852 N.E.2d 137 (2006)

67 Mass.App.Ct. 1104

Laurence C. SMITH & others, [1]

v.

CITY OF MARLBOROUGH.

No. 05-P-745.

Court of Appeals of Massachusetts

Aug. 16, 2006

Editorial Note:

This is an Unpublished Opinion. See MA R A PRAC Rule 1:28

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following the award of land taking damages, the plaintiffs were awarded treble damages in the Superior Court on their additional claims, pursuant to G.L. c. 242, § 7, that the defendant city of Marlborough trespassed, destroyed trees, and removed soil and gravel during the installation of a sixteen-inch diameter water main through their properties. Marlborough appeals.

Background. The plaintiffs are owners of residential properties abutting a way known as Beaman Lane (A.95). On January 20, 1997, Marlborough began clearing and excavation work along the Beaman Lane site in preparation for the installation of the water main (A.421). The Smith plaintiffs filed a complaint in the Superior Court on January 28, 1997, alleging Marlborough's undertaking of the project on their land was improper, and obtained a temporary restraining order the next day. A preliminary injunction was issued on March 10, 1997(A.2). On August 18, 1997, Marlborough ordered an eminent domain taking of an easement on the properties of the plaintiffs, and a second, confirmatory taking was ordered on April 27, 1998 (A.64,151). The plaintiffs filed a complaint for contempt on August 10, 1998. On October 5, 1998, a judge allowed an assented to motion to continue the contempt trial. (A.3).

The plaintiffs moved for partial summary judgment on "liability aspects" of the case, and that motion was allowed on October 26, 2001 (A.4,186,187). The case was bifurcated, and a jury-waived trial held in late May, 2002, on land taking damages. A decision on those damages was issued on June 17, 2002 (A.4-5,203). Marlborough continued the water main installation work throughout these events (A.145). An assented to motion to dissolve the preliminary injunction was allowed on September 26, 2002(A.6). A jury trial on trespass damages was held in May, 2003, followed by a posttrial determination on a request for imposition of treble damages pursuant to G.L. c. 242, § 7 (A.8,419). [2]

Marlborough asks that the trespass damages be vacated or, in the alternative, that single rather than treble damages be awarded (brief at 50). [3]

Discussion. 1. *Summary judgment.* Marlborough's principal claim of error is that the allowance of partial summary judgment for the plaintiffs was an error of law. According to Marlborough, the judge implicitly ruled that Marlborough had no right to clear the land and install the water main, but made no findings of fact or rulings of law. "The argument displays a fundamental misconception of the function of summary judgment. The procedure is only utilized where, as here ... 'there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.' Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974).... While written decisions of summary judgment motion judges are often helpful, they are not necessary.... In the absence of reasons given by the judge, we may consider all the grounds supporting the allowance of [the plaintiffs'] motion." *McMann v. State Ethics Commn.,* 32 Mass.App.Ct. 421, 422 n.2 (1992), and authorities cited. It is our duty on an appeal from the entry of summary judgment to review the materials independently. Compare *Simon v. National Union Fire Ins. Co.,* 57 Mass.App.Ct. 350, 350 (2003).

The action on the plaintiffs' motion appeared on the Superior Court docket: "Allowed after hearing. Defendant failing to have appeared, the court deems this motion unopposed." (A.186). We recognize that there were unusual circumstances, outlined in the margin, [4] which resulted in Marlborough's failure to be represented at the summary judgment hearing, but that failure does not affect our independent review of the summary judgment materials. In any event, Marlborough now points to nothing further that it would have submitted if it had been represented at the hearing or if it had received notice of the rescheduled hearing.

The plaintiffs' summary judgment motion asserted that (1) Marlborough "unlawfully, wrongfully, and intentionally entered upon their land"; (2) the purported takings of land were "invalid as a matter of law"; and (3) Marlborough violated the preliminary injunction (A.383-384). Marlborough responded that (1) the plaintiffs did not own the land in question; (2) the eminent domain taking was proper; and (3) there were genuine issues of material fact with respect to the actions and intent of its agents, employees, and servants who

entered upon the plaintiffs' land (A.162). [5]

As we view the parties' submissions, only the question whether the plaintiffs owned the land in Beaman Lane or whether it was a public way was addressed in the summary judgment proceeding. The controversy centered on the effect of a 1965 order of abandonment of Beaman Lane by Marlborough.

