SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 8
NASSAU COUNTY

JANET HATTON and CHARLES HATTON,
Plaintiff(s),

-against-

INDEX#14057/2006

JEFFREY RICH and LAURA MASS,
Defendant(s).

The plaintiffs and defendants own adjoining real property in the village of Mill Neck, Nassau County, New York. In 2004 the defendants began making changes to their property. As a consequence, the plaintiffs contend that excessive amounts of water, silt, and other debris have been caused to flow onto and accumulate on the plaintiff's property.

Mark Hatton testified on behalf of the plaintiffs. He has been an owner of that property since 1993. He testified that the defendants' property is at an elevation higher than that of the plaintiffs' property. He further testified and entered into evidence photographs of the purported depth of material which has accumulated on his property. He contends that the condition is a continuing problem which is exacerbated by weather conditions.

The plaintiffs also produced Frank Giovinazzo. The witness is a landscaper. He has visited the plaintiffs' property on several occasions to assess its remediation. He produced an estimate for the cost of repair which was entered into evidence over defendants' objection. Ultimately, he testified and estimated that cost to be $28,000. Because mechanized equipment cannot be used, he stated that it would take a team of four men fifteen days to complete the work.

Defendants' counsel argues that an estimate is inadmissible citing the Appellate Term decision of small claims case *Murphy v Lichtenberg-Robbins Buick* [2nd Dept., 1978] 102 Misc.2d 358, 424 NYS2d 809. That argument is misplaced.

In *Murphy* there was simply the introduction of an estimate. There was no accompanying testimony which would be subject to cross-examination. Here, although an estimate was presented, the person who prepared the estimate also testified. Thus, defendants' counsel had a full opportunity to cross-examine the witness concerning the preparation of the estimate. Defendants' counsel also argues that the landscaper was not qualified by the Court as

an expert. A trial court is not required to declare or certify a witness as an expert. *People v Wagner* [2nd Dept., 2006] 27 AD3d 671, 811 NYS2d 125. Mr. Giovinazzo testified that he has 30 years experience in his profession which demonstrates that he has the requisite knowledge.

The defendants also argue that the presentation of only one evaluation for the determination of damages is insufficient. The defendants cite *Jenkins v Etlinger* (1982) 55 NY2d 35, 447 NYS2d 696. This argument is also unavailing because *Jenkins, supra,* holds that if the plaintiffs only evaluate damages on the cost of remediation, the burden rests on the defendants to produce competent evidence of the property value. The case does not hold that the burden rests on the plaintiffs to produce such evidence.

The defendant Jeffrey Rich testified on behalf of defendants. He denied that substantial damage has been caused to the plaintiffs' property. He also testified that at a Village Board meeting, Mark Hatton had testified that the cost of repair was $3,000. However, on cross-examination Mr. Rich was unsure of the year in which the meeting was held. The testimony overall also demonstrated that the condition of the defendants' property is an ongoing matter before the Village of Mill Neck.

The defendants also produced Chuck Panetta, a professional engineer. He inspected the plaintiffs' property on several occasions. He testified that he found minimal damage at the property which could be remedied for $1,000.

In their post-trial brief, defendants request that the Court reserve any assessment of damages until the defendants have an opportunity to present evidence about the diminished value of the property. Procedurally, such an application should be made by a motion not a comment in a brief. However, in this case counsel for defendants had subpoenaed a real estate agent. The Court offered the defendants a continuance to a date when the agent could be produced. The defendants declined this offer. The defendants were not denied an opportunity to submit proof on this issue. *Noga v Noga* [3rd Dept., 1997] 235 AD2d 1002, 653 NYS2d 47. There must be an end to the case. *Cone Mills Corp. v Becker* (Sup. Ct., Nassau County, 1971) 67 Misc2d 749, 325 NYS2d 488.

The evidence clearly demonstrates that a problem has existed between the plaintiffs' and defendants' properties since 2004. The testimony and estimate of Mr. Giovinazzo are more credible than that of defendants' engineer. Therefore, plaintiffs are awarded judgment in the amount of the landscaper's written estimate, $24,983.75. There was insufficient evidence to establish a date for the accrual of interest for this ongoing condition. Therefore, no interest is awarded.

The foregoing constitutes the Court's Decision and Order.
Submit Judgment on Notice.

ENTERED

Dated: JUN 4 2008 JUL 2 4 2008

J.S.C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE