STATE OF MAINE
CUMBERLAND, ss.

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SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-08-260

JAW - Cum 3/23/2009

J. COLE HARRIS and
P. DAPHNE HARRIS,

Plaintiffs

v.

ORDER

THE WOODLANDS CLUB and
THE WOODLANDS HOMEOWNERS
ASSOCIATION,

Defendants

BEFORE THE COURT

This matter came before the court on plaintiffs' motion for attachment of nearly one million dollars and defendants' motion to strike new affidavits attached to plaintiffs' reply to defendants' oppositions to the motion for attachment. For the reasons set forth below, the court denies the plaintiffs' motion for attachment and grants the defendants' motions to strike the plaintiffs' supplemental affidavits.

BACKGROUND

This case arises out of Patriot Day Storm of 2007, when the plaintiffs' property, including the basement of their new home was flooded. Plaintiffs claim that the water management system located on the Woodlands golf course and owned and operated by the defendants caused the flooding of their property, which is adjacent to the golf course. Plaintiffs assert in their complaint causes of action for statutory trespass pursuant to 14 M.R.S.A. § 7551-B (Count I), common law trespass (Count II) and negligence (Count III). In support of their motion for attachment, plaintiffs have filed the affidavit of J. Cole Harris, one of the parties.

Plaintiffs own 12 acres of land and a home on Woodville Road in Falmouth. Harris Aff. ¶¶ 1 – 2. The Woodlands Homeowners Association owns a 19-hole golf course and leases the golf course to the Woodlands Club that manages and operates the golf course. Harris Aff. ¶ 3. The northern boundary of the golf course abuts the plaintiffs' property. Harris Aff. ¶ 4. The Woodlands Corporation, a predecessor to the defendants, beginning in 1987, constructed facilities for the collection, detention, management and dispersion of water, including storm water, flowing on, over and about the Woodlands Project, which were required to be constructed in accordance with mandates of various governmental agencies. Harris Aff. ¶¶ 5 – 7. According to Harris, the Corporation failed to construct the water management system in accordance with the governmental approvals. Harris Aff. ¶ 8. He bases these conclusions on his own comparison of the existing, as-built conditions of the system with the approved plans for the system and from a hydrologic engineering study prepared for him by Pinkham and Greer Consulting Engineers. Harris Aff. ¶ 8.

Relying on the Pinkham and Greer report, Harris concludes that the system was not constructed in accordance with the governmental mandates, and, in particular, some of the water retention ponds were not constructed as approved and lack the water retention capacity that they were required to have, causing water to drain onto his property. Harris Aff. ¶ 10. Additionally, Harris states that several larger water collection swales were constructed on the golf course by the defendants or their predecessors to keep the third hole dry but, as built, they discharge water onto the Harris property. Harris Aff. ¶ 9. Finally, Harris states that the collection of water from the Woodlands Project and the discharge of water onto the Harris property are accomplished through drainage

ditches, swales, detention ponds, culverts and other facilities that are now owned and operated by the defendants.

Plaintiffs seek an attachment and attachment by trustee process against the real and personal property of both defendants in the amount of $939,827.55, which is comprised of claimed actual damages of $288, 275.85, plus double the amount of such damages, $ 576,551.70, on account of intentional trespass, and anticipated legal and other professional costs of $75,000. Harris is not aware of any liability insurance or other security available to satisfy the judgment in this case. Harris Aff. ¶ 14.

Affidavits filed by the defendants set forth a different understanding of the facts. Defendants filed affidavits of Anthony Hayes, the Falmouth Director of Public Works from 1986 until July 2007, and David Domingos, the Woodlands Golf Course Superintendent. According to the defendants, the Harris property was "lower in elevation and the natural recipient of water runoff from the Woodlands Club which was higher in elevation." Hayes Aff. ¶9. Shortly after the Patriot's Day Storm in 2007, Harris, who had purchased his property on Woodville Road the prior year, contacted the Falmouth Public Works Director with his concern that the road culvert under the Woodville Road was undersized and needed replacement. Hayes Aff. ¶¶ 8, 11. The Director inspected the site and the roadway culvert and the culvert just upstream from the Harris' new driveway, and concluded that the obstruction of the roadway culvert by the dislodged silt fence placed by Harris' contractor was "the apparent problem, along with storm debris that obstructed the culvert under the driveway." Hayes Aff. ¶ 12.