The plaintiffs' principal evidence of ownership appears in the affidavit of attorney Charles Gaffney and his title opinion letter (A.96,100).

Marlborough sought to show, based on the opinion of attorney James Scanlon, that Beaman Lane, long a public way, remained a public way, notwithstanding an order of the city council in 1965 abandoning it (A.168). "When the fact of a public way is disputed, the burden of proof falls on the party asserting the fact." *Witteveld v. Haverhill*, 12 Mass.App.Ct. 876, 877 (1981), and cases cited. Marlborough argues that the procedures prescribed in G.L. c. 82, § 32A, were not followed and the discontinuance was thus ineffective. However, that statute could not have been the basis for the order of abandonment, because Marlborough reads the statute as it was rewritten by St.1983, c. 136, and overlooks its very different wording previously in effect in 1965. At that time the statute provided that "[t]his section shall not apply to ways in cities." Compare *Coombs v. Selectmen of Deerfield*, 26 Mass. App Ct. 379, 381 & n.3 (1988).

Marlborough also argues that the procedures in G.L. c. 40, § 15, were not followed, as an additional basis for its assertion that the abandonment was not effective (brief at 13-14). [6] This argument also is without merit. General Laws c. 40, § 15, concerns the conveyance, and at a specified minimum price, of land, an easement, or a right, taken "otherwise than by purchase," which is no longer required for public purposes. There is no indication in this case that Beaman Lane either previously had been taken by eminent domain or was being offered for sale. Cf. *Muir v. Leominster*, 2 Mass.App.Ct. 587, 595-596 (1974).

A way continues until it is discontinued according to law. *Preston v. Newton*, 213 Mass. 483, 485 (1913). See also *Carmel v. Baillargeon*, 21 Mass.App.Ct. 426, 428 (1986). See generally Randall & Franklin, Municipal Law & Practice § 23.12 (2006). A city council may discontinue a way, G.L. c. 82, § 21. The recorded order of abandonment in this case is unequivocal: "[T]he City of Marlborough ... hereby abandons and discontinues any and all rights that it now has or ever had in: Beaman Lane, from Spoonhill Avenue to Stow Road." (A.126). Such an abandonment devolves upon the abutters "full ownership interest in the roadbed." *Nylander v. Potter*, 423 Mass. 158, 161 (1996). The ownership interest extends to the center of the way. *Opinion of the Justices*, 297 Mass. 559, 562 (1937). The "general rule of construction [is that] 'the mention of a way as a boundary in a conveyance of land is presumed to mean the middle of the way, if the way belongs to the grantor." ' *Murphy v. Mart Realty of Brockton, Inc.*, 348 Mass. 675, 679-680 (1965), quoting from *Crocker v. Cotting*, 166 Mass. 183, 185 (1896). See also G.L. c. 183, § 58.

Attorney Scanlon raised a concern that certain deeds in the plaintiffs' chains of title did not state that the fee to the center of the way was conveyed to the respective grantees (A.168-170). Marlborough, however, offers nothing to overcome the "strong" presumption stated in *Murphy v. Mart Realty of Brockton, Inc.*,*supra* at 680.

Accordingly, Marlborough's attempt to undermine the long-settled legal principles applicable to property rights adjacent to a discontinued way fails. It is clear from this record that Marlborough would have no reasonable expectation of sustaining its burden of proving that Beaman Lane is a public way. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). For these reasons, we conclude that the plaintiffs are entitled to summary judgment, as matter of law, on their claim of ownership of the properties in issue.

