To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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TIMOTHY KELLEY, ROSEMARY KELLEY,

Plaintiffs,

-against-

Decision & Order
Index No. 60391/2018
Seq # 1

WASHINGTON AVENUE LOFTS, INSITE ENGINEERING SURVEYING LANDSCAPE ARCHITECTURE, P.C., GALLIN BEELER DESIGN STUDIO, TECH FALL DEVELOPMENT LLC, ALEX TORRES, PROJECT MANAGER,

Defendants.

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The following papers were read on a motion by the defendant, Insite Engineering Surveying Landscape Architecture, P.C. ("Insite") for an order granting summary judgment, dismissing all claims asserted against it pursuant to CPLR 3212:

Notice of Motion/Affirmation/Exhibits A-H
Memorandum of Law in Support
Affirmations & Affidavit in Opposition/Exhibits 1-3
Memorandum of Law in Opposition
Affirmation in Opposition/Exhibit A
Reply Affirmations and Affidavits

The plaintiffs, Timothy Kelley and Rosemary Kelley (the"plaintiffs/Kelleys"), commenced this action on July 6, 2018, by filing a summons and complaint against the defendants, alleging property damage caused by the negligent removal of four trees from the plaintiffs' property during the course of a construction project.

The complaint specifically alleges that on or about April 1, 2017, the defendants negligently excavated the site in the areas of the Kelleys' property, causing damage to trees that were specifically to remain on the property and although, on July 12, 2017, the Kelleys were assured that the trees were off limits, on November 13, 2017, the defendants

negligently destroyed, cut and removed the trees. The complaint alleges negligence, trespass, conversion, violation of RPAPL § 861, and also seeks punitive damages.

The defendants, Gallin Beeler Design Studio ("Gallin"), Insite, and Tech Fall Development d/b/a Washington Avenue Lofts and Tech Fall Development, LLC ("Tech Fall") filed and served answers to the summons and complaint, asserting cross-claims against their co-defendants for contribution, indemnification, and breach of the insurance procurement obligations.

Insite, the civil engineer, contracted with Tech Fall, and prepared and submitted plans to the Village of Pleasantville (the "Village") for the project located at 17-45 Washington Avenue, Pleasantville, which is located adjacent to the plaintiffs' property. Tech Fall is the developer for the project and Gallin, is the architect for the project, which is a new mixed use commercial/residential building, located at 27-45 Washington Avenue.

Insite now files a motion for summary judgment seeking to dismiss the complaint against it, arguing that its June 16, 2016 contract with Tech Fall included engineering and planning services for the project, but excluded surveying services. Insite's project engineer, Scott Blakely ("Blakely"), avers in his affidavit, that Insite did not contract to supervise nor inspect the means and methods of any construction work at the project and did not agree to oversee any excavation or tree removal work at the project.

Insite asserts that it was provided with a survey dated August 16, 2016, depicting the existing site condition, including the location of existing trees at the site and on March 15, 2017, as part of its professional services, it prepared a set of site drawings to be filed by Gallin with the Town of Pleasantville (the "Town"). The Town's building inspector, Robert Hughes ("Hughes"), testified that he reviewed Insite's drawings and confirmed that the trees that were removed were not marked with an "X" indicating that they were not contemplated to be removed. Hughes further testified that it was understood from Insite's approved site plan drawings that the trees at issue, were not designated for removal and such was communicated to the plaintiffs in an email. Insite contends that the plaintiffs' allegations in the complaint and verified particulars agree with the affidavit of Scott Blakely ("Blakely"), Insite's employee, who visited the site in 2019.

Insite argues that it was not involved in the April 1, 2017, July 12, 2017, nor November 13, 2017 events and therefore, cannot be liable to the plaintiffs. Insite did not contract to perform excavation for the project and did not have onsite construction administration responsibility overseeing any excavation. Further, as per Blakely, Insite was not on site on April 1, 2017, when the alleged excavation took place.

Hughes also testified that there was a July 12, 2017 planning meeting, in which the plaintiffs had discussion with the developer concerning the trees that were to remain, per the approved plans. The plaintiffs allege that Vito Errico of Tech Falls, Alex Torres of Tech Fall, and the former owner of the project Warren Schloat, assured the plaintiff that the trees were off limit. Insite contends that, there is no indication that Insite made any representations to the plaintiffs and both Hughes and Blakely confirm that Insite was not present at the planning meeting.

Insite next asserts that, although the bill of particulars alleges that on November 13, 2017, the defendants cut and removed the trees on and adjacent to the property owned by the plaintiffs, Insite did not perform excavation nor tree removal and did not enter onto the plaintiffs' premises and therefore, cannot be liable for the plaintiffs' trespass claim/conversion claim and cannot be liable under RPAPL 861.

