

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 25, 2021

530811

CHARLES F. JOHNSON et al.,
Respondents,

v

MEMORANDUM AND ORDER

TOWN OF OPPENHEIM et al.,
Appellants.

Calendar Date: January 5, 2021

Before: Garry, P.J., Clark, Aarons, Pritzker and Colangelo, JJ.

FitzGerald Morris Baker Firth PC, Glens Falls (Michael Crowe of counsel), for appellants.

Frank M. Puturti Jr., PC, Schenectady (Andrew J. Healey of counsel), for respondents.

Aarons, J.

Appeal from an order of the Supreme Court (J. Sise, J.), entered January 16, 2019 in Fulton County, which, among other things, denied defendants' motion for summary judgment dismissing the amended complaint.

Plaintiffs commenced this action alleging that defendants wrongfully entered their property and removed brush and trees that were located on it. Following joinder of issue and discovery, defendants moved for summary judgment dismissing the amended complaint. Supreme Court, among other things, denied the motion. Defendants appeal.

Defendant Town of Oppenheim "may be liable for conditions adjacent to the highway which interfere with a motorist's safe and legal use of the roadway, such as where tree limbs encroach upon a roadway" (Sherman v County of Cortland, 18 AD3d 908, 910 [2005], lv denied 5 NY3d 713 [2005]; see generally Highway Law § 189). "Trees within the highway limits may be removed by proper public officials without compensating abutting owners if the removal be necessary for highway purposes" (Crowell v State of New York, 18 AD2d 7, 9 [1963] [internal quotation marks, brackets and citation omitted], affd 13 NY2d 1132 [1964]). The discretion to remove such trees, however, must not be abused (see Stevens v State of New York, 21 Misc 2d 79, 80 [Ct Cl 1959], affd 14 AD2d 823 [1961], lv denied 11 NY2d 641 [1962]).

Defendants argue that the trees and brush at issue were encroaching on the highway and, as part of their duty to maintain the highway for safe passage, it was necessary to have them removed. Plaintiffs counter that a question of fact exists as to whether the removal of the entire trees and brush was necessary and whether defendants could have satisfied their duty by leaving the trees and merely trimming their branches. We agree with plaintiffs.

The record discloses that defendants removed the trees and brush at issue because branches were hanging over the highway and hitting snowplows that were clearing the highway. Defendant Richard Crum, the former highway superintendent for the Town, testified at his deposition that he did not request permission from plaintiffs to remove the trees and brush. Crum, however, also testified that the highway could have been maintained by just trimming the tree branches and that a member of a crew involved in cutting the trees and brush asked him if they could just be trimmed. Crum explained that the reason why trimming was not done was because the Town did not have the necessary equipment to do so. Crum also stated that when work was completed, the surrounding area at issue was maintained in that there was more sunlight and "it looked a lot better."

Viewing this evidence, as well as the photographs, in the light most favorable to plaintiffs, a question of fact exists as

to whether it was necessary to completely remove the trees and brush from plaintiffs' property. Furthermore, Crum's testimony reveals an issue of fact as to whether the removal was done for the purpose of safe egress on the highway or for aesthetic purposes (compare Hoffman v Town of Shandaken, 147 AD3d 1275, 1276-1277 [2017]). Accordingly, Supreme Court correctly denied the motion.

Garry, P.J., Clark, Pritzker and Colangelo, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court