According to David Domingos, who began his employment with the Woodlands in 1996, the original developer, prior to the Club's lease of the premises, installed the bulk of the drainage system, including the retention ponds and culverts. Domingos Aff. ¶ 3. The Harris property has been wet property and the lower retention pond has drained onto the Harris property for as long as Domingos has worked for the Woodlands. Domingos Aff. ¶¶ 6, 8. The Harris property lies below the Woodlands golf course and water from the Woodlands flows naturally onto the Harris property. Domingos Aff. ¶ 7. There is a drainage ditch on the Harris parcel that predates the Harris purchase, which diverts water from the Woodlands to the Harris property. Domingos Aff. ¶¶ 9, 10. And, finally, according to Domingos, "[t]he recent changes to the third hole fairway simply moved water to a preexisting culvert under a cart path near the Harris property. They should not have changed the volume of water diverted onto the Harris property." Domingos Aff. ¶ 16.

The defendants raise multiple grounds in their opposition to plaintiffs' motion, including that plaintiffs (1) failed to demonstrate the absence of available and adequate liability insurance to cover any potential judgment; (2) failed to allege any conduct that is prohibited under the trespass statute; (3) failed to provide any credible evidence of causation; (4) failed to show trespass under common law; (5) and failed to identify any breach of any duty owed to them by the defendants.

DISCUSSION

1. Standard of Review.

Attachment is appropriate in circumstances where it is "more likely than not that the plaintiff will recover judgment . . . in an amount equal to or greater

than the aggregate sum of the attachment and any liability insurance." against the defendant. M.R.Civ.P. 4A(c). This standard requires the plaintiff to show that he or she has "a greater than 50% chance of prevailing." *Liberty v. Liberty*, 2001 ME 19, n. 4, 769 A. 2d 845, 847.

A plaintiff must file affidavit(s) that support his or her motion and the affidavit(s) must include specific facts to enable the court to make the requisite findings with respect to the probability of success and the amount of the attachment. M.R.Civ.P. 4A(c) and (i); see also *Atlantic Heating Co., Inc. v. Lavin*, 572 A. 2d 478, 478-79.

2. Use of Supplemental Affidavits in Reply to Opposition of Motion.

Rule 4A(c) requires that an attachment "shall be sought by filing with the complaint a motion for approval of the attachment. The motion for attachment shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (i) of this rule." Rule 4A(c) authorizes the defendant to oppose a motion for approval of attachment "by filing material in opposition as required by Rule 7(c)." Rule 4A(c) does not expressly authorize any further filings by either party. Even if the court were to construe Rule 7(e) to apply and authorize a reply memorandum from plaintiffs to defendants' opposition, this does not allow the plaintiffs to rehabilitate an initial motion by filing supplemental affidavits after the motion for attachment was filed.[1] Accordingly, the court strikes the supplemental affidavits filed by the plaintiffs after the initial motion

[1] The Law Court, as far as this court has been able to determine, has not decided the issue of "rebuttal affidavits". *Barrett v. Stewart*, 456 A. 2d 10 (Me. 1983).

for attachment was filed, including the affidavits of George Marcus, John Larson, and the second affidavit of J. Cole Harris, dated January 29, 2009.[2]

3. Liability Insurance.

Although Harris asserts in his affidavit that he is not aware of any liability insurance, in fact, the defendants have liability insurance in excess of the amount sought by plaintiffs. The Club has liability insurance pursuant to two separate policies with a total coverage of five million dollars. Domingos Aff. ¶ 17. The Association has liability insurance of one million dollars and umbrella coverage of three million dollars for a total of four million dollars in insurance coverage. Goldman Aff. ¶¶ 1 – 3. Thus, there is available liability insurance in an amount available to satisfy any potential judgment, which this court concludes is the question raised in Rule 4A.[3]

4. Plaintiffs' Claims.

Plaintiffs have filed a three-count complaint, with two counts in trespass and one count in negligence. Rule 4A requires the plaintiffs file affidavits that include specific facts that enable the court to find that it is more likely than not

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[2] Even if the rebuttal affidavits were considered by this court, they contain no facts beyond those already set forth in the first Harris affidavit that make it more likely than not that the defendants' storm management system *caused* the flooding of plaintiffs' property. See Larson Aff. ¶ 6.

[3] Rule 4A does not require the court to determine whether a defendant will in fact be covered by his or her liability insurer, but rather whether there is liability insurance available in a sufficient amount to satisfy a potential judgment. Even if an insurer is defending under a reservation of rights, this means that the insurer is waiting to decide indemnification at a later point when the actual facts of the care have been determined and can be compared to the insurance contract. See *Foremost Ins. Co. v. Levesque*, 2007 ME 96, n 2. Motions filed pursuant to Rule 4A are made at a much earlier point in the life of a case and have to be decided before indemnification issues are resolved. Until such issues are resolved, this court concludes that there is available liability insurance in an amount to satisfy any potential judgment.

that they will succeed on their claims in an amount equal to or greater than the aggregate sum of the attachment.

