IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
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JEAN ANTONOPLOS
CLERK

CITY OF COLUMBUS,	:	
Plaintiff,	:	
-vs-	:	Case No. 10 CV H 09 1349
SSA LTD, et al.	:	
Defendants.	:	

JUDGMENT ENTRY

This matter came on before the Court for Trial on August 14, 2013, August 15, 2013, September 30, 2013 and February 21, 2014. Present were Westley Phillips, counsel for Plaintiff, Kevin Humphreys, counsel for Defendant SSA, Ltd., and David Birch, counsel for Defendants Phil Slane and Slane Trucking and Excavation.

On September 14, 2010 Plaintiff, City of Columbus, filed a Complaint asserting six claims: (1) Trespass, (2) Negligence, (3) Nuisance, (4) Conversion, (5) Violation of R.C. 901.51, and (6) Ejectment. On October 21, 2010 Defendants Phil Slane and Slane Trucking and Excavation filed an Answer and Crossclaim against Defendant SSA, Ltd for Indemnification. On November 1, 2010 Defendant SSA, Ltd. filed an Answer and Counterclaim asserting three counterclaims: (1) Breach of Covenant/Contract, (2) Trespass, and (3) Nuisance.

Prior to the last day of trial City of Columbus settled with Defendants Phil Slane and Slane Trucking & Excavating for $3,000 and dismissed said Defendants.

The Plaintiff's settlement with Defendants Phil Slane and Slane Trucking & Excavating does not bar Plaintiff's recovery from Defendant SSA, Ltd.

TERMINATION CODE 6

This case arises out of a dispute between the City of Columbus which owns property in Delaware County and which it acquired in May 1923. The purchased 11.9 acres were to be used as part of the water basin for the O'Shaughnessy Reservoir. The Reservoir was to be created by placing a dam just south of Glick Road, which would back-up water north to US Route 42, as its permanent pool. Exhibit 14. Most of the 11.9 acre parcel is under water as part of the "permanent pool." See Exhibits 16, 17, 18, 23. The distance from the dam to Plaintiff's 11.9 acre parcel is between 6.1 and 6.5 miles. Exhibit 14.

Also in 1923, the City, in the process of acquiring property for the Reservoir, purchased additional land, the surface of which is above the water level of the Reservoir. These lands total 1346 acres and include that part of the 11.9 acres above the water level. These 1,346 acres are used as a buffer to help control the run off into the Reservoir and to preserve the Reservoir's shoreline. See Exhibits 14, 23, 24. Testimony of Steve Lowe, Land Steward.

In August and/or September 2007 the City discovered that its neighbor to the west of the Reservoir had, without permission, entered the City's property and cut trees and other vegetation within **2.7** acres of the original 11.9 acres purchased by the City in 1923. Exhibits 10 a-h. The City's Expert, Dave Ahlum, reduced the 2.7 damaged area to 1.26 acres, for which the City now demands compensation. Exhibit 36. Defendant SSA, Ltd., an Ohio Limited Liability Company, owns the land to the immediate west of the Plaintiff's property. SSA, LTD hired Slane Trucking & Excavating to cut and remove trees and brush from SSA, Ltd's property in an attempt to develop its property with a large retail store, such as Kroger, and a strip mall. See Exhibit 7 and Page 21 of Exhibit 6.

The City had placed Monuments at the property line as shown in Exhibit 1. These Monuments, and the natural density of growth of the trees and other vegetation on the land, made the property line of the Plaintiff's land easily distinguishable from Defendant SSA, Ltd.'s land. Exhibit 6 pages 25-34 shows periodically the vegetation growth for years 1940-2006. Moreover, in May and/or June 2007, the Defendant SSA, Ltd. hired Bird & Ball Engineering And Surveying to develop plans for their proposed shopping center development. Exhibit 7. Therefore, Defendant SSA, Ltd had direct knowledge of the property line location. See Exhibit 7 dated July -2007.

