

**Sedden v Postigo**

2019 NY Slip Op 34233(U)

October 19, 2019

Supreme Court, Monroe County

Docket Number: E2017001828

Judge: J. Scott Odorisi

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STATE OF NEW YORK  
SUPREME COURT            MONROE COUNTY

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MICHAEL SEDDEN, and  
JOSEPHINE SEDDEN,

Plaintiffs,

-vs-

AMY POSTIGO,

Defendant.

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Index#: E2017001828  
{Action # 1}

AMY POSTIGO,

Third-Party Plaintiff,

-vs-

WOODSTONE EARTH CONSTRUCTION, INC.,

Third-Party Defendant.

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MICHAEL SEDDEN, and  
JOSEPHINE SEDDEN,

Plaintiffs,

-vs-

WOODSTONE EARTH CONSTRUCTION, INC.,  
IW CONSTRUCTION, and  
DSB ENGINEERING & ARCHITECTS, P.C.,

Defendants.

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Index#: E2019003419  
{Action # 2}

Special Term  
August 27, 2019

-2-

APPEARANCES

Walter Capell, Esq.  
*Attorney for Plaintiffs*

Steven Curvin, Esq.  
*Attorney for Postigo*

Matthew Duggan, Esq.  
*Attorney for Woodstone*

Valerie Barbic, Esq.  
*Attorney for IW*

Mark Young, Esq.  
*Attorney for DSB*

**JOINT DECISION AND ORDER**

**Odorisi, J.**

These two related lawsuits arise out of the same property damage dispute. Pending before this Court are the following:

1. *Action # 1* - Plaintiffs' motion to compel continued depositions and forensic E-discovery [NYSCEF Docket # 18 - Motion # 1].
2. *Action # 1* - Plaintiffs' joinder motion [Docket # 69 - Motion # 2].
3. *Action # 2* - Defendant Woodstone Earth Construction, Inc.'s pre-answer dismissal motion [Docket # 10 -Motion # 1].
4. *Action # 2* - Defendant DSB Engineering and Architects, P.C.'s dismissal motion [Docket # 32 -Motion # 2].
5. *Action # 2* - Plaintiffs' joinder motion [Docket # 18 - Motion # 3].
6. *Action # 2* - Defendant IW Construction's dismissal motion [Docket # 63 - Motion # 4].

Based upon a review of:

\* *Action # 1 - Motion # 1*: Docket #'s 18-19 and 39-62 submitted by Plaintiffs in support of their discovery motion; Docket #'s 24-31 submitted by Defendant Postigo in opposition to the discovery motion; Docket #'s 37-38 submitted by Defendant Woodstone

-3-

in opposition; and, Docket #'s 64-67 submitted by Plaintiffs in further support of their motion;

\* *Action # 1 - Motion # 2:* Docket #'s 69-81 submitted by Plaintiffs in support of their joinder motion; Docket # 84 submitted by Defendant Postigo in opposition to the joinder motion; and, Docket # 85 submitted by Plaintiffs in further support of their motion.

*Action # 2 - Motion # 3:* Docket #'s 18-30 submitted by Plaintiffs in further support of their joinder motion;

\* *Action # 2 - Motion # 1:* Docket #'s 10-13 submitted by Defendant Woodstone in support of its dismissal motion; Docket #'s 37-47 submitted by Plaintiffs' in opposition to the dismissal motion; and, Docket #'s 70-71 submitted by Defendant in further support of its motion;

\* *Action # 2 - Motion # 2:* Docket #'s 32-33 submitted by Defendant DSB in support of its dismissal motion; and, Docket #'s 49-59 submitted by Plaintiffs' in opposition to the dismissal motion;

\* *Action # 2 - Motion # 3:* Docket #'s 63-69 submitted by Defendant IW in support of its dismissal motion; and, Docket #'s 72-75 submitted by Plaintiffs' in opposition to the dismissal motion; and, Docket # 76 submitted by Defendant in further support of its motion; and, upon oral argument heard at Special Term, this Court hereby:

1. **GRANTS** Plaintiffs' discovery motion.
- 2&5. **GRANTS** both of Plaintiffs' joinder motions.
3. **GRANTS** Woodstone's dismissal motion.
4. **DENIES** DSB's dismissal motion.