Because the summary judgment decision involved only the issue of ownership of the land in Beaman Lane, the other two issues--the validity of the eminent domain taking and the consequences of the actions of Marlborough in entering the plaintiffs' properties--remained for further proceedings in the Superior Court. There is no dispute concerning the Superior Court decision on land taking damages (A.203). [7]

2. *Trespass damages.* Following the jury's award of damages to each of the plaintiffs for removal of trees, the judge, pursuant to the plaintiffs' request, trebled the damages under G.L. c. 242, § 7 . [8]

That provision states:

"A person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the defendant had good reason to believe that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only."

"The statute requires that the cutting be done 'without license' and 'wilfully." ' *Moskow v. Smith*, 318 Mass. 76, 78 (1945). Where such cutting is done intentionally and without legal right to be on the land of another, the cutting is done "wilfully within the meaning of the statute." *Palmer v. Davidson*, 211 Mass. 556, 558 (1912).

Marlborough could bring itself within the single damages provision of the statute if it "had good reason to believe that the land on which the trespass was committed was [its] own or that [it] was otherwise lawfully authorized to do the acts complained of." *Moskow v. Smith,supra.*

The judge noted that the plaintiffs had established by the ruling on their motion for summary judgment that they were the owners of the land in the abandoned Beaman Lane, and ruled that Marlborough's entry therefore was unlawful. She concluded that Marlborough had "failed to establish that it had a good reason to believe that it owned the disputed land," and that it therefore was subject to liability for treble damages (A.425). There is ample support for the judge's decision in this record.

As we have concluded, Marlborough's assertion that Beaman Lane was a public way failed, as matter of law. Nevertheless, it cleared the land although there were strong indications that it had no legal right to do so. In a Water Easement Plan prepared for the water main project in 1995, Beaman Lane is shown with a parenthetical note, "ownership to be determined," and a second note: "This survey was performed without the benefit of the determination of the status of Beaman Lane by the city attorney." There is a reference to "Beaman Lane discontinuance dated June 28, 1965" (A.159 & Ex.1). The Smith plaintiffs raised questions about ownership of the land with city personnel immediately after receiving notice of blasting on January 16, 1997 (A.30).

A temporary restraining order was issued on January 29, 1997. Following that, Marlborough was warned by the judge, on February 18, 1997, after the hearing on the plaintiffs' request for a preliminary injunction: "[I]t is not clear what, if any, appurtenant rights were retained by the City, in the land in question. The Court notes, however, that the City continues its work at its peril ... [I]f trial on the merits proves that the plaintiffs' position should prevail, the City may be subject to an order requiring payment of damages...." (A.2).

Marlborough contends it had good reason to believe it had sufficient rights in Beaman Lane to undertake the water main project, relying on its "experienced attorneys," and also claims it had undertaken "extensive steps to clarify its rights in Beaman Lane before cutting down any of the trees or laying the water pipe" [9] (brief at 28,37). There is no record support for this contention. Marlborough cites no steps taken to clarify its rights other than the order of eminent domain taking. [10] Its arguments on the summary judgment motion were based on inapplicable law. Accordingly, with no legal basis for clearing the plaintiffs' land, Marlborough entered unlawfully and intentionally, and therefore wilfully, as matter of law, *Palmer v. Davidson,* 211 Mass. at 558, and is liable for treble trespass damages.

Conclusion. For the reasons given above, we affirm the judgment setting forth the damages for land taking and trebled damages for trespass, for each of the plaintiffs.

Judgment affirmed.

Notes:

[1] Jan Brassard Smith; and additional plaintiffs who subsequently filed complaints and whose cases were consolidated in the Superior Court with the Smith plaintiffs' case on June 20, 1997(A.3). The additional plaintiffs are Lucinda Lopes, trustee of M. & C. Realty Trust; Rodney and JoAnn Willis; Stephen and Cynthia Ruggiero; Jacqueline Winchenbaugh; William and Donna Cunningham; and Russell and Marie Giordano (A.12-29,55).

[2] We note that the motion for summary judgment, damages on the takings by eminent domain, and the order for treble damages were decided by three Superior Court judges (A.186;203;419). No reason appears to distinguish among them in our decision.

