

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

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 5/2/05
ADJ. DATE 5/3/05
Mot. Seq. #002 - MotD
#003 - MotD

-----X
OAK ISLAND BEACH ASSOCIATION, INC., :
 :
Plaintiff, :
 :
- against - :
 :
JOSEPH SCALISE, SR. and JOSEPH SCALISE, JR., :
 :
Defendants. :
-----X
JOSEPH SCALISE, SR., :
 :
Third-Party Plaintiff, :
 :
- against - :
 :
FRANK SOLINA and CONSTANTINE :
PLAISSAY a/k/a CONNIE PLAISSAY, :
 :
Third-Party Defendants.:
-----X
JOSEPH SCALISE, JR., :
 :
Fourth-Party Plaintiff, :
 :
- against - :
 :
FRANK SOLINA and CONSTANTINE :
PLAISSAY a/k/a CONNIE PLAISSAY, :
 :
Fourth-Party Defendants.:
-----X

WILLIS B. CARMAN, JR., ESQ.
Attorney for Plaintiff
280 Main Street
Farmingdale, New York 11735

LEONARD B. FELDMAN, ESQ.
Attorney for Joseph Scalise, Sr.
811 West Jericho Turnpike, Suite 201W
Smithtown, New York 11787-3220

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
Attorneys for Joseph Scalise, Jr.
3 Gannett Drive
White Plains, New York 10604

LONDON FISCHER LLP
Attorneys for Constantine Plaissay
59 Maiden Lane
New York, New York 10038

FRANK SOLINA, Third-Party Defendant
40 The Bayou
4462 Oak Beach Association
Oak Beach, New York 11072

Upon reading and filing the following papers in this matter: (1) Notice of Motion dated March 11, 2005 and supporting papers by third-party defendant Constantine Plaissay; (2) Affirmation in Opposition dated April 12, 2005 and supporting papers by defendant/third-party plaintiff Joseph Scalise, Sr.; (3) Reply Affirmation In Further Support Of Third-Party Defendant Plaissay's Motion to Dismiss undated by third-party defendant Constantine Plaissay; (4) Letter dated May 12, 2005 and supporting papers by third-party defendant Constantine Plaissay; (5) Notice of Motion dated March 31, 2005 and supporting papers (including Memorandum of Law In Support Of Motion To Dismiss dated March 31, 2005) by fourth-party defendant Constantine Plaissay; (6) Affirmation in Opposition dated April 22, 2005 and supporting papers by defendant/fourth-party plaintiff Joseph Scalise, Jr.; (7) Reply Affidavit in Further Support Of Fourth-Party Defendant Plaissay's Motion to Dismiss dated May 2, 2005; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing, the motions are decided as follows: it is

ORDERED that the motion by third-party defendant Constantine a/k/a Connie Plaissay to dismiss and sever the third-party claim and all cross claims against movant, is granted without prejudice and the third-party action and all cross-claims alleged against third-party defendant Plaissay only are severed and dismissed; and it is

ORDERED that the alternative claim to convert the motion to one for summary judgment, is denied (CPLR 3211[c]); and it is

ORDERED that the motions by fourth-party defendant Constantine a/k/a Connie Plaissay to dismiss and sever the fourth-party claim and all cross claims against movant, is granted without prejudice and the fourth-party action and all cross claims alleged against fourth-party defendant Plaissay only are severed and dismissed; and it is

ORDERED that the alternative claim to convert the motion to one for summary judgment, is denied (CPLR 3211[c]); and it is

ORDERED that the movant is directed to serve a copy of this decision and order upon all parties.

The primary action filed on May 9, 2002 by plaintiff, Oak Island Beach Association, Inc. (OIBA), alleged that defendants Joseph Scalise, Sr. and Joseph Scalise, Jr. are liable for damages to Lot #46 of the Bayou, located within a community beach managed by OIBA pursuant to a lease with the Town of Babylon. Plaintiff contends upon information and belief that Joseph Scalise, Sr. unlawfully destroyed, damaged and removed trees and shrubs from Lot #46. The Bayou is a right-of-way held by plaintiff OIBA, provided by the August 14, 1990 lease for use by members as reflected on the "Map of Oak Beach." Damages sought pursuant to RPAPL §861 are alleged to total approximately \$35,000. The acts alleged occurred on, about or between January, February, March and April 2002. In addition, plaintiff contends that defendant Scalise, Jr. destroyed, damaged and removed trees from the Bayou in the vicinity of Lot #104 of the Bayou, causing damage in the sum of \$12,000.

Joseph Scalise, Sr answered on August 7, 2002 and pleads ten affirmative defenses. Scalise Sr. filed a third-party action against Frank Solina and Plaissay for contribution and indemnification. The pleading states that Solina was a sublessee at Lot #40 the Bayou and is a resident of this state. Until June 18, 2001 Plaissay was a sublessee at #30 Sandy Drive, OIBA. Plaissay currently resides at Highway 212, Chario, Montana 59824. Third-party plaintiff Scalise Sr. seeks recovery from Solina and Plaissay. Scalise Sr. has failed to allege specific facts for recovery from Solina and Plaissay but seeks common law indemnity and contribution based on the parties' relationship, which is not described. Scalise Sr. defends against the primary action partially on grounds of retaliation, based on involuntary acts and good cause to believe that the activity occurred on his property (RPAPL §861).