The Defendant SSA, Ltd. raises the issue that Slane Trucking & Excavating was an independent contractor and not an employee of SSA, Ltd.. Therefore Defendant SSA, Ltd. asserts they are not liable for Slane Trucking & Excavating's trespass on to the City's property. This is typically true. The Fifth District Court of Appeals however, in *Citimortge v. Robson*, clearly set forth the "trespass rule" as an exception to the rule that an employer is not liable for the actions of an independent contractor. See *Citimortgage v. Robson*, 2011 WL 4067324 citing *Conway v. Calbert* (1997) 119 Ohio App 3d 288. The Court in Conway held that, "one who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the lands of another or the creation of the public or private nuisance is subject to liability for harm resulting to others from such trespass or nuisance."

Defendant SSS, Ltd. hired Slane Trucking & Excavating to clear its land. They knew or had reason to know that the excavating was likely to involve a trespass upon the Plaintiff's land. SSA, Ltd. is therefore liable for Slane's actions.

The Court finds that SSA, Ltd., while acting through its contractor, Slane Trucking and Excavating and Phil Slane, trespassed upon the City's property. SSA, Ltd.

controlled and directed Slane Trucking and Excavating. Defendant SSA, Ltd. unlawfully entered on to the City's property and unlawfully cut and removed trees. Some of the City of Columbus' trees were taken from the Plaintiff's property. Some of the Plaintiff's cut trees were left on the City's property. Also, some cut trees taken from SSA, Ltd.'s property were left in piles on the City's property.

From the facts of this case, it is obvious that SSA, Ltd. not only trespassed on the Plaintiff's property, but did so with a "heedless indifference" to obvious property lines which its surveyor, Bird & Bull, had previously identified. The Court therefore finds the Defendant SSA, Ltd. trespassed upon the City's property and did so "recklessly". The real issue now becomes, what is the proper measure of damages for Defendant's reckless trespass.

The City calls the property in question "Reservoir Parkland" which is open to the public to transverse and to enjoy. There are however no foot paths, nor accesses to the Reservoir at this location, and no evidence that this "alleged" public land has ever been used by the public in general. The evidence is clear that the City performed no maintenance on any of the 11.9 acres not flooded by the reservoir's pool. The City had simply allowed "volunteer" trees to grow and die as nature and weather allowed. See aerial photos of the land from 1940 thru 2004. Exhibit 6. It was not until 1994 that the City decided to preserve the natural habitat.

Historically the Courts of Ohio have allowed three methods to measure damages to property owners who have had trees cut from their lands. These methods are: 1) counting the "stumps" for property where the trees were being grown for timber, 2) diminution in value of the property after the injury compared to the value before the injury; and 3) reasonable restoration costs.

The Plaintiff in this case has submitted a Tree Damage Assessment dated August 24, 2007 by Ms. Elayna Grody from the City's Public Utility Department. She has a degree in Wildlife Management and Environmental Economics. The assessment broke the damages into four categories: (1) Damaged but standing trees, (2) Trees pushed over but with roots still attached, (3) Cut stumps in woodland area and (4) Stump piles. Exhibit 35. The gross totals opined by this witness would total $148,060. Exhibit 25. This measure of damage is a "modified stump" approach. It does not take into consideration that the City was not raising timber for harvest. There is no real sample to determine fair market value because most of the trees i.e. Cottonwoods and Box Elders are not trees raised for timber. Moreover, many of species are considered as "nuisance" trees by some. The Court finds no real usefulness in this measure of damages to this case. Perhaps this explains why the Plaintiff City of Columbus did not choose the "modified stump" approach in asserting its damages in its trial brief.

If the measure of damages is the "diminution" value, the Courts should look at the "before value" less the "after value" of the land to decide if there were damages. However, this methodology also does not work in this case. The 1.26 acres of the larger 11.9 acres claimed to be damaged has no road frontage or access, and is in the flood plain. The land has little value to anyone other than the City. Most important, there is no evidence in the records as to the value of the City's property before the trespass and its value after the trespass.

Turning then to the third approach to measure damages - "reasonable restoration costs."

The Courts of Ohio have allowed restoration costs to be used when the owner is holding the land for special reasons specifically important to the owner. The Plaintiff

City of Columbus may elect the measure of damages sought. In this case, City of Columbus chooses restoration costs as its measure of damages. Plaintiff's Damage Brief at Page 11.