[3] We note assertions made by Marlborough which we do not address because they neither conveyed relevant facts nor principles of law appropriate for consideration on the motion for summary judgment. (1) Marlborough claims it could assert rights in Beaman Lane as an abutter under G.L. c. 187, § 5, but does not demonstrate that its property (a water tower site) is either adjacent to the land in question or that it had any rights by deed of ingress or egress over that land (brief at 18-19).(2) Contrary to Marlborough's assertion, there is no indication that any issues of intent were involved in the summary judgment action (brief at 26-28,31-32). (3) The summary judgment action was not tantamount to a default judgment (brief at 32-34). Under Mass.R.Civ.P. 55(a), 365 Mass. 822 (1974), a default judgment may be entered where a party has failed to plead or defend. Marlborough filed an opposition to the plaintiffs' motion and remained active during the course of the litigation.

[4] In a motion for reconsideration, Marlborough's attorney stated in an affidavit that, on the date of the hearing he called the court to ask that it be rescheduled because he was with his father who was gravely ill in a hospital, and was told the hearing would be rescheduled and a new notice would be issued (A.189). Subsequently, he received a call from the clerk inquiring why he had not attended the rescheduled hearing and stating that the matter would be decided on written submissions. The attorney stated he never received any notice of the rescheduled hearing (A.190-191). The motion judge denied the motion on December 31, 2001, without comment (A.4,196).

[5] Marlborough submitted only a memorandum with a

letter title opinion from an attorney, James Scanlon. They are adequate to determine the nature of Marlborough's opposition (A.164,167).

[6] This argument is made in Marlborough's appellate brief and is based on a memorandum of consulting counsel, William Brennan, dated March 10, 1997 (A.71). Although the memorandum predates the summary judgment action in this case, it does not appear that it was included in Marlborough's summary judgment materials. Nevertheless, we have considered it. The memorandum asserts G.L. c. 40, § 15, as a basis for arguing that the abandonment of Beaman Lane was ineffective, and states, similar to attorney Scanlon's opinion (see note 4, *supra*), that certain conveyances in the plaintiffs' chains of title did not specifically convey the fee in the way.

[7] The judge issued a written decision, noting that the only issue in the jury-waived trial was the value of the land taken by eminent domain (A.203). She noted that the issue "whether Beaman Lane was considered to be a public way or was instead part of each lot" had been resolved in the earlier summary judgment action and was "not in dispute at the jury-waived trial." (A.204 & n.2).

Two experts testified and the judge took a view of the properties. Based on the parties' stipulation of the areas taken, and accepting with modifications the approach taken by Marlborough's expert, the judge assigned a value of $0.50 per square foot (A.205-207).

[8] The amounts of damages, determined under the "cost of cure" method, are not disputed on appeal. The damages included cost of replacement of trees, as well as removal of stumps of larger trees that had been cut (A.421; see Tr.4:6 et seq.).

Marlborough complains that it was deprived of an opportunity to present its own "common sense and expert approach" (brief at 47,49), when its expert, a real estate appraiser, was not allowed to testify because he was not an arborist and did not determine the value of the trees (Tr.6-132). Marlborough offers no specific allegations of errors in procedure or in the jury instructions and merely concludes that "according to common sense" the loss of trees could not be worth more than the damages awarded for the land taking (brief at 50).

[9] Marlborough incorrectly states that the *Moskow* case does "not clearly establish that the burden of proving good faith is on the defendant" (brief at 40). That case requires that Marlborough "bring itself" within the statute's protection for single damages by showing it had "good reason to believe" its acts were on land it owns. Whatever Marlborough means by "good faith," that concept is not in issue.

[10] Marlborough cites an affidavit of attorney James Golden, Jr., in support of its statement that the Superior Court "could not conclude as a matter of law that the City had acted in bad faith where the City at all times acted in reliance on its experienced attorneys and their findings and advice, which had proven flawless in previous dealings on such issues" (brief at 37). Nothing in that affidavit indicates any steps Marlborough took to clarify its rights; rather, it merely restates its reliance on its attorneys (A.402).