-4-

6. **DENIES IN PART AND GRANTS IN PART** IW's dismissal motion.

## **LAWSUIT FACTS**

### ***Background Information***

Plaintiffs reside at 1576 Lake Road, Webster. Defendant Amy Postigo ("Postigo") lives next door to the east. Both properties are on Lake Ontario's southern shoreline.

In 2008, Postigo hired Defendant DSB Engineers & Architects, P.C. ("DSB") to design, and in the late Spring of 2014 retained Third-Party Defendant/Defendant Woodstone Earth Construction, Inc. ("WEC") to install, a multi-tiered, gabion-basket retaining wall system across her yard. As part of that project, it is alleged that Postigo instructed DSB and/or WEC employees to trespass on Plaintiffs' land to remove considerable vegetation and shift some soil. This initial structure later began to fail so in December of 2015, Postigo hired Defendant IW Construction ("IW") to remedy the same by building a sheet piling bulkhead, allegedly without New York State Department of Environmental ("DEC") approval, and again with purported trespasses onto Plaintiffs' land. In 2016, there was signs of minor erosion of the northeast corner of Plaintiffs' property. On December 16<sup>th</sup>, the DEC allegedly cited Postigo for building the bulkhead in violation of the Environmental Conservation Law ("ECL"). Thereafter, and in 2017, the same corner of Plaintiffs' property collapsed in a giant landslide, allegedly due to excess water erosion caused by the various work on Postigo's own land.

### ***Procedural History***

The First Action [Index # E2017001828] for negligence and trespass against only Postigo was commenced on August 31, 2017 [Action # 1 - Docket # 40]. After some

-5-

amended pleadings, discovery ensued but is not yet complete [Docket #'s 26-29, 45, 49, 50-61, 68]. On January 16, 2019, Postigo started a third-party action against WEC [Docket #'s 62].

On April 12<sup>th</sup>, Plaintiffs started the Second Action [Index # E2019003149] against WEC, DSB, and IW for trespass and negligence - with a referenced ECL § 15-0701 violation [Action # 2 - Docket #'s 12 & 26]. IW and DSB answered denying liability and raising the statute of limitations as affirmative defenses [Docket #'s 29 & 67]. No discovery has taken place in the Second Action.

### ***Brief Summary of Motion Contentions***

#### ***1. Plaintiffs' Discovery Motion - Action # 1, Motion # 1***

By way of a motion filed February 1<sup>st</sup>, Plaintiffs seek an order compelling continued depositions, and also directing access to Postigo's computers for a forensic search.

Postigo opposes the motion on the basis that Plaintiffs' discovery demand was overly broad, and also that she need not be re-deposed as the items were produced. Nevertheless, Postigo provided a "Privilege Log" of 2018 e-mails with the DEC concerning her property [Docket # 29 & *In Camera* paper submission]. Postigo also submitted an affidavit from herself and her husband explaining that their electronic devices are work ones for a medical office on which confidential medical information are stored.

WEC opposes the motion because no stipulation for a continued deposition was secured before Mr. James Norman's ("Norman") deposition was concluded.

Plaintiffs reply that the newly filed Second Action [as well as the third-party action] warrant a new round of depositions, and the forensic search by D4 can be done to protect any medical information.

-6-

*2&5. Plaintiffs' Joinder Motions - Action # 1, Motion # 2 and Action # 2, Motion # 3*

On June 10<sup>th</sup>, Plaintiffs filed identical joinder motions in each Action due to common questions of fact and law.

Postigo opposed the joinder because it was premature when the Second Action was time-barred, and she had already been subjected to substantial discovery.

No Defendant in the Second Action filed an opposition.

Plaintiffs refute that their joinder requests are premature.

