

Whitlock v Town of Romulus
2022 NY Slip Op 35235(U)
May 5, 2022
Supreme Court, Seneca County
Docket Number: Index No. 51298
Judge: Jason L. Cook
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At a Motion Term of The Supreme Court of
the State of New York held in and for the
Seventh Judicial District, in the County of
Seneca, State of New York, heard on the
10th day of March, 2022.

PRESENT: HON. JASON L. COOK
ACTING SUPREME COURT JUSTICE

STATE OF NEW YORK
SUPREME COURT: COUNTY OF SENECA

Walter H. Whitlock personally and as
Administrator of the Estate of Stephen E.
Whitlock, Peter C. Whitlock, David R.
Whitlock, Martha W. Kolios, and
Jonathan B. Whitlock

DECISION & ORDER

Plaintiffs,

v.

INDEX #51298

The Town of Romulus, Barry A. Schnoll,
Beth E. Moskow, and Cayuga Excavating, Inc.,

Defendants.

JASON L. COOK, AJSC

APPEARANCES: John M. Wells, Esq.
Attorney for the Plaintiffs

Edward Y. Crossmore, Esq.
Attorney for Defendants Barry A. Schnoll and Beth E. Moskow

Matthew J. Duggan, Esq.
Attorney for Defendant Cayuga Excavating, Inc.

Patrick J. Morell, Esq. (failed to appear)
Attorney for Defendant Town of Romulus

FINDINGS OF FACT

Plaintiffs commenced this action by filing a Verified Petition on July 14, 2017. Plaintiffs filed a Summons and Complaint on February 20, 2019 and a Supplemental Summons and First Amended Complaint on March 28, 2018. The Complaint alleges that plaintiffs are the owners of certain real property located 6149 Cayuga Lake Road, Romulus, New York. Defendants Barry A. Schnoll and Beth E. Moskow ("Schnoll and Moskow") own the neighboring property, located at 6141 Poplar Beach Road, Romulus, New York.

Briefly, in 2016, Defendants Schnoll and Moskow retained Defendant Cayuga Excavating ("Cayuga Excavating") to repair or replace a retaining wall on their property. During the excavation for the retaining wall, it was discovered that a culvert, which drained the north side of Swick Road, was routed beneath the Schnoll and Moskow home, and said culvert was in poor condition and was causing the retaining wall and house to shift. Upon discovering the condition of the culvert, Cayuga contacted Daryl Morrell, the highway superintendent for Defendant Town of Romulus (the "Town"). The Town proposed moving the water flow from the original culvert, which collected runoff from north side of the road, to join an existing waterway on Plaintiff's property that collected runoff from the south side of the road.

On or about December 14, 2016, employees of the Town capped the culvert draining on the Schnoll Moskow property and installed a new culvert that directed the water into the existing waterway located on Plaintiff's property. In effect, the Town joined the water runoff from the north side of Swick Road with the existing water runoff originating from the south side of Swick Road. To assist with the construction, the Town solicited and received assistance from Cayuga Excavating. Using an excavator and dump truck owned by the Town, Town and Cayuga Excavating employees completed construction required to divert the waterflow. Plaintiffs were not consulted prior to the new water flow being directed onto their property.

Plaintiffs now move for an order granting summary judgment, including injunctive relief, holding Defendants liable for a continued trespass of water diverted onto the Schnoll Moskow property. In support of their motion for summary judgment, Plaintiffs submit the pleadings, the deposition transcripts of Stacy Voorheis, Daryl Morrell, Richard Hancy, Jonathan Whitlock, and Barry Schnoll, the survey map, and several photographs. At oral argument, Plaintiff's counsel withdrew prior counsel's affirmation and exhibits attached, as prior counsel attempted be a witness to factual issues.

CONCLUSIONS OF LAW

It is well settled that "the proponent of a motion for summary judgment is required to tender sufficient, competent, admissible evidence establishing a prima facie entitlement to judgment as a matter of law so as to demonstrate the absence of any material issue of fact" (*Cole v. Stonefoot*, 2 A.D.2d 871 [4th Dept. 2003], citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

As explained by the Court in Davidowitz v. Cazes, 157 A.D.2d 1014, 1016 [3rd Dept. 1990],

“Summary judgment is a drastic remedy, the procedural equivalent of a trial. Andre v. Pomeroy, 35 N.Y.2d 361, 364 [1974]. Where there is doubt as to the existence of a triable issue or where the issue is arguable, summary judgment should not be granted. Stillman v. Twentieth Century Fox Corp., 3 N.Y.2d 395, 404 [1957]. Issue-finding rather than issue-determination is the key to the procedure.”

Likewise, “when considering a motion for summary judgment, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every favorable inference from the record proof, without making any credibility determinations” (Black v. Kohl’s Dept. Stores, Inc., 80 A.D.3d 958 [3rd Dept. 2011]; see also Barrow v. Dubois, 82 A.D.3d 1685; 1686 [4th Dept. 2011]).

Initially, the Court notes that Defendant Town of Romulus has inexplicably failed to respond to the instant summary judgment motion. The Court finds that the Town’s lack of response concerning, as the Court has previously extended the time to file opposition upon the Town’s request. However, a summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion, i.e. defaulted (Liberty Taxi Mgt., Inc. v. Gincherman, 32 A.D.3d 276 [1st Dept. 2006] citing Vermont Teddy Bear Co., v. 1-800 Beargram Co., 373 F.3d 241 [2nd Cir. 2004] [“the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the ... court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law”]; see also Voss v. Netherlands Ins. Co., 22 N.Y.3d 728 [2014] [“If the moving party fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers. In other words, the burden does not shift to the non-moving party to persuade the court against summary judgment.”])).

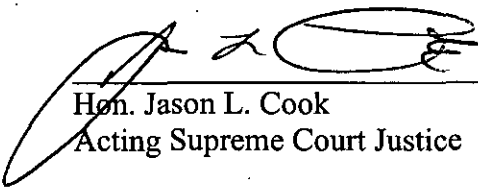
In the instant matter, the Court finds that Plaintiff has failed to demonstrate the absence of any material issue of fact. Several material facts remain in dispute, including, but not limited to, whether the additional water diverted into the existing watercourse on Plaintiff’s property exceeds the actual capacity of the watercourse. While a riparian owner may not introduce a quantity of water that causes flooding of lower locations, an increase that does not result in the waterway exceeding its natural capacity is generally not a ground for liability (Cooper v. Sharon Springs Cent. School Dist., 8 A.d.3d 734 [3rd Dept. 2004]). While Plaintiff indicates that the diversion provided a twenty percent increase in flow, no evidence was provided establishing that the increased flow was beyond the existing capacity, nor has Plaintiff provided any evidence of the level of increased water flow beyond his own subjective observations (i.e. actual objective data of increased amount of flow).

It is therefore,

ORDERED that Plaintiff's motion for injunctive relief and summary judgment is hereby **denied** in all respects.

ENTER

Dated: *May 5,* 2022.



Hon. Jason L. Cook
Acting Supreme Court Justice