Blakely avers that Insite did not contract with any other party other than the developer and did not agree to procure insurance for Gallin. Further, the agreement with Tech Fall did not require Insite to procure insurance for the benefit of any other party and therefore, the claims for breach of the insurance procurement obligation must be dismissed. Insite argues that its agreement with the developer provides for Insite and the developer to indemnify each other to the extent caused by the willful misconduct or negligent acts, errors or omissions and since there is no evidence of such conduct and there is no evidence of negligence on the part of Insite, the cross-claims for contractual indemnification and for common law contribution and indemnification must also be dismissed.

Tech Fall opposes Insite's motion arguing that there exists viable questions of fact warranting denial of the motion. Tech Fall's attorney avers that the trees in question were at the very rear of the property being developed and below the surface of the area, was a

sophisticated subterranean drainage system, with attaching pipes, and the necessary excavation for the drainage system led to an emergency situation in which the trees at issue began to tremble with imminent potential of falling down and injuring persons and/or property.

Tech Fall argues that further discovery is warranted and therefore, the motion should be denied without prejudice to renew, since the architect's deposition and the depositions of every party to the suit, have yet to take place. The attorney asserts that Hughes testified that the initial site plan for the job called for the retention of the subject trees, but he had not realized the extent of the excavation for the depth and size of the subterranean drainage system that the Village required, which necessarily affected the structural integrity of the trees and in hindsight, the trees were required to be removed, so that there was compliance with the Village's specifications for the drainage system.

Hughes also testified that architects and engineers must account for storm drainage in preparing their site drawings and that field changes during the construction phases often require changes not contemplated in the original drawings and plans. Tech Fall asserts that the architectural plans should have taken into consideration the fact that the subterranean drainage system, as required by the Village, and excavation in connection therewith, would necessarily affect the structural stability of the trees in question and that the plans should have called for the boundaries of the parking lot to have been moved inward, with a shorter depth, so that the corresponding retaining wall behind the parking lot, the landscaping above the retaining wall, and the drainage system that was located below that area, could have been installed and constructed a few feet closer to Washington Avenue and correspondingly, a few feet further away from the subject trees, so that the structural integrity of the trees would not have been affected.

The Kelleys, by their attorney, also oppose the motion, arguing that the motion is premature and in the absence of discovery, there is insufficient admissible evidence to support the motion as a matter of law. The attorney argues that, there are genuine issues of material facts as to the role of Insite in the tree removal that occurred contrary to the approved plan and contrary to the understanding of all parties concerned.

Lastly, Gallin opposes the motion, arguing that the motion is premature, due to the minimal discovery that has been conducted and the basis for the plaintiffs' claims, and/or allegations and the cross-claims, need to be flushed out through the discovery process. Gallin contends that there has been no discovery so as to properly develop Gallin's defenses to the allegations asserted. Gallin further contends that the claims asserted against it are devoid of merit, since Gallin was retained as architect to design the mixed use building which, pursuant to Gallin's contract, excluded Gallin's responsibility for the construction means, methods, techniques, sequences or procedures and acts or omissions of the contractors and failure of the contractors to carry out the work in accordance with the contract documents.

Gallin asserts that there seems to be confusion as to the respective roles of the named defendants, which is evident from Tech Fall's opposition to Insite's motion, wherein counsel repeatedly refers to Insite as the architect and references architectural plans as opposed to site plans. Gallin contends that at this point, it is unknown if or to what extent Insite had involvement with the design or installation of the subterranean drainage system and/or the depth and extent of the subterranean excavation and installation required.

In reply to Tech Fall and Gallin's oppositions, Insite proffers that its motion should be granted because Tech Fall does not dispute that Insite's drawings do not call for the removal of the trees in question and further acknowledges it did not inform Insite prior to the removal of any trees, as called for in Insite's drawings; Tech Fall does not reference any contractual provision that Insite has allegedly breached; and Tech Fall's speculation that Insite's design was deficient, is not supported by any evidence in admissible form, including an expert affidavit, averring that Insite's professional services deviated from the standard of care and that the deviation was the proximate cause of the property damage. Insite contends that, other than claiming that additional discovery is required under CPLR 3212, Tech Fall has not stated what specific outstanding discovery warrants the denial of Insite's motion.

With regard to Gallin, Insite states that Gallin acknowledges that Insite's drawings call for the subject trees not to be removed and simply adopts Tech Fall's argument and

alleges that Insite's motion is premature, without detailing what additional discovery would provide the grounds for opposition.

In reply to the plaintiffs' opposition, Insite argues that the plaintiffs do not dispute that Insite's drawings do not call for the removal of the subject trees; they have not provided any evidence that Insite's personnel were physically involved in the removal of the trees; and the plaintiffs have not provided any evidence that Insite's professional services deviated from the standard of care and that the deviation was the proximate cause of the property damage.

