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SHORT FORM ORDER

INDEX No. 08-14370
CAL. No. 11-02465OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4-20-12 (#003)
MOTION DATE 6-11-12 (#004)
MOTION DATE 7-6-12 (#005)
ADJ. DATE 7-16-12
Mot. Seq. # 003 - MG
004 - MD
005 - XMotD

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PINDAR VINEYARDS, LLC and HERODOTUS DAMIANOS, M.D.,

Plaintiffs,

- against -

IRENE C. VITTI, BRIARCLIFF SOD, INC., BRIARCLIFF LANDSCAPE, INC., BRENDA CICHANOWICZ, individually and as Executrix of the ESTATE OF FRANK J. CICHANOWICZ III, THE ESTATE OF FRANK J. CICHANOWICZ III, DONALD J. WILCENSKI, NATALIE WILCENSKI, NEAL J. CICHANOWICZ and CINDY CICHANOWICZ,

Defendants.

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Upon the following papers numbered 1 to 61 read on these motions for summary judgment and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15, 21 - 36 ; Notice of Cross Motion and supporting papers 59 - 53 ; Answering Affidavits and supporting papers 16 - 18, 56 - 59 ; Replying Affidavits and supporting papers 19 - 20, 60 - 61 ; Other 3, 37 - 38, 54 - 55 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the defendant Irene C. Vitti for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against her is granted; and it is further

ORDERED that this motion by plaintiffs for an order pursuant to CPLR 3212 granting partial summary judgment as to the liability of the defendants Briarcliff Sod, Inc., Briarcliff Landscape, Inc., Brenda Cichanowicz, Individually and as Executrix of the Estate of Frank J. Cichanowicz III, the Estate of Frank J. Cichanowicz III, Donald J. Wilcenski, Natalie Wilcenski, Neal J. Cichanowicz and Cindy Cichanowicz (Briarcliff Defendants), and for an immediate trial as to damages, is denied; and it is further

ORDERED that this cross motion by the Briarcliff Defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the complaint is dismissed as to the defendants Briarcliff Landscape, Inc., Brenda Cichanowicz, Individually and as Executrix of the Estate of Frank J. Cichanowicz III, the Estate of Frank J. Cichanowicz III, Donald J. Wilcenski, Natalie Wilcenski, Neal J. Cichanowicz and Cindy Cichanowicz, and is otherwise denied.

This is an action to recover damages based on the negligent spraying of herbicides, which allegedly caused the destruction of approximately 30 rows of grape vines in the plaintiffs' vineyard. In their complaint, the plaintiffs allege that the defendant Irene C. Vitti (Vitti), knew or should have known that the tenants leasing her property would use a chemical herbicide that was particularly harmful to grapevines. The plaintiffs further allege that the remaining defendants (Briarcliff) operated a sod farm on property leased to them by Vitti, and that they improperly sprayed a herbicide on that property which drifted into the plaintiff's vineyard causing the destruction of their grapevines. The complaint sets forth six alternating causes of action sounding in negligence, trespass and nuisance against Briarcliff and Vitti, respectively.

Vitti now moves for summary judgment dismissing the causes of action asserted against her on the ground that she is an out of possession landlord. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of her motion, Vitti submits the pleadings, her affidavit, copies of the subject lease with Briarcliff and letters extending the lease, and the deposition transcripts of the parties to the action. In order to more clearly frame the issues involved in this motion, the Court will only summarize relevant

portions of the transcripts of the parties' deposition testimony, and will expand upon those summaries as is deemed necessary in deciding the additional applications for relief.

At her deposition, Vitti testified that she purchased the subject property (Vitti property) adjacent to the plaintiffs' vineyard in 1998, that the defendant Donald J. Wilcenski (Wilcenski) approached her shortly thereafter requesting that she lease the property to the defendant Briarcliff Sod, Inc. for use as a sod farm, and that she had no knowledge of the alleged damage to the plaintiff's property until she received a copy of the plaintiffs' complaint. She indicated that she has no education in agriculture, and that she was not aware of the herbicide 2,4-D until this action was commenced against her. Vitti further testified that the only control that she ever exercised over the Vitti property was to include a requirement in the lease that Briarcliff plant certain cover crops, which replace the nutrients in the soil after sod is harvested.

In her affidavit dated March 12, 2012, Vitti swears that she has not used, maintained, operated or controlled the Vitti property since 1998, and that she had no control over the operations of Briarcliff. She states that there have been no cross claims asserted against her in this action.

