

<b>D'Amato v Oldenburg</b>
2021 NY Slip Op 33549(U)
March 25, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 620635/2018
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 620635/2018  
CAL. No. 201902481OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. MARTHA L. LUFT  
Acting Justice of the Supreme Court

MOTION DATE 7/15/20  
ADJ. DATE 7/21/20  
Mot. Seq. #001 MD

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SALVATORE D'AMATO and KELLY  
D'AMATO,  
  
Plaintiffs,

SPEYER & PERLBERG, LLP  
Attorney for Plaintiffs  
1300 Veterans Highway, Suite 200  
Hauppauge, New York 11788

- against -

MIRKIN & GORDEN, P.C.  
Attorney for Defendants Ronald S. and  
Kathryn S. Oldenborg  
98 Cutter Mill Road  
Great Neck, New York 11021

RONALD S. OLDENBORG, KATHRYN S.  
OLDENBORG, GREGORY SODEN and  
CLARK'S TREE SERVICE OF LI, INC.,  
  
Defendants.

STEVEN F. GOLDSTEIN, LLP  
Attorney for Defendants Soden and Clark's Tree  
Serv. of LI, Inc.  
One Old Country Road, Suite 318  
Carle Place, New York 11514  
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants Gregory Soden and Clark's Tree Service of LI, Inc., dated June 15, 2020, and supporting papers; (2) Affirmation and Affidavit in Opposition by the plaintiffs, both dated July 7, 2020, and supporting papers (including Memorandum of Law); and (3) Reply Affirmation by defendants Gregory Soden and Clark's Tree Service of LI, Inc., dated July 14, 2020; it is

**ORDERED** that the motion by defendants Gregory Soden and Clark's Tree Service of LI, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint against them, is denied.

In this action, the plaintiffs seek to recover damages for injury to property allegedly sustained on August 2, 2018 when the defendants entered their property without permission and cut, injured, and destroyed three mature trees.

The plaintiffs and defendants Ronald S. Oldenborg and Kathryn S. Oldenborg are the owners of adjoining residential properties in Port Jefferson Station, New York. Defendant Gregory Soden is the owner of defendant Clark's Tree Service of LI, Inc., which is in the business of cutting trees.

D'Amato v. Oldenburg  
Index No. 620635/2018  
Page 2

According to the deposition testimony of Ronald S. Oldenburg, he initially approached Salvatore D'Amato in June 2018 to talk about reducing the height of some trees on the plaintiffs' side of property line to a few feet above the fence in order that the pool in his yard could receive more sunlight. After D'Amato expressed a general lack of concern with the idea, Oldenburg contacted Soden to discuss the work, which included "topping" three of the plaintiffs' trees—two oaks and a maple—and cutting back the overhanging branches of those trees to their respective trunks.<sup>1</sup> He then prepared the following document and presented it to D'Amato for his signature.

To Whom it May Concern:

I, Salvatore Damato, of 3 Rebecca Court, Port Jefferson Station, NY 11776, give permission to my neighbor, Ronald Oldenburg, of 1 Rebecca Court, Port Jefferson Station, NY 11776, to have the company, Clark's Tree Service (licensed and insured), access to my yard to cut the trees on my property, along our shared fence line, to a height just above the top of the fence. During the service, Clark's will remove a section of fence between the properties so that the trees may be removed through the Oldenburg's property, minimizing disruption in mine. The section will be replaced after the service is complete. This service will take place during the summer of 2018 when Mr. Oldenburg schedules the service. Mr. Oldenburg will let me know that date so that my dogs can remain inside our house during the service.

Both D'Amato and Oldenburg signed the document on July 10, 2018. Oldenburg also explained at that time, and D'Amato acknowledged, that Clark's would be entering the D'Amato property during the course of the work to remove the debris. With D'Amato having consented to the proposed work, Oldenburg called Soden to schedule the work for August 2. On August 1, Oldenburg delivered a handwritten note to D'Amato thanking him for allowing the work to proceed and reminding him to keep his dogs in the house. The following morning, when Soden and the other workers arrived at the house, Oldenburg reviewed the job with Soden and then left the house briefly. A half hour later, he returned and Soden indicated to him that D'Amato wanted to talk. When the three of them spoke, D'Amato expressed his displeasure with the extent to which the first of his three trees had been cut and how it would affect the amount of shade in his yard. It was agreed that the other two trees would be left substantially higher, and that an additional tree slated to be cut on the Oldenburg property would be left to help give the D'Amato property more shade. It was also agreed, given D'Amato's unhappiness with how the first tree was cut, that Soden would cut that tree all the way to the ground.

Salvatore D'Amato testified at his deposition that he and Oldenburg had talked two or three times prior to August 2, 2018 regarding the thinning of branches on some of his trees in order to allow more light onto the Oldenburg property. He acknowledged having signed the document presented to

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<sup>1</sup> Based on documentation provided by the plaintiffs, including a publication from the New York State Department of Environmental Conservation entitled "How to Select an Arborist or Tree Service," it appears that "topping" refers to reducing the size of a tree by cutting branches back to stubs or to lateral branches that are not large enough to assume the role of a terminal leader, and is not an approved tree maintenance practice.

