Vaughan v. S.L. Nusbaum Realty, Co.

Circuit Court of the City of Norfolk, Virginia

November 30, 2016, Decided

Case No.: CL15-5895-00/01, Case No.: CL15-5897-00/01

Reporter
2016 Va. Cir. LEXIS 183 *

TRAVIS C. VAUGHAN, Plaintiff, v. S.L. NUSBAUM REALTY, CO., et al., Defendants and Third-Party Plaintiffs, v. DOMINION RESOURCES, INC., et al., Third-Party Defendants.ALEXANDER B. GOLDENBERG, Plaintiff, v. S.L. NUSBAUM REALTY, CO., et al., Defendants and Third-Party Plaintiffs, v. DOMINION RESOURCES, INC., et al., Third-Party Defendants.

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OPINION AND ORDER

The parties appeared before the Court on November 21, 2016, for a hearing (the "Hearing") on the Demurrer of Third-Party Defendants Dominion Resources, Inc. ("DRI") and Virginia Electric and Power Co., d/b/a Dominion Virginia Power ("DVP"), to the Third-Party Complaint filed by Defendants/Third-Party Plaintiffs, S.L. Nusbaum Realty Co. and 1066 Limited Partnership ("Third-Party Plaintiffs"), proper notice having been given to all parties. Having considered the pleadings, the evidence and oral argument presented at the Hearing, and applicable authorities, the Court SUSTAINS the Demurrer and dismisses DRI, without prejudice. The bases for the Court's ruling are as follows.

Background

Plaintiffs Travis C. Vaughan and Alexander B. Goldenberg (collectively, "Plaintiffs")[1] allege that on June 13, 2013, they sustained injuries when the "wind picked up" and they were struck by a falling limb from a tree (the "Tree") located at an apartment complex owned, maintained, and managed by Defendants/Third-Party Plaintiffs. (Compl. ¶¶ 3, 5-6.) Third-Party Plaintiffs allege that—based on an easement granted by Third-Party Plaintiffs, **[*2]** as successors in interest,[2] to DVP (the "Easement")—DRI and DVP had a duty to maintain the Tree, and Third-Party Plaintiffs therefore are entitled to indemnification and contribution for any damages to Plaintiffs for which Third-Party Plaintiffs are found liable. (Third Party Compl. ¶¶ 12-15.)

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[1] Although each plaintiff filed a separate law suit, the Complaints, Third-Party Complaints, and Third-Party Defendant Demurrers are identical with the exception of the identity of the plaintiff.

[2] The Easement was originally granted to "Sussex Estates, Incorporated" on September 17, 1948. (Third-Party Compl. Ex. 1.)

The Easement grants DVP "the right, privilege and easement of right of way, to construct, operate and maintain a pole line for the transmission and distribution of electricity," and, with respect to the issue before the Court, "the right to trim, cut and keep clear all trees, limbs and undergrowth and other obstructions along said lines or adjacent thereto that may in any way endanger or interfere with the proper and efficient operation of the same." (*Id.* Ex. 1.) In their Third-Party Complaint, Third-Party Plaintiffs allege that "[a]s the holder of the Easement, [DRI and DVP have] the rights **[*3]** and responsibilities of the dominant estate with regard to the Easement" and have "the duty to maintain the Easement, including by maintaining any trees growing on the Easement." (*Id.* ¶¶ 9-10.)

Positions of the Parties

DRI and DVP demurred to the Third-Party Complaint, arguing that it fails to do the following: (1) allege facts sufficient to establish that DVP and/or DRI owed a contractual duty to maintain trees located within the easement or a common-law duty to maintain the Tree; (2) allege facts sufficient to establish that Third-Party Plaintiffs can recover under a theory of indemnity or contribution because Third-Party Plaintiffs have not yet been found liable for negligence; and (3) state a claim against DRI, DVP's parent company, because DRI cannot be held vicariously liable for DVP's actions and there are no allegations of independent negligence by DRI. (*See generally* Mem. in Supp. of Third-Party Def.'s Dem.)

Third-Party Plaintiffs respond as follows: (1) DVP's duty to maintain the Easement necessarily includes a duty to maintain the Tree; (2) because Third-Party Plaintiffs contend they were, at most, only passively negligent, claims for indemnity and contribution are not predicated **[*4]** on a jury first finding them negligent; and (3) as Third-Party Plaintiffs concede that there currently are no allegations that DRI is liable for the acts of DVP, any dismissal of DRI should be without prejudice. (*See generally* Br. in Opp'n to Third-Party Def.'s Dem.)

