

**David Greenfield**

**v.**

**Carter Wiseman et al.**

**CV04 400 08 68 S**

**Superior Court of Connecticut, Bridgeport**

**January 18, 2008**

Caption Date: January 17, 2008

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Radcliffe, Dale W., J.

Opinion Title: MEMORANDUM OF DECISION

#### FACTS

David Greenfield, the plaintiff in this action, is the owner of property located at 24 West Branch Road, Weston. He purchased the property in December of 2000 (Ex. 6).

The defendants, Carter and Eileen Wiseman, own property which abuts the Greenfield parcel, known as 16 West Branch Road. The Wiseman property, which is located partially in the Town of Weston and partially in the Town of Westport (Ex. G), consists of approximately 2.225 acres. Access to West Branch Road is provided via a 20-foot corridor, which abuts 24 West Branch Road (Ex. 8).

At one time, Carter and Eileen Wiseman owned Lots A and C as shown on Exhibit 8. Lot C, which constitutes of approximately 2.08 acres, and has 225 feet of frontage along West Branch Road, was sold to Dorian Development of Westport in the fall of 2003.

The conveyance of Parcel C to Dorian Development left the 20-foot corridor to West Branch Road as the only means of ingress and egress for Lot A. (Ex. 8.)

In the fall of 2003, Carter Wiseman left a handwritten note (Ex. 7) along with Exhibit 8, in the Greenfield mailbox. The note and the accompanying map explained the location and dimensions of the access corridor.

As part of the agreement to purchase Parcel C (Ex. 8), the Dorian Development Company agreed to construct a driveway on the 20-foot corridor. The task involved mapping, clearing, grading and paving work. The improvements were begun and completed in January 2004.

This action was originally instituted in four counts,

returnable in July of 2004.

Count one alleged a breach of a restrictive covenant, which the plaintiff claimed was binding upon all of the parties, because it is contained in a deed from a common grantor, West Branch Associates. Count two involved a claim that the defendants breached a covenant to protect adjoining land owners.

In Count three, the plaintiff claimed trespass to his land, and resulting damages, while Count four constituted a claim for violation of applicable zoning ordinances.

The plaintiff subsequently abandoned Counts one, two and four of his Amended Complaint dated August 9, 2007, and proceeded to trial only on the trespass claims contained in Count three.

While Dorian Development, as part of its agreement to purchase and develop Lot C, agreed to install a driveway on the 20-foot corridor adjacent to the plaintiff's property, the actual work was not performed by Dorian Development employees, but by a subcontractor. No representative of Dorian Development, or the unnamed subcontractor testified at the trial.

The completed driveway (Ex. 5, 12, 13 & 15) is located entirely on the property of the defendants, and does not encroach upon the plaintiff's property. The plaintiff claims that certain limbs on a large pine tree situated at the corner of his property (Ex. 16), were cut as part of the driveway construction (see Ex. 3, 4, 11, 14, 17, 18, 19 & 20).

A stake shown on Exhibit 2 and Exhibit A marks the property boundary line. The exhibits also show the areas where the tree was cut, between the stakes and the tree.

None of the parties witnessed the actual cutting of the trees, nor was any testimony presented from those who actually cut the limbs, an action allegedly undertaken as part of the driveway construction project.

The uncontradicted testimony is that neither of the named defendants personally cut any of the branches, or witnessed the actions of those responsible.

The plaintiff claims damages pursuant to §52-560[1] of the General Statutes. He further claims that the fair market value of his property, 24 West Branch Road, has been diminished, as a result of the removal of the branches from the pine tree.

***THE PLAINTIFF HAS FAILED TO PROVE THAT EITHER DEFENDANT COMMITTED A TRESPASS TO PROPERTY***

The essential elements which must be proven to

sustain an action for trespass are: 1) ownership or possession of an interest in land by the plaintiff, 2) an invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest, 3) done intentionally, and 4) causing direct injury. *Avery v. Spicer*, 90 Conn. 576, 579 (1916); *Abington Ltd. Partnership v. Talcott Mountain Service Center*, 43 Conn.Sup. 424, 427 [11 Conn. L. Rptr. 349] (1994).

