

Zetterstrom v County of Saratoga
2011 NY Slip Op 34267(U)
June 1, 2011
Supreme Court, Saratoga County
Docket Number: 20083894
Judge: Stephen A. Ferradino
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SUPREME COURT
STATE OF NEW YORK

COUNTY OF SARATOGA

DEBORAH C. ZETTERSTROM in her capacity
as Co-Trustee of the Zetterstrom Family Trust,

Plaintiff,

- against -

DECISION and ORDER

RJI # 45-1-2010-1601

Index #20083894

THE COUNTY OF SARATOGA,

Defendant/Third-Party Plaintiff,

- against -

W.M. SCHULTZ CONSTRUCTION, INC.

Third-Party Defendant.

APPEARANCES

Deily Mooney & Glastetter, LLP
Attorneys for the Plaintiff
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Albany, New York 12203

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STEPHEN A. FERRADINO, J

2011 JUN -8 PM 2:15
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

The defendant has requested an order of this court to strike from plaintiff's verified bill of particulars and/or to dismiss all claims and/or causes of action contained in the bill of particulars and not set forth in plaintiff's notice of claim and supplemental notice of claim and precluding plaintiff from offering any evidence at the time of trial with respect to these claims and/or causes of action. Plaintiff opposes the motion and

brings a cross-motion seeking leave to amend her notice of claim and her verified complaint. Although there is both a notice of claim and a supplemental notice of claim, the information on the documents is the same. The only difference is a notarized acknowledgment on the second document. The court will therefore refer to the “notice of claim” as a term meaning both.

Defendant takes the position that plaintiff limited her pleadings by the notice of claim. That notice says that a trespass and laying waste of property occurred “on or about July 23, 2007”. Defendant’s demand for a bill of particulars asks “The date and approximate time of the occurrence”. Defendant now objects to plaintiff’s response designating not only July 23, but also July 24 and 25, 2007 as the operative dates.

The purpose of a notice of claim is to give the municipality an early opportunity to investigate the details of a claim. Here the notice of claim notes an “on or about” time frame. That the alleged acts may not have occurred exclusively on July 23, 2007 should not come as a surprise to the defendant. Its investigation of the claim should not have been hampered or prejudiced by the description in the notice of claim.

Defendant also faults plaintiff for failing to disclose RPAPL § 861 as a particular and specific claim in the notice of claim. Defendant’s queried in its demand for a bill of particulars as to which laws the plaintiff will claim defendant violated. Plaintiff at that point noted RPAPL § 861 which has provision for treble damages and attorney fees when the wrongful cutting of trees occurs. The notice of claim lays out that defendant’s agents trespassed, bulldozed and laid waste to plaintiff’s property in connection with the construction of a water utility pipe line. Furthermore in her 50-h testimony the plaintiff’s detailing of the trespass included the cutting of trees on the property. She

indicated that there was an “enormous pile of cut trees.”

Defendant maintains this is a new claim and that the defendant is surprised and prejudiced by the proposition that the plaintiff may seek treble damages and attorney fees under RPAPL § 861. Defendant cites *Friedland v County of Warren*, 61 AD2d 1138 [2009] as standing for the proposition that new claims and new causes of action are prohibited at the bill of particulars stage in the proceedings. In *Friedland* the Appellate Division gives no facts, but it does reflect on *Gagnon v City of Saratoga Springs*, 51 AD3d 1096 [2008]. The facts in *Gagnon* are widely distinguished from the case at bar. In *Gagnon* the plaintiff's notice of claim made note of a defective curb and poor lighting. In the plaintiff's complaint a new theory was presented, that being inadequate crowd control.

Here the plaintiff clearly had laid the foundation for its claim under the RPAPL in its notice of claim and amplified its notice in detail in the 50-h hearing. Zellerstrom's notice of claim identified for the defendant the date, the location and the nature of the project about which a trespass and damage was claimed. A brief internal investigation would likely have brought to light any cutting of trees on the property having allegedly been bulldozed and laid to waste. The plaintiff's claim under RPAPL § 861 cannot be categorized as a new claim or new cause of action. Rather, it is an amplification of the notice of claim and plaintiff's complaint that is properly identified in the plaintiff's bill of particulars in response to the defendant's demand for plaintiff's bill of particulars.