One of the first cases to address the measure of damages was *Ohio Collieries Co. v. Cocke,* 107 Ohio St. 248-249, which held that: "If the injury is of a permanent or irreparable nature, the difference is the market value of the property as a whole, including the improvements thereon, before and after the injury. If then restoration can be made, the measure of damage is the reasonable cost of restoration, plus the reasonable value of the loss of the use of the property between the time of injury and the restoration, unless such cost of restoration exceeds the difference in the value of the property as a whole before and after the injury in which case the difference in the market value before and after the injury becomes the measure."

In *Denoyer v. Lamb* (1984), 22 Ohio App 3d 156 the Court allowed for such recovery but placed a limit on it. "The injured party may recover the cost of reasonable restoration of his property to its previous condition or to a condition as close as reasonably feasible, without requiring grossly disproportionate expenditures and with allowance for the natural process of regeneration within a reasonable period of time."

The issue then becomes whether the "restoration costs" are reasonable or disproportionate.

The Courts tend to start with what is the diminution of the market value of the property as a factor bearing on the reasonableness of the cost of restoration. *Martin v. Design Construction* (2009), 121 Ohio St. 3d 66. Although either party may offer evidence of diminution of the market value as a factor bearing on the reasonableness of the cost of restoration, the Plaintiff need not prove diminution in the real estate market

value to recover the reasonable costs of restoration. See *Martin vs. Design Construction* and *Coldsnow v. Hartshorne,* 2003 WL 1194099.

In this case the only evidence of market value is the Delaware County Auditor's evaluations for 3 parcels generated on April 23, 2013. Exhibit 13 and Exhibit 15, Page 10. The Auditor's documentation covers all of the acres of land owned by the City of Columbus around the Reservoir (i.e. a total of 1346 acres), not just the 11.9 acres alleged to be damaged in this matter. Exhibit 13. This 1346 acres would be the two strips of land approximately 6.1 to 6.5 miles long, which buffers both sides of the Reservoir. Exhibit 14. There is however, no evidence of market value for the 1346 acres before or after the trespass. There simply is only evidence of the land's value as of April 23, 2013.

"All the cases, it should be noted, stress the overall limitation of reasonableness, a concept well established in American Courts." *Denoyer v. Lamb* (1984), 22 Ohio App 3d 156.

The Second District Court of Appeals in *Jones v. Dayton Power & Light Co.*, 1994 WL 702062, stated this principal quite clearly:

> "We conclude that the reasonableness of restoration costs as the measure of damages pursuant to the exception recognized in Ohio is not exclusively determined by comparing the proven cost of restoration to the diminution in value of the property, but should instead be determined by considering whether the propose cost is grossly disproportionate to the entire value of the injured property. In other words, it would not be objectively reasonable for an owner of a beloved motor car having a fair market value of only $10,000 before an accident to insist that a tortfeasor pay $100,000 for the cost to restore it to the exact condition it was in before the accident. On the other hand, it might not be unreasonable for the owner of that motor car to insist that it be restored to its original condition (assuming that the original condition had special value to the owner) if it would cost $5,000 to restore it, even though the diminution in the car's fair market value were only $1,000, or were negligible".

The Courts moreover have placed limits on restoration damages so that they are not disproportionate to the value of the land. Here the City seeks damages in excess of $54,100 as restoration costs. These however, are greatly disproportionate to the value of the 1.26 acres that were damaged, and to award said amount would give the City of Columbus a wind fall.

The most credible evidence as to damages is the testimony and report of David Ahlum. Exhibit 26. Mr. Ahlum opines that there was actually 1.26 acres in which Trees were either removed completely, cut down to the ground level, or damaged by equipment, resulting in bark damage. The trees within this 1.26 acres were native trees and shrubs primarily valued for their buffering of the reservoir, erosion control, and wildlife habitat.