*3. WEC's Dismissal Motion - Action # 2, Motion # 1*

Instead of answering, and on May 31<sup>st</sup>, WEC moved to dismiss arguing that its work ended on October 7, 2015, outside of the three-year limitations period.

Plaintiffs opposed the motion as ECL § 15-0701 (8) sets the statute of limitations from the discovery of the harm, which for them was in June of 2017. Plaintiffs further suggest a continuing trespass. Plaintiffs submitted an Affidavit from Robert L. Keiffer ("Keiffer") - a civil engineer - who opined that the addition of the gabion basket structures "changed" the banks of Lake Ontario thereby triggering the tolling provision of Section 15-0701 (8). Keiffer then explained that the baskets negatively impacted water quality, and allowed surface water to collect and erode Plaintiffs' property. Keiffer also concluded that the later addition of the sheet piling modified the lake waves redirecting them to Plaintiffs' property and thereby causing erosion.

WEC replied that ECL § 15-0701 was inapplicable, and also that its work did not alter the Lake as its construction was confined to the land above the actual water line.

-7-

*4. DSB's Dismissal Motion - Action # 2, Motion # 2*

On June 17<sup>th</sup>, DSB also moved to dismiss based upon the statute of limitations as its work finished more than three years prior to commencement.

Plaintiffs' opposition is identical to that filed in regard to WEC's motion. However, Plaintiffs add that the allegations concerning the timing of DSB's work from their attorney is insufficient.

*6. IW's Dismissal Motion - Action # 2, Motion # 4*

On August 6<sup>th</sup>, IW moved to dismiss based upon the same statute of limitations issue when its work ended in 2015.

Plaintiffs opposed the motion on the same grounds as already raised in the other motions, and specifically cite to the sheet piling work as a lake alteration for which the DEC issued a citation. Plaintiffs also submit photos showing that the baskets and piling are now on their property.

IW replied that the pleadings limited the trespass to the initial construction work, and any current encroachment by the equipment is by Postigo, not them. Also, IW asserts that the Complaint does not set forth a viable ECL claim.

**LEGAL DISCUSSION**

***1. Plaintiffs' Discovery Motion***

Plaintiffs are entitled to their discovery relief. See CPLR 3124; In re Estate of Morningstar, 17 AD3d 1060 (4th Dept 2005) (affirming grant of CPLR 3124 motion to compel discovery).

-8-

The CPLR provides that “[t]here shall be **full disclosure** of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” CPLR 3101 (a) (emphasis added). What is “material and necessary” must be “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” Town of Pleasant Val. v. New York State Bd. of Real Prop. Services, 253 AD2d 8, 15-16 (2d Dept 1999) (citing Allen v. Crowell-Collier Pub. Co., 21 NY2d 403, 406-407 (1968)). Given this broad standard, a trial court is vested with considerable discretion to supervise discovery. See DeLeon v. State, 52 AD3d 1282 (4th Dept 2008). See also CPLR 3104 (a).

As to depositions, given that some new information and/or documents have come to light, this Court sees no legal prohibition to renewed depositions by Plaintiffs. See e.g. Bergerstock v. Auburn Mem. Hosp., 12 AD3d 1034 (4th Dept 2004) (reversing and granting motion to compel). A formal agreement may not have been secured per CPLR 3113 (b), but Plaintiffs reserved their right to recall Norman [Docket # 50, p. 146]. Also, and because a third-party action has now been started, both Defendant and Norman could be deposed in regard to that, so further questioning by Plaintiffs is not unreasonable given this specific context, not to mention the Second Action.

In regard to the forensic E-discovery of Postigo’s computer[s]/device[s], and after consideration of the Sedona Principles, this Court finds that it is appropriate. Postigo does not dispute that relevant information may be on the computer[s]/device[s], but objects only to the fact that the same are her husband’s medical’s office’s equipment and have HIPPA

-9-

information on them.<sup>1</sup> Plaintiffs' proposed forensic professional - D4 - has adequate protections to prevent the release of private medical information.

