

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

HON. RALPH F. COSTELLO

MOTION DATE 3/26/03

ADJ. DATE: 6/10/03  
MOT. SEQ# 001-MD

\_\_\_\_\_  
OAK ISLAND BEACH ASSOCIATION, INC.,

PLAINTIFF,

-against-

JOSEPH SCALISE, SR. AND  
JOSEPH SCALISE, JR.,

DEFENDANTS.

\_\_\_\_\_  
X

PLAINTIFF'S ATTORNEY  
CARMAN, CALLAHAN &  
INGHAM, LLP  
280 MAIN STREET  
FARMINGDALE, NY 11735

DEFENDANT'S ATTORNEY  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER, LLP  
3 GANNETT DRIVE  
WHITE PLAINS, NY 10604

Upon reading and filing the following papers relative to this matter: (1) Defendant Joseph Scalise, Jr.'s Notice of Motion to Amend Answer dated February 27, 2003 seeking to amend his Verified Answer to include an additional affirmative defense to plaintiff's Verified Complaint that plaintiff is an improper party who lacks standing to sue; (2) Defendant's Affirmation in Support; (3) Plaintiff Oak Island Beach Association, Inc.'s Affirmation in Opposition dated April 16, 2003; (4) Defendant's Reply Affirmation dated April 22, 2003; and all the exhibits annexed thereto; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing, the Court issues the following Order relative to this matter: it is

**ORDERED** that defendant Scalise, Jr.'s motion herein seeking an Order of this Court pursuant to CPLR Section 3025(b) to amend by leave said defendant's answer in the instant matter is hereby denied.

Plaintiff Oak Island alleges that defendants Joseph Scalise, Jr. and Joseph Scalise, Sr. unlawfully trespassed on certain property leased by the plaintiff from the Town of Babylon and caused damage and the removal of trees and shrubbery from the said property in January, February, March, and April of 2002 . A suit was instituted pursuant to New York Real Property and Proceedings Law section 861 to recover damages and was joined by Joseph Scalise, Jr. by service of his Verified Answer on July 19, 2002. Defendant Scalise, Jr.'s verified answer contained ten affirmative defenses. Defendant now moves to amend his answer to include an additional affirmative defense, namely defense number eleven, to Plaintiff's Verified Complaint, that asserts that the plaintiff is not the owner of the property alleged to have been damaged and as such, plaintiff is an improper party and lacks standing to sue herein.

It is well settled that an amendment by leave shall be freely granted by the court upon such terms as may be just. Duffy v. Bass & D'Allesandro, Inc. 245 AD2d 333, 664 NYS 2d 833 (2<sup>nd</sup> Dept., 1997). Absent prejudice or surprise adverse to the non-moving party, the amendment by leave should be granted . Felix v. Lettre 204 AD2d 679, 612 NYS2d 435 (2<sup>nd</sup> Dept., 1994). However, prejudice and surprise are not the only factors that may be considered. While the merits of a proposed amendment by leave are rarely examined, the Appellate Division, Second Department has ruled that the merits may be considered if the insufficiency or lack of merit is clear and free from doubt. (Noanjo Clothing, Inc. v. L & M Kids Fashion, Inc. 207 AD2d 436, 615 NYS2d 747[1994]).

As to this matter, there has been no evidence submitted by the plaintiff to support the assertion that the motion will subject the plaintiff to an inordinate delay or prejudice. Therefore, as a matter of law, the plaintiff has failed to establish either inordinate delay or prejudice. However, in the opinion of this court, the lack of merit of the proposed amendment is free from doubt. The proposed answer states that the plaintiff oak Island is an improper party because it is not the owner of the property alleged to have been damaged. Defendant's claim that Oak Beach must be the owner of the property in to order to establish standing is flawed. Defendant Scalise, Jr. fails to provide a legal basis for his proposed amendment. Therefore, in this court's opinion as a matter of law, defendant's proposed amendment lacks merit that is clear from doubt on its face.

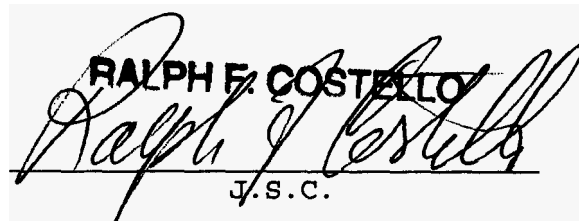
In it's Affirmation in Opposition, plaintiff Oak Island contends **that an action in trespass is grounded on the**

"possessory" interest in the land and not the "fee" interest. Therefore, plaintiff alleges that the actual tenant of the real property has standing to maintain an action for trespass. **104 NYJur2d Trespass, p. 465-66.** This court concurs. "An action may be maintained by the plaintiff as a lessee in actual possession.." **103 Trespass NYJur2d Trespass, Sec. 21.** Therefore, as a matter of law plaintiff does not have to be the owner of the property to maintain an action in trespass.

In the alternative, defendant alleges in his reply affirmation that there is an issue as to whether plaintiff has standing to sue because plaintiff failed to produce a copy of the applicable Master Lease that existed between plaintiff and the Town of Babylon on the dates alleged in the Complaint. Conversely, Defendant concedes to the lease in paragraph 5 of his Affirmation in Support, which states that the lease was in effect at all relevant times alleged in the Complaint, and even provided that "...a copy of the lease agreement is annexed hereto as Exhibit A." The Master Lease in Exhibit A is dated August 14, 1990 and states that the term of the lease extends to December 31, 2050 which covers the time period of the alleged complaint. In the opinion of the court, plaintiff has established that the defendant's proposed amendment to the verified complaint lacks merit. Therefore, as a matter of law, the defendant's motion to amend answer must be denied.

The foregoing constitutes the complete Order of the Court in this matter. Counsel for the movant is directed to serve a copy of this Order with notice of entry upon all other counsel within five days of receipt of same.

Dated: September 23, 2003

**RALPH F. COSTELLO**  
  
J.S.C.

Check One \_\_\_\_\_ Final Disposition   X   Non-Final Disposition