

Feldman v Samcore Assoc., LLC

2014 NY Slip Op 31829(U)

July 9, 2014

Supreme Court, Suffolk County

Docket Number: 07-27582

Judge: Joseph A. Santorelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10/16/13 (#004, #005, #006)
MOTION DATE 1/15/14 (#007)
ADJ. DATE 3/25/14
Mot. Seq. #004 - MD
Mot. Seq. #005 - MD
Mot. Seq. #006 - MD
Mot. Seq. #007 - MD

-----X

PETER FELDMAN,

Plaintiff,

- against -

SAMCORE ASSOCIATES, LLC,

Defendant.

-----X

SAMCORE ASSOCIATES, LLC,

Third-Party Plaintiff,

- against -

MKL CONSTRUCTION CORP., RED'S SITE
DEVELOPMENT CORP. and VINCENTE
NIETO,

Third-Party Defendants.

-----X

ARTHUR L. ALEXANDER, P.C.
Attorney for Plaintiff
150 Broadway, Suite 1600
New York, New York 10038

AHMUTY, DEMERS & McMANUS, ESQS.
Attorney for Defendant
640 Johnson Avenue, Suite 103
Bohemia, New York 11716

ANTHONY B. TOHILL, P.C.
Attorney for Third-Party Defendant MKL Constr.
Corp.
12 First Street, P.O. Box 1330
Riverhead, New York 11901

BAXTER SMITH & SHAPIRO, P.C.
Attorney for Third-Party Defendant Red's Site
Dev. Corp.
99 North Broadway
Hicksville, New York 11801

WADE CLARK MULCAHY
Attorney for Third-Party Defendant Vincente
Nieto
111 Broadway, 9th Floor
New York, New York 10006

Upon the following papers numbered 1 to 85 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-31; 32-52; 53-63; 64-66; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 67-75; Replying Affidavits and supporting papers 76-77; 78-79; 80-83; 84-85; Other MKL's memorandum of law; Nieto's memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant/third-party plaintiff Samcore Associates, LLC for an order pursuant to CPLR 3212, (i) granting summary judgment dismissing the complaint and any and all counterclaims against it; or, in the alternative, (ii) granting summary judgment in its favor and against the third-party defendants for the relief demanded in the third-party complaint, is denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by third-party defendant Red's Site Development Corp. for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint, the third-party complaint, and all cross claims against it, is denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by third-party defendant MKL Construction Corporation for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint, the third-party complaint, and all cross claims against it, is denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by third-party defendant Vincente Nieto for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint, the third-party complaint, and all cross claims against him, is denied.

In this action, the plaintiff seeks injunctive relief and to recover damages for injury to his property resulting from excavation work undertaken by the defendant along the parties' common boundary line from May 2007 through July 2007. The plaintiff claims that in the course of the excavation, the defendant deposited soil onto the plaintiff's property along the entire length of the property line, thereby raising the grade of the plaintiff's property, lowering the grade of the defendant's property, and exposing the plaintiff to liability for damages caused by the flow of surface water onto the defendant's property. The defendant, by way of a third-party action, seeks judgment over against the third-party defendants, MKL Construction Corporation, Red's Site Development Corp., and Vincente Nieto. It appears that sometime prior to July 2007, MKL entered into a contract with the defendant to perform construction management services at the defendant's property. It also appears that MKL, in turn, hired Red's to perform site development work at the property, including land clearing and excavation, and hired Nieto to perform landscaping services at the property, including the installation of a privet hedge.

According to the plaintiff's deposition testimony, he was advised by a neighboring property owner sometime between May and July 2007 that the defendant was removing all the trees and

excavating along the property line and depositing the dirt on the plaintiff's property, all in connection with the construction of a driveway and the installation of landscaping and an irrigation system. A few days later, he visited the site and observed that substantial work was being performed on the defendant's property, that the excavation extended some 18 inches onto his property along the entire length of the property line and was up to four feet deep in some places, and that some of the excavation had been backfilled but that piles of dirt remained on his property. At that time, he asked Phillip Kouffman, MKL's vice-president, to build a retaining wall to mitigate potential erosion, but Kouffman refused to do so.

