

2007-MBAR-416

Laura Bontempo et al.

v.

Antonio Cristino et al.

No. 200600341

Superior Court of Massachusetts

September 6, 2007

Opinion No.: 99766

As-is Docket Number: 2006-00341

Venue: Worcester

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Agnes, Peter W., J.

Opinion Title: MEMORANDUM AND ORDER

1. This is a civil action in which the plaintiffs seek damages from the defendants to compensate them for the harm caused when defendant Dominick Cristino cut down three trees located on the property of the plaintiffs without their permission. Defendant Antonio Cristino entered into a settlement offer with the plaintiffs and the case against him was dismissed. Defendant Dominick Cristino, brother of Defendant Antonio Cristino, did not file an answer or otherwise defend the action. He was defaulted. On August 10, 2007, a default judgment was entered against the defendant Dominick Cristino. The defendant was present at the time. He was not represented by counsel. He declined the court's invitation to confer with counsel for the plaintiffs in an effort to reach a settlement, and offered no reason why a judgment should not enter against him.

2. On August 10, 2007, the court conducted an assessment of damages hearing. The court heard testimony from the plaintiff, Noel Bontempo, and from the defendant Dominick Cristino. The court received 12 exhibits including photographs of the trees in question before they were cut down, photographs of the land after they were cut down, and an affidavit from Kevin Norton, the owner of a landscaping company with a degree in Horticulture who offered opinions about the replacement costs of the trees. Mr. Norton estimated the replacement cost of the Silver Maple at \$30,000 and the other two Elms at 7,000 each. This court determines based on the evidence presented (including the location and condition of the trees) that damages in the amount of \$12,000 should be awarded

against Dominick Cristino.

3. Subsequent to the hearing, defendant Dominick Cristino secured counsel and filed a motion to set aside the default. The factual basis for the motion is that defendant Dominick Cristino was misled into thinking that the law firm representing his brother also represented him. In addition, defendant Dominick Cristino and his brother Antonio Cristino have filed affidavits in which they maintain that they acted on the mistaken, but good faith belief, that the trees in question were located on their side of the boundary line.

4. There is no basis in the record for vacating the default because at all times the defendant Dominick Cristino admits that he cut down trees on the land of the plaintiff without license in violation of G.L.c. 242, §7. What is in dispute, according to defendant Dominick Cristino, is whether he acted "wilfully." If the answer to that question is "yes," the law, G.L.c. 242, §7 provides that he "shall be liable to the owner in tort for three times the amount of the damages assessed..." Thus, in the interests of justice, this court will give the plaintiff the opportunity to make a choice. The plaintiff may offer evidence in rebuttal to that offered by the defendant on the question of wilfulness and it will then be left to the court to determine if the damages should be trebled, or the plaintiff simply may indicate satisfaction with the assessment in the amount of \$12,000 in which case the court will order judgment to enter in that amount.

ORDER

For the above reasons, the defendant's Emergency Motion to set aside default is DENIED. Within 14 days of the date of this order, the plaintiffs may either notify the session clerk that they are satisfied with the award of damages set forth above in paragraph (12) or submit affidavits on the question of wilfulness in which case the court will determine whether the damages should be trebled. In either case, following the fourteen-day deadline, the court will enter final judgment in the matter.

Peter W. Agnes, Jr.

Justice of the Superior Court