Wilcenski was deposed on April 13, 2010, and he testified that he and the defendant Neal J. Cichanowicz are co-owners of the defendants Briarcliff Sod, Inc. and Briarcliff Landscape, Inc. He stated that Briarcliff Sod, Inc. leased the Vitti property from an "I. Vitti," and he described the processes used in sod farming. He acknowledged that the records maintained by Briarcliff show that it sprayed a broadleaf weed herbicide, 2,4-D, at the Vitti property on April 11, 2005, and April 15, 2005. Wilcenski further testified that he and two other employees of Briarcliff were the only individuals who determined whether 2,4-D needed to be applied in Briarcliff's sod farming operations.

Pindar Damianos was deposed on April 21, 2010. He testified that he is the vineyard manager employed by the plaintiff Pindar Vineyards, LLC. He described the damage to the vineyard, and his efforts to ascertain the cause of that damage. He did not give any testimony regarding Vitti.

At his deposition, the plaintiff Herodotus Damianos, M.D. (Dr. Damianos), testified that he is the owner of the Pindar vineyard. He indicated that Vitti approached an employee of the vineyard in 1999, shortly after she purchased the Vitti property, indicating an interest in opening her own vineyard. He did not know if anyone from Pindar spoke with Vitti about the damage caused by 2,4-D after it occurred. Dr. Damianos further testified that he never saw Vitti at the sod farm located on the Vitti property.

Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (***Lindquist v C & C Landscape Contrs.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Gibson v Bally Total Fitness Corp.***, 1 AD3d 477, 767 NYS2d 135 [2d Dept 2003]. Control of the premises may be established by proof of a promise by the owner or lessor to keep the premises in repair or by a course of conduct demonstrating that the owner or lessor has assumed responsibility to maintain a particular portion of the premises (***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]; ***Gelardo v ASTHMA Realty Corp.***, 137 AD2d 787, 525 NYS2d 334 [2d Dept 1988]). They may be held liable for injuries arising from a dangerous condition on their property if they created

the condition or had actual or constructive notice of it and a reasonable time within which to remedy it. (*see* ***Sowa v SJNH Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2nd Dept 2005]; ***Curiale v Sharrotts Woods, Inc.*** 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]). In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see* ***Chianese v Meier,*** 98 NY2d 270, 746 NYS2d 657 [2002], *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151 [1985]). A review of the submissions, including the subject lease and the letter agreements extending the lease terms, reveals that Vitti did not promise to repair the premises, or undertake to maintain the premises. In addition, Vitti has established her prima facie entitlement to summary judgment indicating that she did not have notice or constructive notice of the herbicide spraying conducted by Briarcliff.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see*, ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. "'Proof of negligence in the air, so to speak, will not do'" (***Martin v Herzog***, 228 NY 164, 170, 126 NE 814 [1920], quoting Pollock, Torts [10 th Ed.], p. 472). And while proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Forman v City of White Plains***, 5 AD3d 434, 773 NYS2d 102 [2d Dept 2004]). Further, while proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based, not upon speculation, but upon the logical inferences to be drawn from the evidence (*see* ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; ***Babino v City of New York***, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]). Here, Vitti has established her prima facie entitlement to summary judgment indicating that she did not breach a duty owed to the plaintiffs.

Trespass is an intentional entry onto the land of another without justification or permission (***Carlson v Zimmerman***, 63 AD3d 772, 882 NYS2d 139 [2d Dept 2009]; ***Woodhull v Town of Riverhead***, 46 AD3d 802, 849 NYS2d 79 [2d Dept 2007]; ***Long Is. Gynecological Servs. v Murphy***, 298 AD2d 504, 748 NYS2d 776 [2d Dept 2002]). To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]). Here, Vitti has established her lack of intent or knowledge regarding the alleged entry onto the plaintiffs' land, and the lack of any conduct, intentional or negligent, which interfered with the use and enjoyment of the plaintiffs' land.

Having established her entitlement to summary judgment dismissing the complaint against her, it is incumbent upon the plaintiffs[1] to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the motion, the plaintiffs submit the affidavit of Pindar Damianos dated May 18, 2012, in which he does not make any factual allegations against Vitti. The affirmation submitted by the attorney for the plaintiffs contends that Vitti knew or should have known that 2,4-D was being used on the Vitti property. However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore,*** *supra*). Accordingly, Vitti's motion to dismiss the complaint against her is granted.[2]