Finally, and as to Postigo's DEC communications per the March 1, 2019, Privilege Log [Docket # 29], none of those items are truly privileged, or otherwise protected, so Defendant must disclose the same.<sup>2</sup> See CPLR 3101 (b)-(c) & 3103 (a); Carella v. King, 198 AD2d 567, 569 (3d Dept 1993) (affirming order denying motion for a protective order).

In sum, Plaintiffs are awarded their full discovery application.

### **3-6. Second Action Defendants' Dismissal Motions**

Not all Defendants are entitled to a full scale dismissal. See CPLR 3211 (a) (5).

Plaintiffs' designated causes of action in the Second Action are for trespass and negligence [Docket # 27, ¶¶ 47-99]. Both claims, which deal with injury to property, have a three-year statute of limitations. See CPLR 214 (4). Section 214 (4) is the basis of all of the Second Action Defendants' motions which allege cessation of work more than three years prior to commencement. A defendant who invokes the statute of limitations bears "the burden of proving that the proceeding is time-barred.." Davis v. Kingsbury, 27 NY2d 567, 571 (1970) (dissent).

To start, and as Plaintiffs properly contend, DSB's motion is premised upon only an attorney's affirmation without first-hand proof from the client as to when its work stopped. As Plaintiffs argue, the attorney's timing allegations are hearsay. This is an insufficient

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<sup>1</sup> As Postigo apparently used the company equipment for personal matters, the ownership of the same and HIPPA must not be employed as a shield to block Plaintiffs' limited access to relevant information thereon.

<sup>2</sup> Mention was made at oral argument of a purported separate *in camera* submission of records between Postigo's counsel and WEC, but Chambers never received the same, so a ruling on the same cannot be made at this time.

-10-

factual predicate on which to award the extreme benefit of a wholesale dismissal. See e.g. Edwards v. Coughlin, 191 AD2d 1044 (4th Dept 1993) (the defendants' proof - an attorney affirmation not based upon personal knowledge - failed to establish that the statute of limitations had elapsed). DSB did not submit a reply addressing this issue. Accordingly, and regardless of the eventual merits of the common statute of limitations defense, DSB is not entitled to a dismissal on the motion record before this Court.

As to the remaining defendants - WEC and IW - the statute of limitations issue is more complex. The disposition of those motions revolve around the potential application of the ECL, and in particular, Section 15-0701. The relevant subdivisions of that Section provides that:

1. An alteration (whether or not it causes water to cover or permeate land previously dry) in the natural flow, quantity, quality or condition of a natural watercourse or lake situated in this state and either on or below the surface of the earth, effected by the use either on or off riparian land, withdrawal, impoundment, or obstruction of the water in such watercourse or lake, or by the addition of water thereto, or by changes in the banks, bed, course or other physical characteristics of such watercourses or lake, is reasonable and lawful as against any person, as defined in subdivision two of section 15-0107, having an interest in such watercourse or lake, unless such alteration is causing harm to him or it, or would cause him or it immediate harm if and when begun.

5. Nothing contained in this section shall, however, be construed as depriving any person or corporation having an interest in such watercourse or lake of any remedy either at law or in equity which he now has, or may hereafter acquire, under the law of this state for **harm caused him by an unreasonable alteration in the natural condition** of such a watercourse or lake, regardless of whether such alteration was harmful and unreasonable from its initiation **or subsequently became so.**

-11-

8. Notwithstanding any other provision of this section, **if the harm resulting** from an unreasonable alteration of the natural condition of such a natural watercourse or lake is one which would **not ordinarily be noticeable by an owner of land** actually present thereon, **no statute of limitations shall begin to run against any cause of action referred to in subdivisions** four and five of this section **until the party harmed is fairly chargeable with knowledge that he has been harmed.**

ECL § 15-0701 (1), (5), (8) (emphasis added).

Plaintiffs invoke the foregoing provisions, on which there is only one case (see Hoffman v. Appleman, 120 AD2d 493 (2d Dept 1986) (case was not barred by the statute of limitations)), to salvage their claims from dismissal based upon the 2016 catastrophic collapse of a corner of their property.