On their statutory trespass claim in Count I, plaintiffs must show that they owned the land, the defendants intentionally entered their land, caused plaintiff to suffer a loss by damaging any structure on their property and defendants did not have plaintiffs' permission. 14 M.R.S.A. § 7551-B(1)(2008)[4]. Plaintiff must also show, in addition to trespass, the costs of repairing the damaged property or the replacement value of the property damages. 14 M.R.S.A. § 7551-B(4). To double their damages, plaintiffs must show that the property damage has been caused intentionally by defendants. 14 M.R.S.A. § 7551-B(2).

Under Maine law, a person commits common-law trespass as alleged in Count II, "if he intentionally enters land in possession of the other, or causes a thing or a third person to do so." *Medika v. Watts*, 2008 ME 163, ¶ 5. Maine law establishes that the artificial collection, transportation and diversion of water on to the property of another is an unlawful trespass. *Goodwin v. Texas Co.*, 176 A. 873, 874 (Me. 1935); *McRae v. Camden & Rockland Water Co.*, 22 A. 2d 133, 134-35 (1941). However, Maine law recognizes no liability arising merely from the obstruction or diversion of the natural drainage of surface water. Plaintiffs must show that the defendants artificially collected water and discharged it onto their land, "where it would not otherwise naturally have fallen." *Johnson v. Whitten*, 384 A. 2d 698, 700 (Me. 1978).

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[4] Section 7551-B(1) establishes statutory liability of a person who trespasses:

> A person who intentionally enters the land of another without permission and causes damages to property is liable to the owner in a civil action if the person . . . (A) does . . . damage to any structure on property not that persons own.

In addition to the claims for trespass, the plaintiffs pursue a negligence claim against the defendants (Count III). To establish negligence, plaintiffs must show that a duty of care is owed, there was a breach of that duty, and that an injury to the plaintiff occurred that was proximately caused by the breach of duty. *Bonin v. Crepeau*, 2005 ME 59, ¶ 9, 873 A.2d 346, 348.

Taken as a whole, plaintiffs are required to show that it more likely than not that the defendants operated a water management system that artificially collects water and diverts water from its land onto plaintiffs' land causing damage where it would not otherwise have naturally occurred. To attempt to meet this burden, plaintiffs rely on J. Cole Harris' affidavit. Harris' statements in his affidavit are based on his own observations and his conclusions drawn from a report prepared for him by Pinkham & Greer Consulting Engineers. Harris' affidavit does not show that he is qualified to offer opinions on the crucial issues in this case, that is whether the existing drainage system deviated from approved plans, whether it directs any unanticipated water onto the plaintiffs' property, or whether it caused the damage to plaintiffs' property. Generally, expert testimony is required to assist the court in resolving such issues unless the answers are so obvious that they may be determined by a court as a matter of law or are within the ordinary knowledge and experience of lay people. The questions raised by plaintiffs' complaint do not fit within these exceptions. Even if the court were to accept Harris' representation that Pinkham & Greer Consulting concluded that the water management system was not built in accordance with governmental approvals, Harris does not state that the engineering report concludes that the drainage of surface water from defendants' property *caused* the flooding on plaintiffs' property.

Plaintiffs, at this stage, cannot show that it more likely than not that they would recover damages in the amount sought. Actual damages under 14 M.R.S.A. § 7551-B(4) are "measured either by the replacement value of the damaged property or by the cost of repairing the damaged property." The cost of repairing their home after the flooding is $33,275.85. The balance of plaintiffs' claimed actual damages are comprised of the diminution of the value of their land that they had hoped to subdivide. It does not appear that they would be able to collect these additional damages under their statutory remedies. Further, contrary to plaintiffs' assertions, they would not be entitled to treble damages, but rather to "2 times the owner's actual damages" if the damage to the property is caused intentionally[5]. 14 M.R.S.A. § 7551-B(2). Section 7552(4)(B), in comparison, authorizes "3 times the owner's actual damages" if a person knowingly or intentionally violates 14 M.R.S.A. § 7552(2). Maine law requires that a choice be made to bring an action under § 7551-B or § 7552. Plaintiffs have chosen § 7551-B; therefore, they are barred from an action under § 7552 and hence to treble damages. 14 M.R.S.A. § 7551-B(5).

Accordingly, the court concludes that there is no reliable evidence that supports a conclusion that it is more likely than not that the plaintiffs will prevail against the defendants and receive a judgment in an amount equal to or greater than the amount sought in the attachment and the available insurance.

[5] There is no evidence that the defendants acted intentionally.

The entry is:

It is hereby ORDERED that plaintiffs' motion for attachment and attachment on trustee process is denied. Defendants' motion to strike the supplemental affidavits is granted.

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: March 23, 2009

Joyce A. Wheeler, Justice

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