The evidence fails to show any intentional intrusion or invasion of the plaintiff's possessory interest in 24 West Branch Road, Weston, by either Carter or Eileen Wiseman, the only defendants in this action.

Section 52-560, C.G.S., does not provide a new or independent cause of action. It merely provides a measure of damages applicable in situations in which compensatory damages, in the absence of the statute, would be recoverable. *Koenicke v. Maiorano*, 43 Conn.App. 1, 29 (1996).

Here, there is no evidence suggesting that either of the defendants wrongfully entered the plaintiff's property.

Nor is there any evidence that either defendant committed any act which intentionally injured the plaintiff, or intentionally caused a trespass to his property.

#### *NO PROOF SUFFICIENT TO DEMONSTRATE AGENCY WAS INTRODUCED AT TRIAL*

In order to demonstrate the existence of an agency relationship between the defendants, and the unknown individual or individuals who cut the limbs from the plaintiff's pine tree, the evidence must establish: 1) a manifest action by the principal that the agent will act for him, 2) an acceptance by the agent of the undertaking, and 3) an understanding between the parties that the principal will be in control of the undertaking. *McDermott v. Calvary Baptist Church*, 263 Conn. 378, 384 (2003).

Here, neither of the defendants controlled the means by which the driveway would be installed, and both were unaware of the name of the person or entity engaged by Dorian Development to perform the actual installation work.

Therefore, there is no basis in the evidence presented for a finding of an agency relationship, making the defendants, or either defendant, vicariously liable for the actions of the unknown subcontractor.

#### *PLAINTIFF HAS FAILED TO PROVE ANY ACTUAL DAMAGE*

Assuming, *arguendo*, that the plaintiff had established the elements of a trespass to land, he has utterly failed to demonstrate any resulting damages.

No evidence was introduced concerning the value of the cut branches, and all of the photographs reveal a healthy pine tree which need not be cut down as a result of the branches being removed.

Furthermore, the defendants, or anyone acting as their agent, would be fully justified in cutting any portion of the branches which extended beyond the stake shown in Exhibit A, on to their property. The plaintiff would be limited to any provable damages for the portion of the branches between the stake, and the pine tree.

The plaintiff, David Greenfield, offered, at trial, the opinion that the value of his property, 24 West Branch Road, Weston, had been reduced and diminished from \$1.8 million dollars before the branches were cut, to \$1.775 million following the cutting, a reduction in value of \$25,000. No expert testimony concerning value was presented.

Although an owner of real property is permitted to testify as to the diminution in the value of his property, and the cause for that diminution in value; *Pesty v. Cushman*, 259 Conn. 345, 364 (2002); *Tessmann v. Tiger Lee Construction Co.*, 228 Conn. 42, 47 (1993); *State v. Simino*, 200 Conn. 113, 120 (1986); the weight to be accorded such testimony is for the trier of fact.

The court declines to give any weight to the unsupported opinion testimony of the plaintiff, concerning diminution in value as a result of the cutting of the branches.

#### *CONCLUSION*

It is found, that neither defendant committed a trespass upon the property of the plaintiff, David Greenfield.

It is further found that the entity which cut the branches on the plaintiff's pine tree was not the agent or employee of the defendants at the time the branches were cut.

It is found that the testimony and evidence failed to reveal any actual damages sustained by the plaintiff. Judgment may enter in favor of the defendants. Costs are awarded to the defendants.

RADCLIFFE, J.

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#### Footnotes:

[1]. Section 52-560, C.G.S.-"Any person who cuts, destroys or carries away any trees, timber or shrubbery, standing or lying on the land of another or on public land, except on land subject to the provisions of §52-560a, without license of the owner, and any person who aids therein, shall pay to the party injured five times the

reasonable value of any tree intended for sale or use as a Christmas tree and three times the reasonable value of any other tree, timber or shrubbery; but, when the court is satisfied that the defendant was guilty through mistake and believed that the tree, timber or shrubbery was growing on his land, or on the land of the person for whom he cut the tree, timber or shrubbery, it shall render judgment for no more than its reasonable value."