960 N.Y.S.2d 768

104 A.D.3d 1131

Richard B. SWEGAN and Debra A. Dinnocenzo, Plaintiffs-Respondents,

v.

Eric SVENSON, Marcelle L. Svenson, Defendants-Appellants, et al., Defendants.

Nos. 2013-01636, 18 CA 12-00987

Supreme Court of New York, Fourth Department

March 15, 2013

Erickson Webb Scolton & Hajdu, Lakewood (Paul V. Webb, Jr., of Counsel), for Defendants-Appellants.

Sellstrom Law Firm, LLP, Jamestown (Stephen E. Sellstrom of Counsel), for Plaintiffs-Respondents.

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

MEMORANDUM:

[104 A.D.3d 1132] Plaintiffs commenced this action asserting, inter alia, causes of action for conversion and trespass and seeking damages resulting from the removal of two boundary line trees located partially on property owned by plaintiffs. The trees were removed during the course of renovations performed by Eric Svenson and Marcelle L. Svenson (defendants) on their adjoining property. Defendants hired defendant David McKee, an architect, to provide various architectural design and consulting services as well as project management for the renovations, and McKee hired defendant David Mathews, sued individually and doing business as Great Lakes Tree Service, to cut and remove the two trees. We conclude that Supreme Court erred in denying that part of defendants' motion for summary judgment dismissing the amended complaint against them with respect to the second cause of action, for " destruction of interest," but otherwise properly denied the motion. We therefore modify the order accordingly.

With respect to the first and third causes of action, for conversion and trespass,

defendants contend that they cannot be directly liable because they did not cut down the trees, nor can they be vicariously liable because McKee and Mathews were not defendants' agents. Regardless of McKee's status as an independent contractor, defendants may be held liable for the trespass and ensuing conversion if they " directed the trespass or such trespass was necessary to complete the contract" between defendants and McKee (*Axtell v. Kurey*, 222 A.D.2d 804, 805, 634 N.Y.S.2d 847, *lv. denied* 88 N.Y.2d 802, 644 N.Y.S.2d 688, 667 N.E.2d 338; *seeGracey v. Van Camp*, 299 A.D.2d 837, 838, 750 N.Y.S.2d 400). Even assuming, arguendo, that defendants met their initial burden, we conclude that the court properly determined that plaintiffs raised issues of fact whether defendants " directed the trespass or [whether] such trespass was necessary to complete the contract" (*Axtell*, 222 A.D.2d at 805, 634 N.Y.S.2d 847; *seeMorrison v. Wescor Forest Prods. Co.*, 28 A.D.3d 1225, 1226, 814 N.Y.S.2d 474). Defendants contend for the first time on appeal that they were entitled to summary judgment dismissing the cause of action for conversion on the ground that they had the right as joint owners to remove the trees because they were structurally unsafe and created a safety hazard or private nuisance, and thus that contention is not properly before us (*seeCiesinski v. Town of Aurora*, 202 A.D.2d 984, 985, 609 N.Y.S.2d 745). Defendants further contend that they were entitled to summary judgment **[104 A.D.3d 1133]** dismissing the fourth cause of action, for treble damages under RPAPL 861, on the ground that there is no evidence that they acted recklessly, willfully or wantonly. That contention is likewise raised for the first time on appeal and thus is not properly before us (*seeid.*).

Finally, we note that the second cause of action, for " destruction of interest," is duplicative of the cause of action for conversion, and we therefore grant defendants' motion with respect to the second cause of action (*see generallyM.D. Carlisle Realty Corp. v. Owners & Tenants Elec. Co. Inc.*, 47 A.D.3d 408, 409, 850 N.Y.S.2d 24).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the second cause of action against defendants Eric Svenson and Marcelle L. Svenson and as modified the order is affirmed without costs.