22 N.Y.S.3d 606

134 A.D.3d 1269

DENNIS HALSTEAD et al., Appellants,

v.

BRAD FOURNIA et al., Respondents

2015-09153, 520367

Supreme Court of New York, Third Department

December 10, 2015

E. Stewart Jones Hacker & Murphy, LLP, Latham (John F. Harwick of counsel), for appellants.

Powers & Santola, LLP, Albany (Michael J. Hutter of counsel), for respondents.

Before: McCarthy, J.P., Rose, Lynch and Devine, JJ. McCarthy, J.P., Rose and Lynch, JJ., concur.

MEMORANDUM AND ORDER

[22 N.Y.S.3d 607] Devine, J.

Appeal from that part of an order of the Supreme Court (Muller, J.), entered July 29, 2014 in Clinton County, which partially denied plaintiffs' motion for summary judgment.

Defendant John Jamison contracted with defendant Brad Fournia to cut timber on real property in the Town of Saranac, Clinton County that is owned by Jamison and his wife. Jamison showed Fournia an old line of surveying ribbons that purportedly marked the property boundary with land owned by plaintiffs. The ribbons did not mark the actual property boundary, which resulted in Fournia cutting and removing 488 trees on plaintiffs' property.

Plaintiffs thereafter commenced this action and asserted various claims related to the removal of the timber. Following **[134 A.D.3d 1270]** joinder of issue and discovery, plaintiffs moved for summary judgment. Supreme Court granted summary judgment to plaintiffs on the issue of liability, but found that questions of fact required a trial on the issue of damages. Plaintiffs appeal from that part of the order declining to grant summary judgment on the issue of damages.

We affirm, albeit for reasons different than those advanced by Supreme Court. Defendants concede that they removed timber from plaintiffs' property without permission to do so, rendering them liable (*see* RPAPL 861; *Jones v. Castlerick, LLC*, 128 A.D.3d 1153, 1154, 8 N.Y.S.3d 727 [2015]). Supreme Court found questions of fact with regard to whether defendants " had good cause to believe that [they] had a legal right to cut plaintiffs' trees" (*Fernandes v. Morgan*, 95 A.D.3d 1626, 1628, 945 N.Y.S.2d 786 [2012]). Plaintiffs did not dispute on appeal -- and conceded at oral argument -- that defendants

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believed in good faith that they were entitled to remove the trees. In any event, the demonstration by a trespasser of a " good faith belief in a legal right to harvest timber does not absolve that person from all liability under RPAPL 861, but merely saves him or her from having to pay the plaintiff treble damages" as measured by the stumpage value of the trees removed (*id.* ; *see* RPAPL 861). Plaintiffs submitted proof as to the stumpage value of the trees, but made clear that they were electing to seek statutory damages of $250 per tree that are available in any successful timber trespass claim (*see* RPAPL 861 [1], [2]; *Fernandes v. Morgan*, 95 A.D.3d at 1628; *Vanderwerken v. Bellinger* , 72 A.D.3d 1473, 1476, 900 N.Y.S.2d 170 [2010]).

Defendants assert that damages of $250 per tree are not mandatory, and that RPAPL 861 affords discretion to Supreme Court to award a lesser amount of statutory damages. To effectuate the intent of the Legislature in enacting RPAPL 861, we look to the language of the statute, mindful that " [w]hen its language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of its words" (*People ex rel. Harris v. Sullivan*, 74 N.Y.2d 305, 309, 545 N.E.2d 1209, 546 N.Y.S.2d 821 [1989]; *seeMatter of Liberius v. New York City Health & Hosps. Corp.* , 129 A.D.3d 1170, 1171, 11 N.Y.S.3d 305 [2015]). The statute unambiguously directs that defendants " shall be liable for the stumpage value or [$250] per tree, or both," and gives no indication that a lesser amount of statutory damages per tree may be awarded (RPAPL 861 [2]). That reading of the statutory language is confirmed by the legislative history of RPAPL 861, which was enacted in 2003 in an effort to deter the illegal taking of timber by increasing the potential damages for that activity (*see* Senate Introducer's Mem **[134 A.D.3d 1271]** in Support, Bill Jacket, L 2003, ch 602, at 7; Mem of Dept of Envtl Conservation, Bill Jacket, L 2003, ch 602, at 14). The legislation was understood, in line with that intent, to " provid[e] for more suitable fines of *at least* $250 per tree" (Mem of Counsel for St Off of Parks, Recreation and Historic Preservation, Bill Jacket, L 2003, ch 602, at 21 [emphasis added]). Statutory damages of $250 per tree,

which cannot be reduced, amounts to $122,000 given the undisputed fact that 488 trees were removed.

