781 N.Y.S.2d 624

1 Misc.3d 127(A)

Agi FLIEGMAN & Mendel Fliegman, Appellants,

v.

Liebel RUBIN, Dorothy Rubin, Tower Builders & Contractors Corp., Hi-Tower Contractors, Inc., Jacob Katz a/k/a Jack Katz, Mark Klein, Inc. and Triangle Construction, Inc., Respondents.

Nos. 2002-1413 KC, 2003-33 KC.

2003-51542

Supreme Court of New York, 2nd and 11th Judicial Districts

November 20, 2003

Editorial Note:

This case is not published in a printed volume and its disposition appears in a table in the reporter.

PRESENT: ARONIN, J.P., PATTERSON and GOLIA, JJ.

OPINION

Appeals by plaintiffs from (1) so much of an order, as limited by their brief, of the Civil Court, Kings County (D.Silber, J.), entered July 29, 2002, as granted the motion of defendants Hi-Tower Contractors, Inc. and Jacob Katz a/k/a Jack Katz for reargument of an order of the same court, entered April 2, 2002, and, upon reargument, granted the branch of their motion which sought summary judgment dismissing the trespass cause of action asserted against them and (2) an order of the same court, entered November 4, 2002, which (a) in effect, granted plaintiffs' subsequent motion for reargument of the order entered April 2, 2002 and, upon reargument, adhered to its prior order and (b) granted the cross motion by defendants Hi-Tower Contractors, Inc. and Jacob Katz a/k/a Jack Katz for summary judgment dismissing the cause of action asserted against them pursuant to RPAPL 861.

On the Court's own motion, the appeals are consolidated for purposes of disposition.

Appeal from the order entered July 29, 2002 unanimously dismissed as that order was superseded by the order entered November 4, 2002.

Order entered November 4, 2002 unanimously modified by providing that (1) upon reargument, the branch of the motion by defendants Hi-Tower Contractors, Inc. and Jacob Katz a/k/a Jack Katz for summary judgment dismissing the trespass cause of action asserted against them is denied and (2) the cross motion by defendants Hi-Tower Contractors, Inc. and Jacob Katz a/k/a Jack Katz for summary judgment dismissing the cause of action asserted against them pursuant to RPAPL 861 is denied; as so modified, affirmed with $10 costs payable to plaintiffs by defendants Hi-Tower Contractors, Inc. and Jacob Katz a/k/a Jack Katz.

After three large trees located on plaintiffs' property fell to the ground damaging plaintiffs' property, plaintiffs commenced this action to recover damages for, among other things, negligence, trespass and violation of RPAPL 861. Plaintiffs commenced the action against Liebel Rubin and Dorothy Rubin (collectively the Rubins), the owners of the abutting property. Plaintiffs alleged that the trees fell as a result of an excavation which occurred on the Rubins' property as part of a house construction project.

Among others, plaintiffs also named as defendants Hi-Tower Contractors, Inc. (hereinafter Hi-Tower) and Jacob Katz a/k/a Jack Katz (the project's construction managers) and Mark Klein, Inc. (the foundation subcontractor).

After the defendants' motions for summary judgment were denied, Hi-Tower and Katz moved to reargue, inter alia, the branch of their motion which sought summary judgment dismissing the trespass cause of action. The court granted reargument and, upon reargument, held that Hi-Tower and Katz were entitled to summary judgment dismissing the trespass cause of action. Plaintiffs then moved for reargument and Hi-Tower and Katz opposed plaintiffs' motion and cross-moved for summary judgment dismissing the causes of action which sought to recover damages pursuant to RPAPL 861 and which were asserted for the first time in plaintiffs' amended complaint. Although the court stated that it was denying reargument, it nevertheless addressed the merits of plaintiffs' contentions regarding the trespass cause of action. The court also granted the cross motion to dismiss the cause of action asserted pursuant to RPAPL 861. Plaintiffs appeal from both orders.

While no appeal lies from an order denying reargument, where, as here, the court addressed the merits of plaintiffs' motion, the court, in effect, granted reargument and adhered to its determination (see *Matter of Gabriele v. Metropolitan Suburban Bus Auth.*, 239 A.D.2d 575, 577). As a result, plaintiffs may appeal from the order and their appeal from

the prior order which, inter alia, granted the motion by Hi-Tower and Katz for reargument must be dismissed (see id.).

Hi-Tower and Katz claimed that they were entitled to summary judgment because they did not perform the excavation or instruct the excavation subcontractor as to how to perform the excavation. However, the fact that Hi-Tower and Katz did not perform any physical labor or control the manner in which the excavation was performed, is not dispositive (see *Kleeman v. Rheingold*, 81 N.Y.2d 270). In any event, because the trees fell onto plaintiffs' property and plaintiffs testified at their examinations before trial that somebody entered onto their property to dispose of the trees and to clean up the construction debris blown onto plaintiffs' property, to obtain summary judgment dismissing the trespass cause of action, it was defendants' burden to demonstrate either that entry was with permission or that there was no entry thereon. Inasmuch as defendants failed to do so, defendants are not entitled to summary judgment dismissing the trespass cause of action (see *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562; *Ligo v. Gerould*, 244 A.D.2d 852).

With respect to plaintiffs' cause of action to recover damages pursuant to RPAPL 861, the trees at issue were located on plaintiffs' property and roots and branches from the trees encroached onto the Rubins' property. At common law, adjoining property owners, such as the Rubins, are permitted to trim tree branches and roots which encroach onto their property from a neighboring property (*see 1 NY Jur 2* d, Adjoining Landowners § 57; 2 CJS, Adjoining Landowners § 62). However, the right to self-help is limited, in that an adjoining landowner's right to engage in self-help "does not extend to the destruction or injury to the main support system of the tree * * *" (1 NY Jur 2d, Adjoining Landowners § 57.; *see also 2* CJS, Adjoining Landowners §§ 62, 65-67). Inasmuch as RPAPL 861(1) provides, in relevant part, that "[i]f any person cuts down or carries off any wood, underwood, tree * * * or otherwise despoils a tree on the land of another, without the owner's leave, * * * an action may be maintained against him by the owner * * *," it is in accord with common law principles. Thus, RPAPL 861 does not require that a trespass occur in order to impose liability (see *Crosby v. RAM Forest Prods.*, 244 A.D.2d 1007). Indeed, damages may be recovered under the common law and pursuant to RPAPL 861 if a tree is, among other things, cut down or despoiled even if the defendants herein did not enter onto the plaintiffs' property (see generally *Jenkins v. Etlinger*, 78 A.D.2d 705, modified on other grounds 55 N.Y.2d 35; *Booska v. Pate*, 24 Cal.App.4th 1786).

Accordingly, in the instant action, there are issues of fact as to whether the severance of the trees' roots during the excavation despoiled plaintiffs' trees (*see RPAPL 861* [1]; *Zuckerman*, 49 N.Y.2d 557) and, if so, whether the trees fell due to defendants' casual or involuntary acts (*see RPAPL 861* [2]).