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| <b>Silverman v Doell</b>                                                                                                                                                                                                                                         |
| 2014 NY Slip Op 33242(U)                                                                                                                                                                                                                                         |
| December 17, 2014                                                                                                                                                                                                                                                |
| Supreme Court, Madison County                                                                                                                                                                                                                                    |
| Docket Number: 2012-1626                                                                                                                                                                                                                                         |
| Judge: Eugene D. Faughnan                                                                                                                                                                                                                                        |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

At a Motion Term of the Supreme Court of the State  
of New York held in and for the Sixth Judicial  
District at the Madison County Courthouse,  
Wampsville, New York, on the 24<sup>th</sup> day of October,  
2014.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : MADISON COUNTY

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DAVID SILVERMAN,  
and  
ANN S. ROTHSCHILD, formerly known as  
ANN B. SILVERMAN

Plaintiffs,

-VS-

GERALD DOELL,

Defendant.

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DECISION AND ORDER

Index No. 2012-1626  
RJI No. 2013-0300-M

APPEARANCES:

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**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court on a motion by Gerald Doell (“Defendant”) for Summary Judgment pursuant to CPLR §3212 as against David Silverman and Ann Rothschild (“Plaintiffs”).

This matter was commenced by the filing of a Verified Complaint on August 6, 2012. An Amended Verified Complaint was filed on August 22, 2014. An Amended Answer was served but not filed.

Plaintiffs seeks damages for the alleged diversion of water from Defendant’s property onto their property. Defendant’s counterclaim for an implied easement, easement by prescription, trespass, injury to private property and intentional infliction of emotional distress.

The Court received and reviewed the following submissions with regard to this matter: Defendant’s motion for summary judgment with Affirmation of Mario D’Arrigo, Esq. dated September 10, 2014; affidavit of Gerald A. Doell dated September 12, 2014; affidavit of Robert J. Kukenberger dated August 6, 2014, with Exhibits, and Memorandum of Law; Plaintiffs’ response to motion with affidavit of David Silverman dated October 16, 2014; affidavit of Andrew Watkins dated October 16, 2014; attorney affidavit of Franklin A. Josef, Esq. dated October 16, 2014, and attached Exhibits; Reply Affidavit of Gerald Doell dated October 21, 2014 and Reply Affirmation of Mario D’Arrigo, Esq. dated October 21, 2014.

The basic facts are not in dispute. Plaintiffs and Defendant own properties in the Town of Cazenovia, Madison County, New York. Plaintiffs’ property is at 1100 Marlyn Park Drive and is located on Cazenovia Lake. Defendant’s Property is at 1030 Marlyn Park Drive and is located uphill and west of Plaintiff’s property. Marlyn Park Drive runs between the two subject

properties. There is a culvert under Marlyn Park Drive which begins at Defendant's property and runs to Plaintiffs' property. Since at least the mid 1970s, there has been some sort of culvert between the two properties which drained water from Defendant's property to Plaintiffs' property.

The Defendant alleges that Plaintiffs inserted a four inch flexible drain pipe in the culvert and otherwise narrowed the culvert thereby limiting the flow of water. Defendant alleges that this narrowing has also resulted in increased blockages thereby further limiting the flow of water from his property causing parts of his yard to be unuseable during periods surrounding heavy rains. To attempt to address the problem, Defendant created a water retaining area in the area adjacent to the culvert thereby allowing water to collect in one area of his yard and ultimately drain through the culvert.

Plaintiffs allege that in creating this retaining area, Defendant moved 25 cubic yards<sup>1</sup> of soil and utilized the soil removed from the retention area to re-grade his property thereby increasing the total amount of water which flows through the culvert and onto Plaintiffs' property and into a french drain on their property. Plaintiffs' argue that this creates larger areas of ponding on his property causing more of his property to be unuseable during periods of heavy rain.

When seeking summary judgment, the movant must make a *prima facie* case showing its entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. *Amedure v. Santard Furniture Co.*, 125 AD2d 170 (3<sup>rd</sup> Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3<sup>rd</sup> Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3<sup>rd</sup> Dept. 2001); *Sheppard-Mosely v. King*, 10 AD3d 70, 74 (2<sup>nd</sup> Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v.*

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<sup>1</sup>Defendant admits to excavating 17 cubic yards of soil.

*New York Univ. Ctr.*, 64 NY2d 851, 853 (1985).

Defendant submitted an affidavit from Robert J. Kukenberger (“Kukenberger”), a licensed civil engineer and neighbor of the parties. Kukenberger is familiar with the property and the drainage issues surrounding the culvert under Marlyn Park Drive. He confirms that over time, the culvert has become obstructed with roots and debris limiting the flow of water between the properties. Kukenberger is also familiar with Defendant’s excavation and confirmed that it improved drainage on Defendant’s property. He opines that the retention area created by Defendant does not affect the total amount of water flowing onto Plaintiffs’ property but rather collects it into a single area and retains it until it can pass through the culvert. This creates an area for 3,400 to 5,000 gallons of water to accumulate while reducing areas in Defendant’s lot that are saturated with water.

Assuming, without finding, that Defendant has presented a *prima facie* case for summary judgment, it is clear that the Plaintiff has submitted sufficient proof that there are triable issues of material fact precluding a summary finding. Plaintiff submitted an affidavit of Andrew Watkins (“Watkins”), a licensed professional engineer, in opposition to the Defendant’s motion. Watkins describes the retention area located on Defendant’s property and noted the alleged re-grading of Defendant’s property. Watkins opined that the re-grading increases the amount of water distributed from Defendant’s property to Plaintiffs’ property. Watkins further opines that Defendant’s failure to include erosion controls and screening devices to prevent leaves and foreign objects from flowing into the french drain located on Plaintiffs’ property increases the likelihood of debris clogging and failure of the drain flooding on Plaintiffs’ property.

The Court notes that Defendant disputes the opinion of Defendants’ expert. However, whether Defendant’s actions increased the volume of water diverted onto Plaintiffs’ property or creates conditions detrimental to the operation of the french drain are factual issues reserved to the finder of fact. The Court finds that Plaintiffs’ have provided sufficient evidence as to the existence of

material issues of fact. As such, Defendant's motion for Summary Judgment is **denied**.  
For the reasons stated herein, all other requests not specifically addressed are likewise **denied**.

Dated: December 17, 2014  
Wampsville, New York



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HON. EUGENE D. FAUGHNAN  
Supreme Court Justice