The Court accepts Mr. Ahlum as an expert and finds his approach to restoration costs is partially supported by the evidence. Mr. Ahlum's costs calculator as to restoration costs is reasonable and necessary as to the following elements:

See Exhibit 36, Appendix 7

Cost Compilation	**Cost**
Cost of Trees	$1,660.50
Shipping of trees to Columbus	$ 300.00
480 trees shelter tubes	$ 1,216.32
480 Woods stakes	$ 367.60
Fertilization tablets	$ 67.47
Shipping cost for tubes, stakes & fertilization tablets	$ 263.81
Labor to plant trees and seed 1.26 acres	$10,493.53
Total Cost	$14,369.23

The Court however finds that to add 3 years of maintenance after planting would not be reasonable. In no case should an injured party, the City of Columbus, be placed in a better position than the party would have been had the wrong not been done. The Plaintiff should not receive a windfall. The trees to be replaced were "volunteer" and basically native trees of little or no market value – Cottonwood, Ash, and Hackberry. The City had spent no funds to maintain these trees since taking ownership in 1923. To award a windfall to the City would be to ignore the holding of *Denoyer vs. Lamb,* that the reasonable costs of restoration should make allowance for the natural process of regeneration within a reasonable period of time.

The City also claims damages for the loss of environmental benefits of the trees that were destroyed. In their report (Exhibit 27), Sakthi Subburayalu, Research Scientist and T. Davis Sydnor, Professor Emeritus, explain the environmental effect of the loss or damage to trees. Using i-Tree as a tool, they have attempted to quantify the ecosystem services provided by the trees and then to opine the damages caused by the trespass.

The Court finds the damages, if any opined by this method, are not specific damages to the Plaintiff, City of Columbus, but rather damages sustained to the general public in the area of the trespass. The Court finds the evidence of $48,300 loss of environmental benefits to be to speculative and not proven by the preponderance of the evidence. The Court therefore does not grant the Plaintiff City of Columbus these damages for loss of environmental effect.

The Court hereby finds for the Plaintiff upon its claims for Trespass and Violation of 901.51. The Court awards the following damages:

This Court therefore finds the reasonable cost of restoration which would not require grossly disproportionate expenditures is $14, 369 as compensatory damages. The Court having found the trespass by SSA, Ltd and its agent to be reckless, awards treble damages under § 901.51 in the amount of $43,109.00.

The Court does not find that Defendants acted with malice and therefore the Plaintiff's request for punitive damages is Denied.

Plaintiff's claims for Negligence, Nuisance, Conversion, and Ejectment are hereby Dismissed.

Turning to the Counterclaims of SSA, Ltd , the Court finds that SSA, Ltd. has not established by the preponderance of the evidence that there has been a breach of contract, trespass or a nuisance created by the Plaintiff City of Columbus. The Defendant's claims arise arguably from a drainage ditch reserved for the benefit of the SSA, Ltd's land as set forth in the original deed of conveyance when the original 11.9 acres was conveyed to the city.

From the evidence submitted, the Defendant's failed to prove by the preponderance of the evidence which ditch it claimed not to be maintained. The deed of conveyance was dated May 1923. The Defendant claims that the ditch now flows into a pond and as the pond fills it overflows and there is no ditch for the overflow. This is not the result of the Plaintiff's alleged breach of covenant/contract, its trespass or resulting nuisance.

The pond in question was not created until 1940 when U.S. 42 was built. This is long after the city was deeded the 11.9 acres. The pond was a "barrow pit" with no overflows. The Court fails to see how these facts establish any cause of action for breach of covenant/contract, trespass or nuisance.

The Defendant's counterclaims are therefore Dismissed for lack of evidence

Defendants Phil Slane and Slane Trucking and Excavation's Crossclaim is Dismissed.

Defendants SSA, Ltd, Phil Slane and Slane Trucking and Excavation are jointly and severally liable to Plaintiff, City of Columbus for the damages awarded above.

Defendants SSA, Ltd shall pay the court costs incurred in these proceedings.

Dated: March 21, 2014.

W. DUNCAN WHITNEY, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by □ Regular Mail, □ Mailbox at the Delaware County Courthouse, □ Facsimile transmission

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