Legal Standard

A demurrer tests the legal sufficiency of the claims stated in the pleading challenged. *Dray v. New Mkt. Poultry Prods., Inc., 258 Va. 187, 189, 518 S.E.2d 312, 312 (1999)*. The only question for the court to decide is whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against the defendant. *Thompson v. Skate Am., Inc., 261 Va. 121, 128, 540 S.E.2d 123, 126-27 (2001)*. On demurrer, the court must admit "the truth of all material facts properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from the alleged facts." *Cox Cable Hampton Rds., Inc. v. City of Norfolk, 242 Va. 394, 397, 410 S.E.2d 652, 653, 8 Va. Law Rep. 1330 (1991)*. A demurrer does not admit the correctness of any conclusions of law, however. *Ward's Equip., Inc. v. New Holland N. Am., Inc., 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997)*.

A court may consider attachments to the Complaint when ruling on a demurrer and, in so doing, the court should ignore any factual allegations contradicted by the terms of any authentic, unambiguous documents that are part of the record. *Id.* When an agreement is plain and unambiguous on its face, courts will not look beyond the instrument itself. *Ross v. Craw, 231 Va. 206, 212, 343 S.E.2d 312, 316 (1986)*. To prevail in a **[*5]** cause of action for negligence, a plaintiff must prove the elements of duty, breach, causation, and damages. *Fox v. Custis, 236 Va. 69, 73, 372 S.E.2d 373, 375, 5 Va. Law Rep. 507 (1988)*. The question of whether a duty exists is a pure question of law. *Fox v. Custis, 236 Va. 69, 74, 372 S.E.2d 373, 375, 5 Va. Law Rep. 507 (1988)*.

Discussion

1. Duty to Maintain the Tree

Third-Party Plaintiffs allege that DRI and DVP "had the duty to maintain the Easement, including by maintaining any trees growing on the Easement" and that Third-Party Plaintiffs had no such duty. (Third-Party Compl. ¶¶ 10, 11.) As pleaded, the sole source of any alleged duty is the Easement granted by Third-Party Plaintiffs—as successors in interest—to DVP. (*Id. ¶ 7*.) Third-Party Plaintiffs contend that DVP's "duty to maintain the Easement necessarily includes maintaining the Tree." (Br. in Opp'n to Third-Party Def.'s Dem. 4.) DRI and DVP, on the other hand, assert that "DVP has a duty only to maintain the easement consistent with its use thereof for constructing, operating and maintaining an electric line." (Reply Mem. in Supp. of Third-Party Def.'s Dem. 2.) DRI and DVP contend that although the Easement grants DVP the *right* to trim trees within the easement right of way, it "does not . . . create an *obligation* for DVP or DRI to maintain trees growing within the Easement **[*6]** that do not affect powerline operations" (Mem. in Supp. of Third-Party Def.'s Dem. 4) and does not create "an affirmative *duty* on the part of DVP to the general public to maintain every part of every tree 'growing on' DVP's right-of-way-regardless of whether it actually interferes with the power lines" (Reply Mem. in Supp. of Third-Party Def.'s Dem. 1-2).

The relevant question therefore is whether the duty to maintain the easement right of way imposes a concomitant duty upon DVP—as the owner of the dominant estate—to maintain *all aspects* of the Tree, as the answer to this question

affects the degree of specificity required for the allegations in the Third-Party Complaint.[3] The Court holds that it does not.

The Virginia Supreme Court has held that ***HN4*** with the right to use an easement comes a duty. Specifically, the owner of the dominant estate has "the duty to maintain [the] easement[ ] in a manner consistent with the use allowed." *Westlake Props. v. Westlake Pointe Prop. Owners Ass'n, 273 Va. 107, 121, 639 S.E.2d 257, 265-66 (2007)*; *see also Anderson v. Lake Arrowhead Civic Ass'n, 253 Va. 264, 273, 483 S.E.2d 209, 214 (1997)* ("[T]he owner of a dominant estate has a duty to maintain an easement."). In *Westlake*, a property owners' association was granted easements **[*7]** to maintain a townhome community's sewer system; after a catastrophic system failure due to improper construction, the court held that the duty of the association "required the restoration of the disturbed real property [owned by individual property owners] *in which the sewer system was located*." *Westlake, 273 Va. at 121-22, 639 S.E.2d at 266* (emphasis added). The court noted that sewer system repairs necessarily "require[ ] invasion of the soil" owned by the individual property owners. *Id. at 121, 639 S.E.2d at 265*. The association's obligation, however, appears to be limited to disrupting others' real property only to the extent necessary to maintain and repair the sewer system. While the association may well have the duty to prevent encroachment of the sewer system by tree roots, *see Donner v. Blue, 187 Wn. App. 51, 347 P.3d 881, 884 (Wash. Ct. App. 2015)*, it cannot seriously be contended that the association also would have the duty to cultivate, care for, and cut all grass—as well as all trees and bushes—that happened to lie within the easement right of way if repairs were not necessary.