The plaintiffs now move for summary judgment against the Briarcliff Defendants (#004), and the Braircliff Defendants cross-move for summary judgment dismissing the complaint against them (#005). In their opposition to the cross motion, the plaintiffs contend that said cross motion must be denied as procedurally defective in that it was not made in a timely manner. The Court's computerized records show that the note of issue was filed in this action on December 6, 2011. Although the 120-day statutory period for making a summary judgment motion expired on April 5, 2012, the plaintiff's motion made on May 21, 2012, was timely pursuant to a stipulation dated March 28, 2012, and so ordered by the undersigned on April 2, 2012. The cross motion by the Briarcliff Defendants was not made until June 20, 2012, the date on which it was served (*see* CPLR 2211). Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). However, a court may entertain a belated cross motion for summary judgment if a timely motion for such relief has been made on "nearly identical" grounds (***Grande v Peteroy***, 39 AD3d 590, 592, 833 NYS2d 615, 617 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 497, 793 NYS2d 176 [2d Dept 2005]). Here, the issues raised in the subject cross motion are nearly identical to those raised in the plaintiff's motion, and both will be considered herein.

In support of their motion, the plaintiffs submit, among other things, the affidavit of Pindar Damianos dated May 18, 2012, previously submitted in opposition to Vitti's motion for summary judgment, the previously mentioned deposition transcripts of Vitti and Wilcenski, and three reports regarding inspections of the Vineyard by various experts. In his affidavit, Pindar Damianos (Damianos), swears that the plaintiffs own and operate a vineyard located at 43295 Country Road, Southold, New York (Vineyard), which is surrounded by sod farms operated by Briarcliff. He states that, on June 5, 2005, he received a call from one of the plaintiffs' employees that they had observed that some of the grapevines in the Vineyard were damaged and/or dead. He went to the Vineyard where he observed "at least thirty rows of vines" which looked "unhealthy" and, based on his educational degrees, he was able

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[1] In its cross motion, Briarcliff submits an affirmation in support of Vitti's motion, acknowledging that she had no control over its operations.

[2] In dismissing the complaint, the Court finds that the cross claims asserted against Briarcliff are now academic.

to recognize the symptoms of the vines as evidence of 2,4-D exposure. He called Peter Gristina, a colleague who is a local vineyard manager, to get a second opinion about his observations. When Mr. Gristina agreed with him, Damianos called Alice Wise (Wise), a viticulture specialist from the Cornell Cooperative Extension (Cornell), who inspected the damaged grapevines on June 9, 2005 with Andrew Senesac (Senesac), a weed specialist employed by Cornell. He indicates that Wise and Senesac issued a report dated June 24, 2005, in which they indicated that the grapevines were damaged by exposure to "drift from the 2,4-D herbicide." He states that Hans L. Helmprecht, PhD. (Helmprecht) of Chemical Consulting of Babylon, inspected the damaged grapevines on June 11, 2005, and reported that they showed severe damage typically caused by an herbicide. Damianos further swears that Barry H. Gump, PhD. (Gump), a professor of Chemistry and Enology at California State University at Fresno, inspected the Vineyard on June 24, 2005, and observed signs of "curled leaves and wilted growing tips." Thereafter, the plaintiffs took steps to try to save the damaged grapevines based on the experts' recommendations. However, those efforts were unsuccessful. Damianos further states that Briarcliff breached an agreement made between sod farmers and owners of vineyards at a meeting arranged by Cornell, that sod farmers would not spray 2,4-D "after approximately the first week of April."

At his deposition, Wilcenski testified that the defendant Briarcliff Sod, Inc. (BSI) leased the Vitti property, that it maintained "spray records" regarding "applications," and that an entry in the spray records in his handwriting indicates that BSI sprayed 2,4-D at the Vitti property on April 15, 2005. He stated that the spray records note a "wind speed/direction/temperature" of "Southwest 10, 45 degrees," on that date. He indicated that he attended a meeting called by Cornell prior to 2005, at which Senesac appeared for Cornell, which was attended by vineyard growers, and other sod farmers. The purpose of the meeting was to discuss the application of 2,4-D before "grape bud break," because "the grape plant was very susceptible to 2,4-D and ... we needed to come to an agreement or a date to try to abide by." Wilcenski further testified that the participants at the meeting discussed that "every year is different and we, no one has control over temperatures and time, but as a rule of thumb April 15th was a give-or-take date that was agreed on." He acknowledged two instances prior to 2005 in which other vineyards had complained about 2,4-D spraying by BSI. He stated that wind speed is important because of "the possibility of the product to drift," and that BSI used "hooded sprayers" in 2005 to prevent problems with drift.

At her deposition, Vitti testified as set forth above. Her testimony does not assist in determining the plaintiffs' motion against Briarcliff. The Court turns next to the three reports submitted in support of said motion. Initially, the Court notes that the expert "report" submitted by Helmprecht is unsigned. More importantly, the "report" does not indicate the writer's background or education regarding the effects of chemicals on horticulture, and it does not indicate the type of herbicide involved in the alleged damage to the Vineyard.

