendant Village in connecting the electrical power from the overhead lines to the metal pipes on plaintiff's property – constitute a trespass. These questions require resolution by the trier of fact. The contradictory deposition testimony of the various parties does not resolve these issues, nor does it clearly establish the relevance of the easements on which the parties rely to buttress the respective positions. As such, both defendants'

²Paul Pallas is still employed by the defendant Village. His title is now Electric Utility Superintendent.

applications are **denied**.


A motion pursuant to CPLR §4102(e) for an extension of time to file a demand for a jury trial must be based upon a factual showing that the earlier waiver of the right was the result of either inadvertence or other excusable conduct indicating a lack of intention to waive such right. *Caruso, Caruso & Branda, P.C. v Hirsch*, 60 AD3d 886 [2d Dept 2009]; *Fisher v RWSP Realty, LLC*, 53 AD3d 595, 597 [2d Dept 2008]; *Skelly v Sachem School Dist.*, 309 AD2d 917, 918 [2d Dept 2003]. Here, the note of issue certifying the case ready for trial was filed on or about January 1, 2011. Defendant McDonough has failed to make the required factual showing that its failure to serve a demand for a jury trial within fifteen days after service of the note of issue as required by CPLR §4102(a) was the result of inadvertence or other excusable conduct indicating a lack of intention to waive such a right.

Under the circumstances extant, and given the fact that plaintiff is 87 years old and received a trial preference, it cannot be said that plaintiff's rights would not be prejudiced if the court, in its discretion, granted the requested relief. As such, McDonough's request for an extension of time to file the jury demand is **denied**. It is hereby

ORDERED, that the parties are directed to appear for trial in DCM on June 2, 2011.

This constitutes the Decision and Order of the Court.

DATED: May 24, 2011
Mineola, N.Y. 11501

ENTER: 
HON. MICHELE M. WOODARD
J.S.C.

ENTERED

JUN 01 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE