

Behar v Quaker Ridge Golf Club, Inc.

2015 NY Slip Op 32886(U)

July 6, 2015

Supreme Court, Westchester County

Docket Number: 11594/2010

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 7-6-2015 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF WESTCHESTER PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

FILED JUL 06 2015

TIMOTHY C. IDONI COUNTY CLERK COUNTY OF WESTCHESTER

-----X LEON BEHAR and GAIL BEHAR,

Plaintiff,

Index No. 11594/2010

-against-

DECISION & ORDER

QUAKER RIDGE GOLF CLUB, INC.,

Defendant.

-----X

The following papers numbered 1 to 7 were read on plaintiff's motion to restore the matter to the calendar and to direct a hearing be held on an assessment of damages.

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits _____	1-3
Affidavit in Opposition/Exhibits _____	4-5
Reply Affirmation/Exhibits _____	6-7

Factual and Procedural Background

Plaintiffs commenced this action seeking to permanently enjoin defendant from permitting play at the second hole of defendant golf course. The complaint alleges nuisance, trespass and negligence and relates the intrusion of golf balls onto their property which abuts defendant's golf course. Plaintiffs own one of a number of homes which abut defendant's golf course in the Village of Scarsdale. They contend that between November 2007, when they bought their home, and the Spring of 2008, they enjoyed the full use of their backyard, observing only the occasional golf ball on the perimeter of their property. As spring of 2008 turned to summer, plaintiffs constructed a swimming pool and a swing set on their property. They also endured a storm in June 2008 which brought down a number of tall trees on the periphery of the golf course on or near their property line.

Unfortunately, without the natural screening of the trees, the number of golf balls landing on plaintiffs' property increased as did the number of golfers seeking to reclaim their errant golf balls. Plaintiffs therefore erected a fence on their property as well as a 25-foot safety net to stop the incursion of golf balls landing on their property. Since plaintiffs brought this action, defendant received authorization to erect a 40-foot safety net on defendant's property along the property line. This replaces the 25-foot net which plaintiffs took down in the autumn of 2010. In addition to the new 40-foot safety net now in place, defendant is also in the process of planting 15 30-35 foot trees in front of the new net to provide additional landscape screening.

By order dated January 24, 2011, the Court (Murphy, J.) denied plaintiffs' application for a preliminary injunction finding that plaintiffs did not sustain their burden of establishing irreparable harm. Further, in balancing the equities the Court noted "plaintiffs were not surprised by the presence of a golf course next to them, and that they have not yet replaced the trees in their backyard which also provided screening from the balls."

By order dated July 14, 2011, the Court (Murphy, J.) denied plaintiffs' motion for leave to renew their motion for a preliminary injunction.

By Decision and Order dated May 1, 2012, the Appellate Division, Second Department affirmed the motion court's orders.

By Decision and Order dated July 5, 2012, this Court granted defendant's motion for summary judgment dismissing the complaint, granted defendant's application to direct that plaintiffs' comply with the tree preservation plan, and denied plaintiffs' cross motion for a permanent injunction, summary judgment on liability and summary judgment dismissing the first counterclaim.

By Decision and Order dated June 18, 2014, the Appellate Division Second Department reversed this Court's July 5, 2012 decision and order. The Appellate Division denied defendant's motion to dismiss and granted plaintiff's cross motion for a permanent injunction and for summary judgment on liability. In their appellate brief, on page 57, plaintiffs also asked the Appellate Division for an order "directing that the matter be remitted to Supreme Court, Westchester County for an assessment of damages on [plaintiffs'] nuisance, negligence and trespass causes of action. The Appellate Division, however, made no such direction and did not address this request in its decision.

On July 17, 2014, plaintiffs' filed a "Judgement of Reversal" with the Westchester County Clerk's Office. The Clerk struck the provision of that judgment which stated "ORDERED, that the within action be restored to the calendar of the Supreme Court, Westchester County, for an assessment of damages;"

In October 2014, plaintiffs made a motion to the Appellate Division, Second Department, pursuant to CPLR 5019 seeking a correction of the June 18, 2014 decision. The plaintiffs argued that the Appellate Division had improperly omitted language directing

that the case be restored for an assessment of damages. Defendant opposed this application.

On January 21, 2015, the Appellate Division, Second Department, denied the motion without explanation.

Thereafter, plaintiffs twice moved for leave to appeal the Appellate Division's January 21st denial of its motion to correct the June 18, 2014 order.

The Court of Appeals denied each of plaintiff's applications on the ground that the order appealed is not considered a final determination pursuant to the Constitution.

Plaintiffs bring this motion to restore the matter to the calendar. In support of this motion plaintiffs argue that they are entitled to a hearing on damages on the ground that their claim for damages was raised in their complaint, in their cross motion for summary judgment and in their appeal.

In opposition, defendants argue each of plaintiffs' attempts to have this matter restored to the calendar for an assessment of damages has been denied. Defendant argues that while plaintiffs were granted an injunction they were not granted the relief of money damages.

Discussion

CPLR §5524 Rule 5524. **Entry of order; remittitur and further proceedings** provides:

(a) Entry of order in appellate court. An order of a court to which an appeal is taken shall be entered in the office of the clerk of that court.

(b) Remittitur and further proceedings. A copy of the order of the court to which an appeal is taken determining the appeal, together with the record on appeal, shall be remitted to the clerk of the court of original instance except that where further proceedings are ordered in another court, they shall be remitted to the clerk of such court. **The entry of such copy shall be authority for any further proceedings.** Any judgment directed by the order shall be entered by the clerk of the court to which remission is made.(Emphasis added)

Here, it is undisputed that the June 18, 2014 decision and order of the Appellate Division made no direction that the matter be remitted for further proceedings in the Supreme Court. Further, plaintiffs' motion to correct the order to add such a direction was denied. The Court notes that while plaintiff sought an assessment on damages in its

complaint, cross motion and appeal, the Appellate Division did not address that request.

In view, of this determination by the Appellate Division, this Court has no power to restore this matter to the calendar and direct an assessment on damages.

Accordingly, plaintiffs' motion is DENIED.

Dated: White Plains, New York
July 6, 2015



HON. WILLIAM J. GIACOMO, J.S.C.

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