Plaintiffs have accordingly demonstrated that they are entitled to $122,000 under one measure of damages, but that does not end the matter. Supreme Court is not obliged to award statutory damages and is entrusted with the discretion to award " the stumpage value *or* [$250] per tree, *or* both" for an unlawful taking (RPAPL 861 [2] [emphasis added]; *seeFernandes v. Morgan*, 95 A.D.3d 1626, 1627, 945 N.Y.S.2d 786 [2012]). Were it the case that plaintiffs " only present[ed] evidence as to one measure of damages," their claimed damages would be used in the absence of " evidence going to the other measure" (*Jenkins v. Etlinger*, 55 N.Y.2d 35, 39, 432 N.E.2d 589, 447 N.Y.S.2d 696 [1982]; *seeFisher v. Qualico Contr. Corp.*, 98 N.Y.2d 534, 539, 779 N.E.2d 178, 749 N.Y.S.2d 467 [2002]; *Barron v. Dube*, 48 A.D.3d 1059, 1059, 850 N.Y.S.2d 762 [2008]; *Jaklitsch v. Finnerty*, 96 A.D.2d 690, 691, 466 N.Y.S.2d 774 [1983]). In this case, however, both plaintiffs and defendants submitted proof as to the other measure, with plaintiffs providing the affidavit and report of a forester who opined that the stumpage value of the trees was under $5,000. Inasmuch as plaintiffs' own motion papers left unresolved the issue of whether " a lesser amount than that claimed . . . will sufficiently compensate for the loss," Supreme Court correctly directed an immediate trial on the issue of damages (*Jenkins v. Etlinger*, 55 N.Y.2d

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at 39; *see* CPLR 3212 [c]; *see alsoWinegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]).

As a final matter, plaintiffs assert that they are entitled to an award of counsel fees as a component of their damages.

" Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5, 503 N.E.2d 681, 511 N.Y.S.2d 216 [1986] [citations omitted]; *accordMount Vernon City School Dist. v. Nova Cas. Co.*, 19 N.Y.3d 28, 39, 968 N.E.2d 439, 945 N.Y.S.2d 202 [2012]). Plaintiffs claim that they may recover counsel fees pursuant to RPAPL 861 (2), but that statute only provides for an award of the " reasonable costs associated with maintaining [the] action." Counsel fees are not costs, and empowering a court to award one does not ordinarily **[134 A.D.3d 1272]** constitute authority to award the other (*seeMoskowitz v. Wolchok*, 126 A.D.2d 463, 464, 511 N.Y.S.2d 4 [1987]; *Matter of O'Brien*, 28 A.D.2d 1040, 1040, 283 N.Y.S.2d 926 [1967]; *Miss Susan, Inc. v. Enterprise & Century Undergarment Co., Inc.*, 270 A.D. 747, 750, 62 N.Y.S.2d 250 [1946], *affd* 297 N.Y. 512, 74 N.E.2d 461 [1947]). Strictly construing the language of RPAPL 861, as we must (*see e.g.Matter of Mingo v. Chappius*, 123 A.D.3d 1347, 1347, 999 N.Y.S.2d 271 [2014], *lv dismissed* 25 N.Y.3d 1038, 10 N.Y.S.3d 520, 32 N.E.3d 958 [2015]), we discern nothing beyond an intent to award incidental " expenses incurred in prosecuting or defending an action or special proceeding," the definition of costs rather than counsel fees (*Stevens v. Central Natl. Bank of Boston*, 168 N.Y. 560, 566, 61 N.E. 904 [1901]; *see e.g.Alland v. Consumers Credit Corp.*, 476 F.2d 951, 955-956 [2d Cir 1973]; *Libra Bank Ltd. v. Banco Nacional De Costa Rica, S.A.*, 570 F.Supp. 870, 892-893 [SD N.Y. 1983]). Thus, RPAPL 861 does not permit an award of counsel fees to a prevailing party and, to the extent our decision in *Vanderwerken v. Bellinger* (72 A.D.3d at 1476) reads to the contrary, it should not be followed.

McCarthy, J.P., Rose and Lynch, JJ., concur.

ORDERED that the order is affirmed, with costs.