The beginning analysis is whether an ECL claim is even before this Court, as Defendants assert. Plaintiffs' Summons with Notice cites a violation of ECL § 15-0701 [Docket # 26]. Additionally, and although not designated under a distinct cause of action heading, Plaintiffs raise ECL allegations in connection with their negligence claims [Docket # 27, ¶¶ 61, 77 & 98]. As this Court is bound to liberally interpret pleadings (see CPLR 3026), there are ample allegations on which to sustain an ECL violation, albeit perhaps inartfully drafted. See generally Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977); Syracuse Indus. Dev. Agency v. Gamage, 77 AD3d 1353, 1354 (4th Dept 2010). Therefore, this Court must next decide if Section 15-0701 (8) applies to the negligence causes of action involving WEC and IW.

As to WEC, Plaintiffs allege that its work disturbed the yard soil and vegetation and did not have ample erosion control [Docket # 27, ¶¶ 33 & 56 ; see also Docket # 22 {First

-12-

Action Complaint} ¶¶ 14, 18 & 25]. This initial theory of liability comports with WEC's position that it installed the gabion baskets exclusively on the land, not the shoreline, so it did not alter the lake itself. In response to the dismissal motion, Plaintiffs shift strategies and use Keiffer to tie poor lake water quality to increase storm and surface water run off caused by the baskets.<sup>3</sup> However, Plaintiffs' lawsuit is not about diminished lake water quality, but lost use and enjoyment and decreased property value due to the collapse [Docket # 27, ¶ 60]. Simply put, and even crediting Keiffer conclusion, there is still a disconnect that prevents the application of ECL § 15-0701 (8)'s longer statute of limitations. Consequently, the hybrid negligence/ECL claim against WEC is untimely.

On the other hand, and in regard to IW, it placed the sheet piling at the bottom of the slope at the actual lake shore. Unlike WEC more uphill and confined work, IW's waterline construction impacted the lake itself, as evidence by the alleged DEC citation. Furthermore, Keiffer's expert opinion about the altered wave action stands un rebutted. This claimed direct change of the lake's shoreline arguably triggers Section 15-0701 (8), and in turn, makes the negligence claim against IW timely.

Unlike the ECL/negligence claim, the trespass claims do not get the benefit of Section 15-0701's tolling provision. In seeming recognition of this, Plaintiffs try to rescue their trespass claims by invoking a continuing trespass theory of liability. As to this theory, the Court of Appeals has decreed that:

'certain cases such as nuisance or continuing trespass where the harm sustained by the complaining party is **not exclusively traced to the day when the original**

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<sup>3</sup> Surface water run off is not a qualifying "watercourse." See ECL § 15-0107 (4); Jeffers v. Jeffers, 107 NY 650, 651 (1887).

-13-

**objectionable act was committed.** The rule is based on the principle that continuous injuries create separate causes of action barred only by the running of the statute of limitations against each successive trespass. The repeated offenses are treated as separate rights of action and the limitations period begins to run as to each upon its commission'

Capruso v. Vil. of Kings Point, 23 NY3d 631, 639 (2014) (internal citation omitted and emphasis added). See also Bloomingdales, Inc. v. New York City Tr. Auth., 13 NY3d 61, 66 (2009); Scheg v. Agway, Inc., 229 AD2d 963, 964 (4th Dept 1996).

Plaintiffs insist on a continuing trespass due to the baskets and sheet piling have collapsed onto their property. This may be true, but this Court fails to gleam how this post-construction development is chargeable against WEC and IW as the installers who have no ability to access the area to remediate the condition. More specifically, only Postigo is in the position to remedy the current encroachment which emanates from her property. Plaintiffs' case of Sova v. Glasier, 192 AD2d 1069 (4th Dept 1993) does not support their continued trespass claims [Docket # 48, p. 7]. In Sova, a newly built garage crossed the property boundary and drew a lawsuit by the impacted landowner against his neighbor. Sova thus undermines Plaintiffs' continuing trespass claims against WEC and IW as it shows that the exclusive remedy is against the offending property owner who has the exclusive authority to control items stemming from her land.