D'Amato v. Oldenburg  
Index No. 620635/2018  
Page 3

him by Oldenburg on July 10 although he did not read it in full detail. Sometime during the late morning on August 2, he heard yelling outside and looked to see that one of his trees had been cut down to the stem, leaving a 10- or 12-foot “stump,” and that two or three others had been topped, notwithstanding that D'Amato had not authorized any work aside from the thinning of the branches. Oldenburg was very apologetic and said that the workers had “screwed up.” When Oldenburg offered to have the stump removed, D'Amato agreed. It was also agreed that one of the trees on the Oldenburg property would remain in order to preserve some shade for the D'Amato property.

At his deposition, Gregory Soden acknowledged that neither he nor his company was a certified arborist or held any licenses for tree cutting. In June 2018, Ron Oldenburg contacted him to have tree work done. In addition to some work on his own property, Oldenburg wanted two oak trees and one maple tree on the D'Amato property cut down to the top of the six-foot border fence. Soden advised Oldenburg that Oldenburg would need to have D'Amato sign a letter detailing the work to be performed and granting permission to do the work. On the morning of August 2, Oldenburg showed Soden the signed letter. Soden arrived at the property at 9 a.m. that morning. Before starting any work, he spoke with both Oldenburg and D'Amato about the work, including the work to be done on the D'Amato property. D'Amato did not offer any objections at that point. The workers then proceeded to take down a section of fence, remove two maples on the Oldenburg property, and then top the maple tree on the D'Amato property. After they completed the first stage of the work on D'Amato's maple tree, having topped the maple to 13 or 14 feet, D'Amato, who had been standing on his deck and watching the work, told them to stop and asked to speak with Oldenburg. D'Amato was unhappy with how his maple tree had been topped. Following an argument between Oldenburg and D'Amato, in which D'Amato expressed that he did not want any of his trees cut down to the fence line, it was agreed specifically by them which branches of the oak trees would be cut and to what height the trees would be topped, and the work was completed to those specifications. Sometime later in the day, D'Amato indicated that he wanted the maple tree completely removed, and the tree was subsequently cut to the ground.

The plaintiffs plead three causes of action in their complaint—the first, for violation of RPAPL 861, the second, for negligent trespass, and the third, for intentional trespass—by which they seek to recover compensatory and statutory damages, including treble damages under RPAPL 861, as well as punitive damages in the amount of \$100,000.00.

Now, discovery having been completed and a note of issue having been filed on December 18, 2019, Gregory Soden and Clark's Tree Service of LI, Inc. (hereinafter “the defendants”) move for summary judgment. In support of their motion, the defendants contend, based on the parties' deposition testimony, that they had written permission to be on the D'Amato property and to remove portions of the border fence, that such permission unambiguously described the work to be performed, that all work was performed within the scope of the permission granted except to the extent D'Amato directed the defendants to do otherwise at the site, date, and time it was performed, and that all work was completed as requested.

In opposition, the plaintiffs submit, *inter alia*, the affidavit of Salvatore D'Amato, in which he denies having consented to any cutting of his trees aside from allowing a licensed, expert tree cutter to thin out some of the branches that shaded his neighbor's pool, or having engaged in a discussion with

D'Amato v. Oldenborg  
 Index No. 620635/2018  
 Page 4

Soden or any other representative of the tree company at any time before the work was performed. He also contends, as a result of the work, that his maple was left with no branches or leaves and was so damaged that “the only thing that could be done is cut it to the ground”; as to the oaks, he claims, according to his “arborist expert,” that those trees are “sick and dying as a result of the topping.”


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. *Nick’s Garage v Geico Indem. Co.*, 165 AD3d 1621, 85 NYS3d 660 [2018]).

Summary judgment is denied with respect to the first cause of action. Under RPAPL 861, any person who engages in, or causes another to engage in, the cutting, removing, injuring or destroying of the trees of another without the owner’s consent is liable for such conduct. Here, the defendants failed to demonstrate prima facie that the plaintiffs’ trees were not injured or destroyed as a result of the work performed or that the plaintiffs authorized them to injure or destroy the trees.

As to the second and third causes of action, which sound in trespass, there remains at least one mixed question of law and fact, sufficient to defeat summary judgment, viz., whether permission to enter the plaintiffs’ property was granted under false pretenses in that Clark’s Tree Service of LI, Inc. was represented to be “licensed” and, if so, whether the defendants may be subject to liability for having exceeded the scope of the permission granted (see *Gates v AT&T Corp.*, 100 AD3d 1216, 956 NYS2d 589 [2012]). “Liability [for trespass] may attach regardless of defendant’s mistaken belief that he or she had a right to enter” (*Volunteer Fire Assn. of Tappan v County of Rockland*, 101 AD3d 853, 855, 956 NYS2d 102, 105 [2012]).

Accordingly, the motion is denied.

Dated: March 25, 2021

  
 A.J.S.C.

HON. MARTHA L. LUFT

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION