Zimmerman v Fredericks
2015 NY Slip Op 31991(U)
July 29, 2015
City Court of Rye, Westchester County
Docket Number: SC15-46
Judge: Joseph L. Latwin

CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

ERIC ZIMMERMAN & LUCI ZIMMERMAN, SC15-46

Plaintiffs,

-against- DECISION AND ORDER

SEIGLINDE FREDERICKS & ROBERT FREDERICKS,

Defendants.

Appearances:
Plaintiffs *Pro Se*
Defendants *Pro Se*

Love thy Neighbor. Mark 12:31. Nature will out. Aesop, The Cat-Maiden.[1]

This is a small claims action between neighbors. Plaintiffs are a young couple who fairly recently purchased their home in Rye Brook. Their neighbors, defendants, are an elderly couple, blessed with the badges of age – declining mental states and physical limitations. The parties' properties are situated along Blind Brook – a brook that runs from the Westchester County Airport, south through the town of Harrison, the Village of Rye Brook and the City of Rye until it flows into Milton Harbor and Long Island Sound. Plaintiffs complain that defendants maintained their property in such a way as to attract

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[1] The gods were once disputing whether it was possible for a living being to change its nature. Jupiter said "Yes," but Venus said "No." So, to try the question, Jupiter turned a Cat into a Maiden, and gave her to a young man for a wife. The wedding was duly performed and the young couple sat down to the wedding-feast. "See," said Jupiter, to Venus, "how becomingly she behaves. Who could tell that yesterday she was but a Cat? Surely her nature is changed?" "Wait a minute," replied Venus, and let loose a mouse into the room. No sooner did the bride see this than she jumped up from her seat and tried to pounce upon the mouse. "Ah, you see," said Venus, "Nature will out."

rodents, specifically by allowing the build-up of domesticated pet foods and trash, causing infestation of plaintiffs' property and allowing a tree near the property line to overhand plaintiffs' property. For these things, plaintiff seeks recovery of their pest control expenses and the expenses of trimming the tree.

At the trial, Mr. Zimmerman and defendants' son testified. It was conceded that the tree in question stood on defendants' property near the property boundary and that limbs overhung plaintiffs' property. Plaintiff said he trimmed only the limbs that were over his property. Defendants argue that plaintiff cut off portions of limbs on defendants' side of the property line. There was no proof offered of any actual harm or any imminent danger of actual harm to the plaintiffs or the plaintiffs' property by reason of the overhanging branches. The tree still stands alive almost two years after plaintiffs trimmed it.

I Smell a rat

The law classifies animals as "wild or ferae naturae" and "domestic or domitae naturae." The former includes animals that are wild by nature and, not having been subjected to confinement or control by man, live in a natural state. New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal. Nor is there strict liability except upon a showing that the owner knew of the animal's vicious propensities. *Petrone v. Fernandez*, 12 NY3d 546, 883 N.Y.S.2d 164 [2009]; & *Bard v Jahnke*, 6 NY3d 592, 815 N.Y.S.2d 16 [2006]). *But see*, *Doerr v. Goldsmith* 110 AD3d 453, 978 NYS2d 1 [1st Dept 2013](Dog owner could be held liable in negligence to bicyclist, who was injured when owner called unleashed dog to her and it was defendants' actions, and not dog's own instinctive, volitional behavior, that most proximately caused the accident).

Rats are medium-sized, long-tailed rodents. Rats are opportunistic survivors and often live with and near humans. Some rats are kept as pets. Notably, rats are often bred and kept as research animals. But mostly, rats are considered deadly pests[2] -- long been held up as the chief villain in the spread of the Bubonic Plague. Here, there was no evidence or suggestion that defendants owned or kept rats either as pests or for laboratory research, nor exercised any dominion over them. The rats here appear to be wild animals.

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[2] Of course, there is Remy, the French rat who dreams of becoming a great French chef despite his family's wishes in the movie "Ratatouille". But see, "Ben" and "Willard". Of course, James Cagney burnished the image when in "Taxi", he said "Come out and take it, you dirty yellow-bellied rat, or I'll give it to you through the door!."

Rats are ubiquitous. Indeed, the only rat-free continent is Antarctica, due to its hostile climate which is too severe for rat survival, and its lack of human habitation to provide buildings to shelter them from the weather. The New York City metropolitan area has a long and colorful history of rats. The city says there is no reliable measure of the rat population, despite many past claims to the contrary. A 1949 article in The New York Times, detailing Mayor William O'Dwyer's "war on rodents," placed the estimate at 15 million. A more recent rule of thumb held that there was a rat for every resident, though research suggests this figure overstates the number by about six million. Matt Flegenheimer, *New York City Escalates the War on Rats Once Again*, NY Times, June 24, 2015.

The area adjacent to Blind Brook is a haven for small animals. The brook provides a ready source of water for the animals and plants living nearby. This creates a food rich environment for all sorts of animals. Add to this natural environment, the plentiful food and shelter offered by humans living in the suburban environment. The combined natural and human-provided environment makes the vicinity of Blind Brook a utopia.