Although Virginia courts apparently have not articulated the extent of a power company's duty pursuant to an easement, at least one other jurisdiction has. In a case stemming from a property owner's personal injury when his heel struck a **[*8]** metal shield on a guy wire supporting a pole bearing equipment of defendants, the New Jersey Superior Court held that, as owners of the dominant estate, "defendants were under an affirmative duty to make reasonable inspections of their easement upon plaintiff's property and to use due care to keep the guy wires and [metal shield] in good repair." *Ingling v. Pub. Serv. Elec. and Gas Co. and N.J. Bell Tel. Co., 10 N.J. Super. 1, 76 A.2d 76, 81 (N.J. Super. Ct. App. Div. 1950)*. ***HN5*** Courts also have held that the easement holder is liable to third parties for any injuries caused by a lack of maintenance of the easement. *See, e.g., Greiner v. Columbia Gas Transmission Corp., 41 F. Supp. 2d 625, 631-32 (S.D.W. Va. 1999)* (citing Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 8.1 (2nd ed. 1993)).

The Court holds that, in the instant case, the Easement does not impose an affirmative duty on DVP, as owner of the dominant estate, to tend to the Tree beyond those actions necessary to maintain the easement in a manner consistent with the use allowed. DVP has the duty to inspect the easement and make repairs as necessary. This includes trimming, cutting, and clearing trees,[4] but—as indicated in the Easement—*only* to the extent that such trees, or parts thereof, "endanger or interfere with the proper and efficient operation" of the "wires, poles, attachments, equipment and accessories" **[*9]** associated with the "pole line for the transmission and distribution of electricity." (Third-Party Compl. Ex. 1.) DVP nevertheless could be liable if Plaintiffs' injuries were proximately caused by DVP's improper maintenance of the easement consistent with its use by, for example, failing to clear portions of the Tree from the vicinity of power lines when necessary, trimming the Tree in such a fashion as to endanger the public, or compromising the health of the Tree through improper trimming.[5] *See Westlake, 273 Va. at 107, 112, 122, 639 S.E.2d at 260, 260, 266* (holding that a property owners' association had the "obligation to maintain and repair the septic system" because it had been granted easements to "locate, maintain, repair, operate and replace" elements of the system). Stated differently, DVP must take necessary actions to properly maintain the pole line and its accoutrements and, if DVP exercises its right to "trim, cut and keep clear all trees, limbs and undergrowth and other obstructions along said lines or adjacent thereto that may in any way endanger or interfere with the proper and efficient operation of the same," it must exercise reasonable care in doing so.

The Third-Party Complaint simply alleges that "[t]he tree from which the limb fell is located on a portion of the Property that is included in an easement" and that Plaintiffs'"injuries were a direct and proximate result of [DRI and DVP's] negligence." (Third-Party Compl. ¶¶ 7, 12.) DRI and DVP properly note the following: "[N]either the

[3] For purposes of the demurrer, the Court assumes that all portions of the Tree are within the easement right of way.

[4] The Easement also grants the right to trim, cut, and clear "undergrowth **[*10]** and other obstructions" as well. (Third-Party Compl. Ex. 1.)

[5] The Court notes that the Complaint alleges that the Tree had "many dead branches" and a "large rotten place/hole approximately twenty-one (21) inches in diameter within its trunk" and that the Tree "had been trimmed in a lopsided manner around power lines and away from" Third-Party Plaintiff's building, but these conditions currently are not tied in any way to DRI or DVP. (Compl. ¶ 9.)

Complaint nor the Third-Party Complaint alleges that Plaintiff[s were] injured by DVP's pole line or as a result of DVP's failure to maintain or properly operate that pole line. Nor [have] Plaintiff[s] alleged that the falling of the tree's branch was caused by DVP's electric line." (Reply Mem. in Supp. of Third-Party Def.'s Dem. 4.)

Although a duty arises from the Easement, facts must be alleged to support a breach of such duty. Because **[*11]** the Third-Party Complaint is devoid of any facts alleging improper maintenance of the Tree by DRI or DVP, Third-Party Plaintiffs have failed to sufficiently allege that DRI or DVP is liable for Plaintiffs' damages. DRI and DVP's demurrer with respect to the breach of such duty therefore is sustained.

2. Indemnity

As an initial matter, any right to indemnification in the instant case must arise from equity, as there is no allegation that there is an indemnity contract. ***HN6*** "Equitable indemnification arises when a party without personal fault, is nevertheless legally liable for damages caused by the negligence of another. Equitable principles allow the innocent party to recover from the negligent actor for the amounts paid to discharge the liability." *Carr v. Home Ins. Co., 250 Va. 427, 429, 463 S.E.2d 457, 458 (1995)*.