The plaintiff pleads two causes of action in his complaint. The first is for injunctive relief, preventing the defendant from further interfering with the plaintiff's property and directing that the defendant restore the property to its prior condition. The second, sounding in trespass, is for damages in the amount of \$250,000.00.

The defendant pleads three causes of action in its third-party complaint. The first is for common-law indemnification and contribution against each of the third-party defendants. The second is for contractual indemnification against MKL. The third, likewise against MKL, is for failure to procure insurance.

MKL pleads cross claims against Red's and Nieto for contribution and common-law indemnification.

Nieto pleads cross claims against MKL and Red's for contribution and contractual indemnification, as well as a counterclaim against the defendant for contribution and common-law indemnification.

Now, discovery having been completed and a note of issue having been filed on June 24, 2013, the defendant and third-party defendants separately and timely move for summary judgment.

To obtain summary judgment it is necessary that a party establish its cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]), and that it do so "by tender of evidentiary proof in admissible form" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]; accord *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). A party moving for summary judgment must satisfy its burden by demonstrating affirmatively, with evidence, the merit of its claim or defense rather than by merely pointing to gaps in its opponent's case (e.g. *Plotits v Houaphing D. Chaou, LLC*, 81 AD3d 620, 915 NYS2d 626 [2011]).

The defendant, in support of its motion, contends that the plaintiff's first cause of action fails to present a "justiciable controversy" and, moreover, that there is no validity to the plaintiff's claim of potential exposure to liability for damages caused by the flow of surface water onto the defendant's property. As to the plaintiff's second cause of action, the defendant contends that the plaintiff has produced no evidence of a trespass onto his property by anyone, and that even if there were proof of a trespass, there is no evidence that the plaintiff sustained any resulting damages. Relative to the third-

party complaint, the defendant contends that it is entitled to summary judgment on its claim for contractual indemnification against MKL based on certain language in the parties' construction management agreement, and on its claim for common-law indemnification on the ground that all of the work along the property line was performed by the third-party defendants.

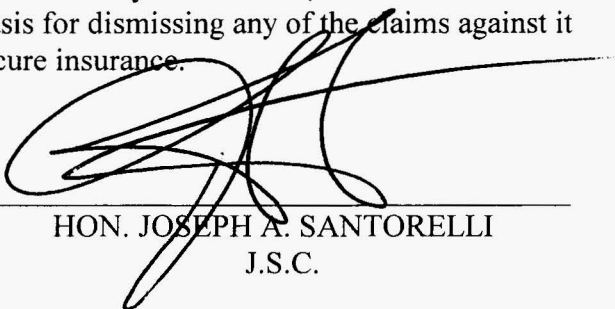
The defendant's motion is denied. Were the plaintiff, by way of his first cause of action, seeking to enjoin the defendant or future owners or possessors of the defendant's property from initiating lawsuits to recover damages sustained by the flow of water from the plaintiff's property onto the defendant's property, the court might well find the cause of action to be nonjusticiable as wholly speculative and abstract. But that is not the relief sought, and the defendant does not explain how the plaintiff's actual request for injunctive relief preventing further interference with his property and directing that it be restored to its prior condition fails to present a concrete justiciable controversy. The defendant's further claim that the plaintiff has no valid claim of potential exposure to liability for damages for water runoff likewise appears to stem from its mistaken belief as to the nature of the injunctive relief requested; as such, it is rejected as well. Although it may be that the plaintiff will not ultimately be able to prove the elements necessary for granting of the permanent and mandatory injunctive relief which he seeks, the court finds no basis in the record for an award of summary judgment at this juncture. As to the plaintiff's second cause of action, the court finds the defendant's evidentiary showing insufficient to demonstrate its entitlement to judgment as a matter of law. A defendant, as here, may not satisfy his burden on a summary judgment motion by demonstrating the perceived insufficiency of the plaintiff's proof (*George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 585 NYS2d 894 [1992]). Notably, a defendant may be held liable for trespass even if it did not enter the plaintiff's land; it is sufficient that the defendant caused or directed another person to enter (*e.g. Spellburg v South Bay Realty*, 49 AD3d 1001, 854 NYS2d 563 [2008]). The defendant's further claim that the plaintiff's own subsequent work on the property not only caused him injury far beyond that alleged in the complaint but also somehow "terminated" his claim for damages lacks both factual and legal support and would appear to have no bearing on the question of the defendant's liability for trespass. Regarding the third-party claim for contractual indemnification, it does not appear on this record that the defendant's attorney is competent to attest to the authenticity of what he claims to be the parties' construction management agreement; consequently, his affirmation does not properly serve as a vehicle to introduce such documentary evidence to the court (*cf. Zuckerman v City of New York*, *supra*). Nor is summary judgment warranted on the third-party claim for common-law indemnification, as there remains a question of fact whether and to what extent each of the third-party defendants was responsible for the plaintiff's alleged damages. "Summary judgment on a claim for common-law indemnity * * * is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (*La Lima v Epstein*, 143 AD2d 886, 888, 533 NYS2d 399, 401 [1988]). And notwithstanding the breadth of relief requested in its notice of motion, the defendant has offered no argument in support of its requests for summary judgment dismissing the counterclaim for contribution and common-law indemnification against it or in its favor on its third-party claim for contribution.