In *Stearn v Prentice Bros., Ltd.* (Eng) [1919] 1 KB 394, 9 BRC 535—Div Ct, the plaintiff sued for damage to his crops caused by rats attracted to the defendants' premises by a pile of bones, defendants being bone manure manufacturers and their premises being separated from plaintiff's fields only by a meadow through which the rats passed back and forth, there was no evidence as to where the rats bred, or that defendants had neglected any duty to destroy the rats, if they had such a duty, and it appeared that plaintiff had done nothing to destroy the rats or to protect his crops from them, it was held that there was no liability on the part of the defendants for the damages complained of. The rats were considered animals ferae naturae which the plaintiff could have killed when they invaded his property.

Encroaching Tree

Since the trees in this case are not poisonous or noxious in their nature, they are not a nuisance per se, in such a sense as to sustain an action for relief. *Countryman v. Lighthill*, 24 Hun 405 [1881]. Where a tree is located so near the line of an adjoining landowner that the branches overhang, the adjoining landowner may resort to self-help in the first instance, to cut off overhanging branches. *Hoffman v. Armstrong*, 48 NY 201 [1872], and *Marino v. Lorch*, 2 Misc3d 56, 774 NYS2d 254 [App Term, 2nd Dept 2003]. The right to remove

overhanging branches does not depend upon any title in the branches or limbs themselves where the base of the tree is upon the adjoining land.

The right to self-help extends to ordinary trimming and clipping, where this burden is not unreasonable, since the branches are readily visible and easily cut. Permissible self-help does not extend to the destruction or injury to the main support systems of the tree; nor does it extend past the property line.

In order for the plaintiffs to prevail in an action in trespass their burden extends beyond proof of an invasion of his right to exclusive possession of his land to proof that such invasion or intrusion is the result of an act either intentionally done or so negligently done that such intent will be presumed. The trespass may not be based on a mere nonfeasance or an omission to perform a duty. *Loggia v. Grobe,* 128 Misc2d 973, 491 NYS2d 973 [Suffolk County Dist Court 1985]. Here, there is no proof whatsoever of an intentional intrusion or that defendants were even aware of tree's intrusion prior to notification by plaintiff of the alleged damages.

In order to sustain a cause of action for nuisance with regard to trees not noxious, poisonous, decayed, or dangerously unsound, a plaintiff must establish that the overhanging branches or encroaching roots are causing "sensible damage" i.e., damage not simply nominal in form but rather damage "a sensible person if subjected to ... would find injurious" (*Countryman v. Lighthill*, 24 Hun 405, 407 [1881] [berry bushes suffering from shade caused by overhanging branches did not satisfy sensible damage requirement. Otherwise, plaintiff's remedy is limited to self-help – the precise remedy plaintiffs' chose.

Most of plaintiffs' evidence consisted of records of the Village of Rye Brook's Building Department. While these documents refer to the risk of rat infestation, none of them identifies the defendants' property as being the source of the rats that sojourned on plaintiffs' property. Thus, even if they were all admitted into evidence, none of the documents establish the critical link that might create some liability on the part of the defendants. The Court is mindful of the relaxed rules of evidence in small claims proceedings, but given the inability to cross examine critical eyewitnesses and the missing link in the evidence tying the rats to the defendants, the Court cannot fully credit plaintiffs' documentary evidence so much as to establish liability of the defendants.

Providing the parties with substantial justice according to the rules and principles of substantive law (UCCA 1804, 1807; *see Cosme v Bauer*, 27

Misc3d 130(A), 2010 NY Slip Op 50638(U) [App Term, 9th Jud Dist April 8, 2010]; *Ross v Friedman*, 269 AD2d 584 [2nd Dept 2000]; & *Williams v Roper*, 269 AD2d 125 [1st Dept 2000]) and under a fair interpretation of the evidence (*see Claridge Gardens v. Menotti*, 160 AD2d 544 [1st Dept 1990] with this Court having had the opportunity to observe and evaluate the testimony and demeanor of the witnesses and to evaluate the credibility of the witnesses, (*Nobile v. Rudolfo Valetin Inc.*, 21 Misc3d 128[A], 2008 N.Y. Slip Op 51962[U] [App Term, 9th and 10th Jud Dists 2008] (*see also, Vizzari v. State of New York*, 184 AD2d 564 [2nd Dept 1992]; *Kincade v. Kincade*, 178 AD2d 510, 511 [2nd Dept 1991]; & *Rotem v. Hochberg*, 28 Misc3d 127(A), Slip Copy, 2010 WL 2681875 (Table) [App Term, 9th and 10th Jud Dists , 2010]), the Court finds that plaintiffs have no claim for damages.

This case should have never reached the Court. In the spirit of neighborliness, especially given the defendants' age and infirmity, plaintiff should have offered to help the defendants resolve the issues. Instead, plaintiffs called the cops [the Building Inspector] on them. The defendants' son, also bears some criticism. He should have been aware of the condition of his parents' property and taken steps to reduce the trash, excess pet food and rats on the premises. It may be time for the defendants to seek alternate living arrangements since they appear to be no longer capable of managing to live independently in a single family residence. A little more caring and neighborly love might have helped to resolve all the issues.

Accordingly, it is,

ORDERED and ADJUDGED that the plaintiffs' claim is dismissed.

June 29 2015

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JOSEPH L. LATWIN
Rye City Court Judge

ENTERED

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Appeals