Discussion

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issue of fact from the case (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Id.*).

Negligence

To prevail on a negligence claim, the plaintiff must establish: (1) the existence of a duty owed to the plaintiff; (2) the breach of such duty; (3) and that the breach of the duty was the proximate cause of the injury incurred (*see Engelhart v County of Orange*, 16 AD3d 369 [2005]).

Here, Insite argues that it was not involved in overseeing excavation and removal of the subject trees, but there has been no discovery in the case and there are issues of fact for this Court with regard to the roles of the various defendants and their respective duties and responsibilities on the project. "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" (*see Okula v City of New York*, 147 AD3d 967 [2d Dept 2017]; *see also Hawana v Carbuccia*, 164 AD3d 563 [2d Dept 2018]). Therefore, the Court denies that part of the motion for dismissal of the negligence cause of action, with leave to renew upon the completion of discovery.

Trespass

"Trespass is an intentional entry onto the land of another without justification or permission" *Woodhull v. Town of Riverhead*, 46 A.D.3d 802, 849 N.Y.S.2d 79 (2d Dept., 2007). "The essence of trespass is the invasion of a person's interest in the exclusive possession of land" (*Curwin v Verizon Communications (LEC)*, 35 AD3d 645 [2d Dept 2006]).

Despite the Court's determination as to the negligence claim, it is clear, even without discovery, that Insite did not take part in the excavation of the property and in no way intentionally entered upon the plaintiffs' land or interfered with their interest in the exclusive possession of the land. Further, there is no dispute that Insite's drawings excluded the Kelleys' trees from demolition. Therefore, there is no need for further discovery as it pertains to the trespass cause of action against Insite and that part of the motion is granted.

Conversion

To establish a claim for conversion, a plaintiff must show that the defendant intentionally and without authority, assumed or exercised control over the plaintiffs' property (*Colavito v New York Organ Donor Network, Inc.*, 8 nY3d 43 [2006]). As with the trespass claim, Insite's drawings clearly stated that the subject trees were not to be part of the project and were not marked to be demolished. Additionally, Insite was not present at the site and its scope of work did not include oversight or supervision. Therefore, there is no need for further discovery with regard to the conversion cause of action and that part of the motion is granted.

RPAPL 861

RPAPL 861[1] states in pertinent part that:

> If any person, without the consent of the owner thereof, cuts, removes, injures or destroys, or causes to be cut, removed, injured or destroyed, any underwood, tree or timber on the land of another..., and action may be maintained against such person for treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation (NY RPAPL 861[1]).

Here, once again, there is no dispute that Insite was not involved in the excavation or tree removal activities and Insite did not cut, remove, injure nor destroy the subject trees and none of the co-defendants' or the plaintiffs' opposition papers have disputed such.. Insite's drawings did not indicate that the subject trees were to be removed. Therefore, that part of Insite's motion is granted.

Cross-Claims

Insite did not contract with any other party other than the developer and did not agree to procure insurance for Gallin. Further, the agreement with Tech Fall does not require Insite to procure insurance for the benefit of any other party. Therefore, the cross-claims for breach of the insurance procurement obligation by all co-defendants against Insite, is dismissed.

Insite's agreement with the developer provides for Insite and the developer to indemnify each other to the extent caused by the willful misconduct or negligent acts, errors or omissions. Since the Court has not dismissed the negligence cause of action, it will not dismiss the contractual nor common law indemnification claims as to Tech Fall and only the contractual indemnification claim as to Gallin, since there was no such contract between those parties.

Accordingly, based on the foregoing, it is

ORDERED that Insite's motion is granted in part and denied in part; and it is further

ORDERED that the part of Insite's motion seeking dismissal of the causes of action for trespass, conversion and violation of RPAPL 861, is granted; and it is further

ORDERED that the plaintiffs' causes of action against Insite, for trespass, conversion and violation of RPAPL 861 are dismissed; and it is further

ORDERED that the part of Insite's motion seeking dismissal of the cause of action for negligence, is denied; and it is further

ORDERED that the part of the motion seeking dismissal of the cross-claim for breach of insurance procurement obligation, is granted; and it is further

ORDERED that the cross claims by the other defendants against Insite for breach of the insurance procurement obligation, are dismissed; and it is further

ORDERED that the part of the motion seeking dismissal of contractual indemnification is denied as against Tech Fall and granted as against Gallin; and it is further

ORDERED that the contractual indemnification claim against Gallin, is dismissed.

ORDERED that the part of the motion seeking dismissal of common law indemnification claims, is denied.

The parties are directed to appear before the Preliminary Conference Part on a date to be determined. The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2020

HON. SAM D. WALKER, J.S.C.