The report by Wise and Senesac dated June 24, 2005, clearly sets forth the areas of the Vineyard which show damage, and the variation in the degree of damage in different "blocks" within the vineyard. The writers then state that "On June 9, 2005, we observed symptoms on the grapevines that occurred as a result of exposure to drift from 2,4-D herbicide." They do not set forth the facts upon which they base their conclusions. More importantly, they do not indicate the source of the alleged drift which caused the damage. An expert's opinion can have no greater probative value than the facts or data upon which

it is based (***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 589 [1997]; ***Guldy v Pyramid Corp.***, 222 AD2d 815, 634 NYS2d 788 [3d Dept 1995]).

In his report dated July 5, 2005, Gump states "On June 24, 2005, I visited your vineyard that has suffered damage from drift of 2,4-D herbicide from the adjacent property." Again, this report does not set forth the facts upon which he bases these conclusions. Under a heading entitled "Symptoms of 2,4-D Injury," Gump sets forth the following:

> Initial 2,4-D symptoms are twisting and leaf curling, which may occur within hours of exposure. Leaves that are not fully expanded at the time treatment (*sic*) may be stunted and distorted. Within a week after exposure general chlorosis may develop at high exposure levels. Leaves will drop and shoots may die, followed by stem dieback.

The plaintiffs have failed to establish their entitlement to summary judgment herein. Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364 [1974]; ***Elzer v Nassau County***, 111 AD2d 212 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]).

There are issues of fact requiring a trial in this action including, but not limited to, the terms of the agreement between sod farmers and owners of vineyards at the Cornell meeting, whether Briarcliff was negligent in spraying when it did, whether Briarcliff was negligent in the manner in which it sprayed on April 15, 2005, and whether said spraying was the proximate cause of the damage to the Vineyard. Here, it is undisputed that Briarcliff last sprayed on April 15, 2005, and that the plaintiffs' employees discovered the injuries to the grapevines on June 5, 2005, more than seven weeks later. A review of the record does not resolve the questions surrounding this apparent delay in cause and effect raised by the reports submitted by the plaintiffs. Accordingly, the plaintiffs' motion for summary judgment is denied.

Briarcliff cross-moves for summary judgment, among other things, on the ground that the plaintiffs have failed to submit evidence that any of the defendants except BSI had any connection to the leasing of the Vitti property, or that they were owners, or otherwise involved in the control or operations of the sod farm. A review of the record reveals that the plaintiffs have not submitted any such evidence, and that in opposing the cross motion, the plaintiffs do not address the issues raised in this branch of the cross motion. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc 3d 1242[A], 2009 NY Slip Op 51849[U] [Sup Ct, Bronx County 2009]). Moreover, to the extent that the record establishes that the defendants Donald J. Wilcenski and Neal J. Cichanowicz are co-owners of BSI, there are no allegations which

would indicate any individual liability on their part (*see* ***Matter of Morris v New York State Dept. of Taxation and Fin.***, 82 NY2d 135, 603 NYS2d 807 [1993]; ***Seuter v Lieberman***, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). Accordingly, that branch of the cross motion which seeks to dismiss the complaint against the defendants Briarcliff Landscape, Inc., Brenda Cichanowicz, Individually and as Executrix of the Estate of Frank J. Cichanowicz III, the Estate of Frank J. Cichanowicz III, Donald J. Wilcenski, Natalie Wilcenski, Neal J. Cichanowicz and Cindy Cichanowicz, is granted.

In addition, BSI, now standing as the lone Briarcliff defendant, cross moves for summary judgment dismissing the complaint on the grounds that the agreement between the sod farmers and vineyard owners at the Cornell meeting (Cornell Agreement) proves that it was not negligent in spraying as late as April 15, 2005, serves as permission to enter the plaintiffs' property which forecloses a finding of trespass, and serves as an invitation to conduct spraying activities on or before that date, which forecloses a finding of a private nuisance. As discussed herein, there are multiple issue of fact requiring a trial in this action which are not eliminated by the instant cross motion. Among these are, the terms and conditions of the Cornell Agreement, as well as the intention of the parties in entering into said agreement, and whether BSI negligently applied the herbicide 2,4-D on April 15, 2005, allowing it to drift onto the plaintiffs' property. Accordingly, that branch of the cross motion which seeks to dismiss the complaint against BSI is denied.

Dated: 9/24/12

THOMAS F. WHELAN, J.S.C.