The third-party defendants, though moving separately, each raise similar if not identical arguments. As to the complaint, they raise the same arguments as those raised by the defendant in support of its motion, except that MKL contends additionally that the plaintiff's claims are not

actionable pursuant to the maxim *de minimis non curat lex* (the law does not concern itself about trifles); as to the third-party complaint and cross claims, they contend that there is no evidence of any agreement to indemnify or that any of them caused the plaintiff harm.

The third-party defendants' respective motions are denied as well. As to the complaint, it suffices to note that their arguments suffer generally from the same infirmities and misconceptions as defeated the defendant's motion, that an invasion of another's property need not be more than *de minimis* to constitute a trespass (*Standard Realty Assoc. v Chelsea Gardens Corp.*, 105 AD3d 510, 964 NYS2d 94 [2013]) and, in any event, that any question as to the extent of the trespass would relate not to liability but to damages, which is not an element of trespass (*Amodeo v Town of Marlborough*, 307 AD2d 507, 763 NYS2d 132 [2003]). Their arguments pertaining to the various claims for contractual indemnification, common-law indemnification, and contribution are also devoid of merit. To the extent that Red's seeks summary judgment dismissing the "third-party claims and cross claims" against it for contractual indemnification (despite the reference to multiple claims, it appears that the only party seeking contractual indemnification against Red's is Nieto), the court finds its argument that "[t]hroughout the course of discovery in this action, no party has produced an indemnification agreement that relates to work performed by Red's on [the defendant's] property" is plainly insufficient to warrant the granting of summary judgment. Similarly, as to the claims for common-law indemnification against it, while Red's cites the absence of evidence in the record that it committed any wrongdoing or that any alleged wrongdoing on its part resulted in harm to the plaintiff, it failed to demonstrate affirmatively that it did not commit a trespass. "Entering upon the land of another without permission, even if innocently or by mistake, constitutes trespass" (*Curwin v Verizon Communications [LEC]*, 35 AD3d 645, 827 NYS2d 256, 257 [2006]). Nor, with respect to the claims for contribution against it, may Red's be said to have met its burden of establishing that it did not owe the defendant a duty independent of its contractual obligations and that it did not owe a duty to the plaintiff, a breach of which contributed to his injuries (see *Fatirian v Monti's Holding*, 65 AD3d 1280, 885 NYS2d 763 [2009]; *Hites v Toys "R" Us*, 33 AD3d 759, 822 NYS2d 624 [2006]). The foregoing analysis applies equally to the arguments raised by MKL and Nieto, who do little more than incorporate the allegations and attachments in the other motions and whose submissions suffer from the same evidentiary deficiencies; it is also evident that MKL has failed in its moving papers to articulate a basis for dismissing any of the claims against it based on contractual indemnification or failure to procure insurance.

Dated: JUL 09 2014



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION