

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~DIANE A. LEDEDEFF~~
~~CAROL EDMOND~~ J.S.C.

FILE PART 835

0103395/2004

BRAUN, JURAJ
vs
AMERICAN-SCANDINAVIAN

SEQ 3

PARTIAL SUMMARY JUDGMENT

INDEX NO. 103395/04
MOTION DATE 5/19/05
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
AUG 26 2005
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The motion is decided in accordance with the accompanying memorandum decision. It is hereby

ORDERED that Plaintiffs' motion for partial summary judgment on their second through fifth causes of action is granted to the extent that it is deemed established that defendant, without having been granted an easement, is continuously encroaching onto plaintiffs' property, and that the below-grade encroachment exceeds six inches; the motion is otherwise denied and summary judgment is granted against movant severing and dismissing the fifth cause of action alleging negligence. It is further

ORDERED ASF's cross-motion is denied. It is further

ORDERED that the parties are directed to appear for a status conference in Part 35 (Room 543), on September 27, 2005, at 3:15 p.m., a schedule for expeditious completion of outstanding discovery will be established. It is further

ORDERED that counsel for plaintiff shall serve all parties with a copy of this memorandum decision and order with notice of entry within twenty days of entry.

Dated: 8/15/05

[Signature]
CAROL EDMOND J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY I.A.S. PART 35

-----X
JURAJ BRAUN and HELEN BRAUN

Plaintiffs,

-against-

THE AMERICAN-SCANDINAVIAN FOUNDATION,

Defendant.

-----X

THE AMERICAN-SCANDINAVIAN FOUNDATION,

Third-Party Plaintiff,

-against-

BARNEY SKANSKA CONSTRUCTION COMPANY,
SKANSKA USA BUILDING, INC., and
URBAN FOUNDATION COMPANY, INC.,

Third-Party Defendants.

-----X

CAROL R. EDMOND, J.:

In this action involving a physical encroachment on property owned by plaintiffs Juraj and Helen Braun, plaintiffs move for partial summary judgment, as to liability only, against the adjoining property owner, defendant The American-Scandinavian Foundation ("ASF"). By cross-motion, ASF moves for summary judgment on its indemnification claim against third-party defendant Urban Foundation Company Inc. a/k/a Urban Foundation Engineering, Inc. ("Urban"),

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~~arguing that any damages sustained by plaintiffs were caused by acts or omissions of Urban.¹~~

Factual and Procedural Background

On April 30, 2001, plaintiffs bought a townhouse located at 38 East 38th Street, New York, New York, from Theresa and Clare Sabbatino, intending to use it both as their residence and as an office for their medical practice. The backyard portion of plaintiffs' lot abuts the Scandinavia House, a building located at 56-58 Park Avenue, in New York, New York and owned by defendant ASF, a not-for-profit organization. Plaintiffs made plans to add an addition to the building in the rear yard which would extend up to the property line abutting the ASF property on the east, and a building permit was issued in December 2003 (Braun aff., para. 6).

Plaintiffs submit the results of a title search performed by an employee of New York Title Research Corporation, who opines, based upon his review of the title examinations, that the owners of 56-58 Park Avenue do not have the right to place below-grade footings on plaintiffs' property (Slive affidavit, paras. 5-6). Further, plaintiffs' architect and engineer avers that, before finalizing plans for the addition, she reviewed design drawings for the Scandinavia House to ensure there was nothing in those plans that would affect plaintiffs' plans, and states that those drawings showed the foundation wall to be below grade, entirely within the ASF property line (H. Ruman affidavit, para. 8). However, when plaintiffs' contractors dug a test pit in the yard adjacent to the ASF property, they discovered that a concrete foundation wall belonging to the Scandinavia House extended approximately one and a half feet onto plaintiffs' property. She describes the encroaching footings as starting immediately beneath the pavement, and extending

¹The amended verified complaint is annexed as exhibit O to the motion, and the third-party complaint is annexed as exhibit N.

~~down to the bottom of the Scandinavia House basement and along the entire length of the Scandinavia House. In addition, she states that a timber work form, apparently placed by the ASF subcontractor who poured the foundation, was left in place, increasing the width of the encroachment an additional two feet. Plaintiffs allege that the presence of the encroachment forced them to cease construction and to redesign and resubmit their plans, resulting in diminished space, increased cost, and delay (Braun aff., paras. 18-19).~~

About three years earlier, between April 1998 and late 1999, ASF had undertaken a project to build an extension onto the Scandinavia House for an auditorium. It retained Barney Skanska Construction Co., now Skanska USA Building, Inc. ("Skanska"), to act as construction manager, and Skanska subcontracted with third-party defendant Urban to do the excavation and foundation work. In reply, plaintiffs submit an affidavit of one of the former owners of the property, who avers that during the construction, she became concerned that the project was encroaching on the property she owned with her sister, and spoke to someone who "appeared to be in charge," who assured her it was not extending over the property line and that she "had nothing to worry about" (Sabbatino aff., para. 3).²

ASF's president avers that ASF hired Skanska to build the addition entirely within ASF's property line, and that ASF neither knew of nor consented to any portion of the foundation or footings being within plaintiffs' property (Gallagher aff., para. 24). He asserts that, in any event, the "encroachment" is "nothing more than excess concrete" poured by its contractors, and that he advised the Brauns that they could remove it because it was not necessary to the support of the

²Plaintiffs referred to, but did not submit, the Sabbatini affidavit in the original motion papers. The affidavit is annexed as exhibit A to the Kahan reply affirmation.