In all, DSB must stay in the entire case, and IW too for a negligence/ECL cause of action only.

#### ***2&5. Plaintiffs' Joinder Motions***

Plaintiffs are entitled to a joint discovery and trial process. See CPLR 602 (a); Williams v. Mascitti, 71 AD2d 813 (4th Dept 1979) (ordering joint trial).

-14-

Plaintiffs are correct that these two lawsuits revolve around the same core facts and legal issues. See e.g. Zimmerman v. Mansell, 184 AD2d 1084 (4th Dept 1992) (reversing denial of motion to combine three cases all stemming from the same incident). In opposition, Postigo - the only defendant to file a response - failed to show prejudice to a substantial right. See e.g. Del Bello v. Wilmot, 59 AD2d 1023 (4th Dept 1977) (appellants failed to meet their burden of establishing any resulting prejudice).

In sum, these two lawsuit will proceed together jointly, but will retain their separate Index Numbers. See e.g. Held v. Ball, 123 AD2d 507, 508 (4th Dept 1986) (reversing and combining four cases involving the same accident for a joint trial).

#### CONCLUSION

Based upon all of the foregoing, it is the Decision and Order of this Court that:

1. **GRANTS** Plaintiffs' discovery motion.
- 2&5. **GRANTS** both of Plaintiffs' joinder motions.
3. **GRANTS** WEC's dismissal motion.
4. **DENIES** DSB's dismissal motion.
6. **DENIES IN PART AND GRANTS IN PART** IW's dismissal motion. The negligence/ECL claim against IW may proceed, but the trespass claim may not.

#### *Joint and Amended Scheduling Order*

**ORDERED**, that this Scheduling Order supersedes any prior one issued in either case; and it is further

**ORDERED**, that time for completion of all discovery, including any depositions, shall be **March 20, 2020**; and it is further

-15-

**ORDERED**, that a Note of Issue and Statement of Readiness in each case is to be filed on or before **April 3, 2020**. **FAILURE OF THE PLAINTIFF TO FILE A NOTE OF ISSUE AND CERTIFICATE OF READINESS BY THE DATE PROVIDED HEREIN WILL RESULT IN THIS MATTER BEING DEEMED STRICKEN "OFF" THE COURT'S CALENDAR WITHOUT FURTHER NOTICE PURSUANT TO 22 NYCRR § 202.27.** If so dismissed, the case may be restored without motion within one year of such dismissal by: (1) the filing of a Note of Issue and Certificate of Readiness; and, (2) the forwarding of a copy thereof with a letter requesting restoration to the Court's Assignment Clerk. Also, restoration after one year shall, before the filing of a Note of Issue and Certificate of Readiness, require the additional documentation of a sworn affidavit by a person with knowledge showing a reasonable excuse for the delay, a meritorious cause of action, a lack of prejudice to the defendant, and the absence of intent to abandon the case. **THIS COURT SHALL AT ANYTIME AFTER THE DATE LISTED ABOVE, ENTERTAIN A DEFENSE MOTION TO DISMISS FOR WANT OF PROSECUTION WHICH RELIEF COULD INCLUDE A DISMISSAL OF THE COMPLAINT. THIS ORDER SHALL SERVE AS VALID 90-DAY DEMAND UNDER CPLR 3216 IF SO PROPERLY SERVED;** and it is further

**ORDERED**, that pursuant to CPLR 3212 (a) summary judgment motions are due within **ninety (90) days** of the Note of Issue filing date; and it is further

-16-

**ORDERED**, that any extensions of the above deadlines will be granted only upon the showing of good cause, set forth in writing, and on notice to opposing counsel, at least **ten (10) business days** in advance of the date to be extended. That writing **must be accompanied by a proposed Amended Scheduling Order!**

Signed at Rochester, New York on October 19, 2019.



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HONORABLE J. SCOTT ODORISI  
Supreme Court Justice