DRI and DVP argue that "because the Third-Party Complaint is necessarily predicated upon a finding of fault on behalf of Third-Party Plaintiffs, they are . . . not entitled to common law indemnity." (Mem. in Supp. of Third-Party Def.'s Dem. 6 (citing *Philip Morris, Inc. v. Emerson, 235 Va. 380, 411, 368 S.E.2d 268, 285, 4 Va. Law Rep. 2568 (1988)*, for the proposition that a defendant guilty of active negligence is not entitled to equitable indemnification from a third-party defendant).) Third-Party Plaintiffs respond that "[b]ecause [their] position **[*12]** is that they did not maintain the Easement, at most a jury could find that they were passively negligent." (Br. in Opp'n to Third-Party Def.'s Dem. 7.)

In *Philip Morris*, the Virginia Supreme Court held that ***HN7*** "[i]f a defendant is guilty of *active negligence*, he may not obtain indemnification from any other defendant." *235 Va. at 411, 368 S.E.2d at 285* (emphasis added). Third-Party Plaintiffs imply that by its use of the phrase "active negligence," the Virginia Supreme Court was indicating that if a defendant were guilty only of *passive negligence*—negligence by omission—equitable indemnification would be available to the defendant. The Court disagrees with this interpretation of *Philip Morris*.

The Virginia Supreme Court took pains in *Philip Morris* to point out that the party seeking indemnification "was not held liable on a theory of vicarious liability." *Id.* This strongly suggests that, by referencing "active negligence" in the context of vicarious liability, the Court simply was distinguishing between a party who is *at fault*—who, in that case, was actively negligent and therefore could not seek indemnification—and a party who is *without fault*—who was vicariously liable and therefore could seek indemnification. Because a **[*13]** party who is passively negligent—by failing to perform an act it was obliged to perform—clearly is *at fault*, a proper reading of *Philip Morris* leads to the conclusion that a passively negligent defendant may *not* seek equitable indemnification.

Although decided a year before *Philip Morris*, the United States Court of Appeals for the Fourth Circuit, applying Virginia law in a diversity case, arrived at a similar conclusion in *Wingo v. Celotex Corp., 834 F.2d 375 (4th Cir. 1987)*. In rejecting a claim that a party's passive negligence allowed it to seek equitable indemnification, the Court of Appeals noted that the Virginia Supreme Court, in *Maryland Casualty Co. v. Aetna Casualty and Surety Co., 191 Va. 225, 60 S.E.2d 876 (1950)*, adopted the following rule: ***HN8*** "A person who, *without personal fault*, has become subject to tort liability for the unauthorized and wrongful conduct of another is entitled to indemnity from the other for expenditures properly made in the discharge of such liability." *Wingo, 834 F.2d at 379* (emphasis added) (quoting *Restatement of Restitution, § 96*); *see also Carr v. Home Ins. Co., 250 Va. 427, 429, 463 S.E.2d 457, 458 (1995)* (noting that equitable indemnification is available only to parties "without personal fault").

This Court likewise recognizes that the presence or absence of personal fault is the gravamen for determining whether a party may seek equitable indemnification, not whether a party's negligence is passive or **[*14]** active. Stated differently, a defendant who is at fault—whether by active negligence or passive negligence—is precluded from seeking equitable indemnification from another defendant. As there are no allegations in the Third-Party Complaint that could give rise either to contractual indemnification or vicarious liability, the Court sustains the demurrer with respect to any claim of indemnification by Third-Party Plaintiffs.

3. Contribution

DRI and DVP's assertion that there is no basis for a contribution claim relies on the absence of a duty by them to Plaintiffs. (Mem. in Supp. of Third-Party Def.'s Dem. 6.) Because Third-Party Plaintiffs have not pleaded sufficient facts in the Third-Party Complaint to establish such a duty, or the breach thereof, the Court finds that there currently is no

basis for a contribution claim. The Court therefore sustains the demurrer with respect to any claim of contribution by Third-Party Plaintiffs.

4. Liability of DRI

Third-Party Plaintiffs concede that DRI is not a party to the Easement and that the Third-Party Complaint fails to allege any other basis for liability against DRI. (Br. in Opp'n to Third-Party Def.'s Dem. 4.) DRI therefore is dismissed as **[*15]** a party to this action. Because there has been no adjudication regarding DRI's involvement—or non-involvement—in the case at bar, the dismissal is without prejudice.

Conclusion

Based on the foregoing, DRI and DVP's Demurrer to Third-Party Plaintiffs' Third-Party Complaint is SUSTAINED, and DRI is dismissed, without prejudice, as a third-party defendant. Third-Party Plaintiffs are granted leave to amend their Third-Party Complaint within twenty-one days. Any objections to this Order shall be submitted to the Court within fourteen days. Endorsements are waived pursuant to *Rule 1:13*. The Clerk shall mail (or e-mail) copies of this Order to all counsel of record.

IT IS SO ORDERED this 30th day of November, 2016.

David W. Lannetti

Circuit Court Judge

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