Scandinavia House (*id.*, para. 12). ASF claims it has not had an opportunity for discovery, and needs to be able to examine and measure the alleged encroachment (*id.*, para. 33).

The assertion that there has not been an inspection is refuted by plaintiffs' counsel, who submits correspondence showing that an inspection was scheduled for March 26, 2004, and avers that he personally attended the inspection at which a representative of ASF and its attorney were present (Kahan affirmation, para. 6 and exhibit B). He states that ASF's representative viewed, measured and took pictures of the encroachment at that time (*id.*).

In opposition to ASF's cross-motion, Urban's president avers that it was his "understanding that permission was given to Skanska, by the prior owner of the property" to allow Urban to build the retaining wall. He states that the issue of permission was addressed during a "group discussion," and that Urban was "explicitly told that permission was given to place the temporary earth retention system on adjacent property to support the retaining wall in its current location" (Mazzo aff., paras. 4-5). Urban submits a letter giving permission for another aspect of the project work, but no documentation concerning the use of plaintiffs' property.

Plaintiffs commenced this action against ASF in March 2004, seeking a preliminary injunction directing ASF to remove encroachments on plaintiffs' property. The pre-answer motion was denied by order dated March 15, 2004. On May 5, 2004, ASF answered and impleaded Skanska and Urban. Skanska moved for an order compelling arbitration of ASF's third-party claims against it, and plaintiffs sought leave to amend their complaint to assert claims directly against Skanska and Urban. Skanska's motion was granted based on the arbitration clause in its contract with ASF, and the claims against it have been severed and stayed pending

arbitration of their dispute (exhibit H, order of Hon. Diane A. Lebedeff, dated September 29, 2004).³ Plaintiffs' cross-motion to amend to assert claims directly against Skanska and Urban was denied on the grounds, *inter alia*, that those claims are barred by the applicable negligence statute of limitations (*id.*).

Legal Discussion

Plaintiffs seek partial summary judgment on their second through fifth causes of action, but their motion papers only address the issue of damages recoverable in a trespass claim. Accordingly, the motion is denied as to the nuisance claim (fourth cause of action), and negligence claim (fifth cause of action). Further, as to the negligence claim, upon a search of the record, which includes the uncontradicted affidavit of ASF's president denying that ASF knew of or directed any encroachment onto adjoining property, summary judgment is granted against the moving party severing and dismissing that cause of action (CPLR 3212[b]; see *Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106 [1984]).

The remaining claims seek damages for continuous trespass and encroachment (second and third causes of action). In opposition to the motion, defendant ASF argues that plaintiffs have failed to make a *prima facie* showing that ASF's property is encroaching on their property, and that there is an issue of fact as to which party was responsible for creating the encroachment. ASF also contends that the motion is premature since it has not had discovery, and that discovery may disclose that the encroachment is less than six inches, in which case the action would be time-barred under RPAPL § 611(2).

³Skanska and ASF arbitrated a previous dispute, and Skanska has commenced a separate action against ASF concerning their settlement agreement.

Defendant argues that the two affidavits submitted in support of plaintiffs' motion are inadequate since they are not based on personal knowledge, but are merely conclusory, and that there is no evidence presented of a survey of the property. Defendant also points out that the annexed photographs are so dark as to be illegible. Defendant's argument is unavailing since the affidavits of plaintiff Helen Braun and of the Brauns' architect/engineer are expressly based on personal knowledge acquired by observation of the site of the encroachment. In addition, the architect/engineer reviewed the ASF drawings and the title search and property survey for plaintiffs' property, and clearly describes the location and dimensions of the encroaching footings.

ASF further argues that, in cases seeking damages to property caused by construction on adjoining property, a landowner cannot be held liable for the negligent acts of its independent contractor, unless it "directed the trespass or such trespass was necessary to complete the contract" (see *Axtell v. Kurey*, 222 A.D.2d 804 [3d Dept.1995]; see 2A N.Y. Jur.2d Agency and Independent Contractors § 406, "[w]here the agreement under which a contractor is working does not contemplate that any trespass will be made by the contractor, the employer is not necessarily liable for unauthorized collateral trespasses made by the contractor"). However, an adjoining landowner, like plaintiffs in this case, also has a statutory right to bring an action demanding removal of a physical encroachment prior to expiration of the adverse possession limitations period, regardless of the fault of the encroaching landowner (RPAPL § 871 [1]; *Shaw v. Bronfman*, 284 A.D.2d 267 [1st Dept. 2001], lv. denied 97 N.Y.2d 725 [2002], reinstating trespass claim asserted solely against adjoining owners, based on evidence that their contractors caused "an entry onto plaintiffs' property by a steel beam emanating from [their] premises

issues of fact and since the motion is premature.

CONCLUSION

Plaintiffs' motion for partial summary judgment on their second through fifth causes of action is granted to the extent that it is deemed established that defendant, without having been granted an easement, is continuously encroaching onto plaintiffs' property, and that the below-grade encroachment exceeds six inches; the motion is otherwise denied and summary judgment is granted against movant severing and dismissing the fifth cause of action alleging negligence. ASF's cross-motion is denied.


The parties are directed to appear for a status conference in Part 35 (Room 543), on September 27, 2005, at 3:15 p.m., a schedule for expeditious completion of outstanding discovery will be established.

Counsel for plaintiff shall serve all parties with a copy of this memorandum decision and* order with notice of entry within twenty days of entry.

This decision constitutes the order of the court.

Dated: August 15, 2005

FILED
AUG 26 2005
NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

CAROL EDMED
J.S.C.