

Asa Christiana et al.

v.

Christopher Fischer et al.

CV075001942S

Superior Court of Connecticut, Litchfield

October 17, 2007

Caption Date: October 17, 2007

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Gallagher, Elizabeth A., J.

Opinion Title: MEMORANDUM OF DECISION
RE MOTION TO STRIKE

This case involves a claim for damages to the plaintiffs' property allegedly resulting from the defendants' alteration of the topography of their land and the construction of a retaining wall.

The complaint is brought in four counts, alleging negligence, recklessness, nuisance, and trespass. Before the court is the defendants' motion to strike the second and fourth counts on the ground that the allegations contained therein are insufficient to state a cause of action in recklessness (second count) and trespass (fourth count).

The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted . . . A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court . . . We take the facts to be those alleged in the complaint . . . and we construe the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged. (Citations omitted; internal quotation marks omitted).

Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498, 815 A.2d 1188 (2003).

The defendants argue, with respect to the second count, that the plaintiffs do not state a claim for recklessness. Our appellate courts have held that "[r]ecklessness is a state of consciousness with reference to the consequences of one's acts . . . It is more than negligence, more than gross negligence . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something

more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them . . . [R]eckless conduct tends to take on the aspect of highly unreasonable conduct, involving an *extreme departure* from ordinary care, in a situation where a high degree of danger is apparent . . . It is at least clear . . . that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention . . ." (Emphasis added; citations omitted; internal quotation marks omitted.) *Craig v. Driscoll*, 64 Conn.App. 699, 720-21, 781 A.2d 440 (2001), *aff'd*, 262 Conn. 312, 813 A.2d 1003 (2003).

In the second count, the plaintiffs repeat the allegations of negligence and additionally allege that the defendants constructed and/or rebuilt a driveway without a building permit and in violation of the town's zoning regulations. In the fourteenth paragraph, they describe the zoning violation as "flagrant" and indicate that the failure to obtain a permit and comply with the zoning regulations was a "reckless disregard" of the plaintiffs' rights. The plaintiffs, however, make no allegation that the defendants were made aware of any problems that they were causing to the plaintiffs' property prior to their completion of the alteration and construction work. As pled, the allegations fail to support a cause of action for recklessness. The motion to strike the second count is therefore granted.

With respect to the fourth count, the defendants contend that the plaintiffs have failed to allege the intentional conduct essential to state a cause of action for trespass. They argue that there is no allegation that the defendants intended to direct water or other debris onto the plaintiffs' property or that they acted with knowledge to a substantial certainty that the water or other debris would enter the plaintiffs' property.

Our Supreme Court, citing *Scribner v. Summers*, 84 F.3d 554 (2nd Cir. 1996), set out the requirements for a cause of action under the theory of trespass: "The essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury . . . [I]n order to be liable for trespass, one must intentionally cause some substance or thing to enter upon another's land. A trespass may be committed on, beneath or above the surface of the earth, which includes "soil water, trees, and other growths . . . A trespass need not be inflicted directly on another's realty, but may be committed by discharging foreign polluting matter at a point beyond the boundary of such realty . . . [I]n determining the existence of the requisite intent for trespass, the issue was not whether the defendants had

intended the contaminated substances to enter the plaintiff's land, but whether the defendants had intended the act that amounted to or produced the unlawful invasion and had good reason to know or expect that subterranean and other conditions would cause the contaminated substances to migrate from the defendants' to the plaintiffs' land." (Citations omitted; internal quotation marks omitted). *City of Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 87, 88, 89 (2007).

The plaintiffs here allege that they notified the defendants that they were having severe drainage problems as a result of the land alteration and construction on several occasions, and that the defendants failed to take corrective action. In *Ahnert v. Getty*, Superior Court, Judicial District of New London at New London (Apr. 4, 1997, Handy, J.), the plaintiffs in an action for trespass asserted that "the defendant knew or should have known that significant amounts of dust were settling outside of the defendant's premises, including on the plaintiffs' property," and "the defendant intentionally invaded the plaintiffs' property by his placement of excessive dust thereon." The court found that the plaintiffs satisfied the intent element for an action in trespass.

The court finds that the plaintiffs' allegations are sufficient to establish a cause of action for trespass. Accordingly, the motion to strike the fourth count is denied.

For the above-stated reasons, the motion to strike is granted as to the second count and denied as to the fourth count.

BY THE COURT,

Gallagher, J.