In its reply the defendant claims that there is no foundation for a claim under RPAPL § 861. Defendant relies on portions of plaintiff's 50-h testimony to support its position. Through select transcript excerpts, the defendant claims various points. Per

the defendant's recounting, the plaintiff testified that no further tree cutting or mowing occurred on July 24 or 25, 2007. Theoretically this negates the claim of trespass on those dates, but plaintiff testified that other trespass occurred on those dates. Therefore this issue remains open.

Per the defendant, the plaintiff also testified that the trespass was not intentional. A careful reading of the transcript yields otherwise. Plaintiff testified plainly that the trespass by the County's agents occurred when the County (wrongfully) gave permission to its agents. The comment about the trespass being "not intentional" taken in context indicates that the agents believed that the County had given adequate permission. The comment does not relieve the County of its potential liability under respondeat superior.

There is much questioning in the 50-h hearing about the County's rights under an easement. To the extent that there are "admissions," the Plaintiff continually qualified her 50-h hearing answers by noting that she did not have the easement "document in front of (her)." Additionally she repeatedly explained that certain legal concepts were better explained by her attorney. The record presented does not contain the language of the easement, or a map. Furthermore it does not provide any evidence that all of the alleged trespass occurred in the "easement." The argument advanced by the defendant that the undefined easement absolves it of liability is at best unpersuasive and at worst disingenuous.

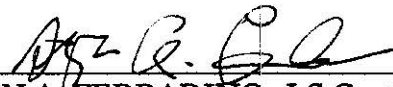
It is interesting to note that the defendant's demand for a bill of particulars is well suited for a personal injury action, asking such information as "the length of time the plaintiff was partially disabled" and "the length of time the plaintiff was confined to the hospital." Plaintiff did what she could to fashion meaningful responses to questions that

would be totally unrelated to a trespass action and destruction of property. Plaintiff now seeks leave of the court to amend her notice of claim and her complaint to eliminate the basis of defendant's current motion.

"Provided that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, leave to amend pleadings under CPLR 3025 (b) should be freely granted." *U.S. Fidelity and Guar. Co. v Delmar Development*, 22 AD3d 1017 [2005]; *Smith v Haggerty*, 16 AD3d 967, 967-968 [2005], quoting *State of New York v Ladd's Gas Sta.*, 198 AD2d 654, 654 [2003]. The court finds that there is no surprise or prejudice in the plaintiff's bill of particulars and therefore denies the relief sought by defendants. Furthermore the plaintiff's motion to amend is granted. Plaintiff may amend the notice of claim and complaint accordingly; that is plaintiff may include the dates July 24 and 25, 2007 and may note RPAPL § 861.

Any relief not specifically granted is denied. No costs are awarded to any party. The original decision and order shall be forwarded to the plaintiff for filing and entry. The underlying papers will be filed by the court.

Dated: June 1, 2011
Malta, New York


STEPHEN A. FERRADINO, J.S.C.

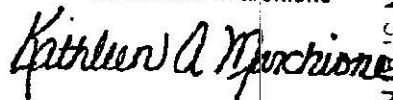
Papers Received and Considered:

Notice of Motion dated February 7, 2011

Affirmation of Jill E. O'Sullivan, Esq., affirmed February 7, 2011 with attached Exhibits A-D

Memorandum of Law dated February 7, 2011

ENTERED
Kathleen A. Marchione



Saratoga County Clerk

SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SP
NY

2011 JUN - 8 PM 2:15

ENTERED

Notice of Cross-Motion dated March 18, 2011

Affirmation of Alexander Powhida, Esq., affirmed March 18, 2011 with attached Exhibits A-D

Memorandum of Law in Opposition to Motion to Dismiss of Saratoga County and in Support of Cross-Motion to Amend the Notice of Claim and Complaint dated March 18, 2011

Reply Affirmation of Martin A. Cohen, Esq., affirmed March 28, 2011

Memorandum of Law dated March 28, 2011