Scalise Jr. filed an answer dated July 19, 2002, alleging ten affirmative defenses, and a cross claim against Scalise Sr. for indemnity. In partial defense Scalise Jr. contends that the acts were involuntary, since defendant believed that Lot #46 would be developed and cleared rather than maintained as community property (RPAPL §861). In turn, Scalise Jr. filed a fourth-party action (#05-136) against Solina and Plaissay. The pleading contends that the acts to the trees and shrubs occurred prior to January, February, March and April 2002, when Solina had subleased Lot #40 the Bayou, 4462 and Plaissay subleased Lot #30 Sandy Drive OIBA until June 18, 2001. Scalise Jr. contends Solina and Plaissay are proportionately responsible and claims common law indemnification. There are no actual allegations which indicate the nature of the wrong or the basis that Plaissay or Solina may be subject to liability. Moreover, there are no facts to show that Plaissay was involved in any activity during the January through April 2002, that the fourth-party action arose from the primary tort claim or that Plaissay resided or had contacts in New York after June 18, 2001 (CPLR 3211[a][7],[a][8]; CPLR 302[a]; *Schenker, et al. v Assicurazioni General*, 2002 US Dist LEXIS 12845 [2002]; *Wehringer v Brannigan*, 1990 US Dist LEXIS 16447 [1990], *affd* 9 F3d 1536 [1993]; *BBIG Realty Corp. v Ginsberg*, 111 AD2d 91[1st Dept. 1985]).

Depositions were held in the primary action. A witness for plaintiff named Gus Colette purportedly implicated Plaissay to the underlying damage. However, neither the transcript of testimony nor a summary of the facts was submitted although counsel has offered to submit same should the court deem it necessary (CPLR 3211[a][7],[a][8]; CPLR 302[a]; *Elmore v City of New York*, 15 AD3d 334 [2d 2005]; *Warner v Levenson*, 188 AD2d 268 [1st Dept. 1992]).

The primary plaintiff, OIBA, is the lessee of the ground lease dated August 14, 1990 with the Town of Babylon. The primary complaint fails to plead facts which indicate the status of the Scalise defendants. The affidavits of Scalise Jr., sworn to April 18, 2005, and counsel, Jacqueline Hattar, sworn to April 22, 2005, establish that when the claims accrued between January and April 2002, Scalise Jr. subleased Lot #38. The third-party action filed by Scalise Sr. against Solina and Plaissay pleads the third-party defendant subleased, managed and controlled Lot #40. Third and fourth-party plaintiffs Scalise Sr. and Scalise Jr. contend that Plaissay subleased Lot #30 Sandy Drive until June 18, 2001. This does not reconcile with the accrual of the original claim from January through April 2002. The fourth-party affidavit, sworn to March 2005 by Plaissay, admits the sublease of Lot #30 Sandy Drive from January 1981 through June 18, 2001. Plaissay also asserts that he acted as president of OIBA from October 1, 1989 through September 30, 1998 without further participation in the community properties.

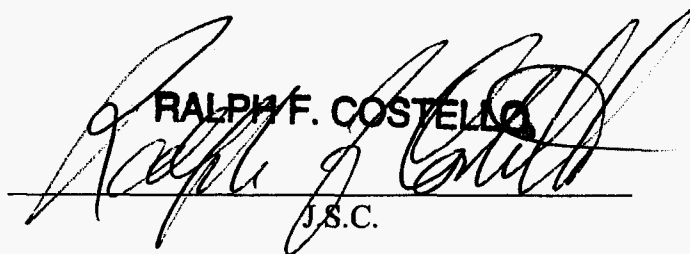
When Plaissay relocated to the State of Montana on June 4, 2001, the premises at Lot #30 Sandy Drive were conveyed/subleased on June 18, 2001.

The only reference to the party status of Scalise Sr. as a defendant and third-party plaintiff appears in attorney Johanne Tingue's affirmation, sworn to April 12, 2005, and in Scalise Sr.'s affidavit, sworn to April 12, 2005 in opposition to dismissal of the fourth-party action. These affidavits reflect that Scalise Sr. had subleased Lot #39 at the time the alleged claims accrued. The allegations pertaining to the Plaissay damage were prior to the dates alleged in the primary pleading. Scalise Sr. further contends that designated "community property" areas mandate prior OIBA board of directors approval for the performance of work. Although the board ignored Scalise Sr.'s complaints regarding the prior Plaissay activity, OIBA chose to presently sue the Scalises.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court accepts the facts alleged as true, and plaintiff benefits from every favorable inference to ascertain whether the facts plead a cognizable cause of action (*Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Elmore v City of New York*, *supra*). The pleadings herein fail to particularize the status of the parties, the transactions, occurrences and material elements (*Warner v Levenson*, 188 AD2d 268). A defendant may implead a person, not a party, who might be liable to the defendant for all or part of the damage addressed in the primary claim (CPLR 1007). The impleader may allege alternate, hypothetical or inconsistent causes of action and will be sustained, provided the facts do not preclude the primary defendants' liability and the liability of the third-party (*BBIG Realty Corp. v Ginsberg*, 111 AD2d 91; *Lucci v Lucci*, 150 AD2d 649 [2d Dept. 1989]).

Since no cause of action is alleged against Plaissay with regard to any acts committed between January and April 2002, the fourth-party action is dismissed. Speculation concerning the prior acts of Plaissay is not subject to this litigation. The damage did not arise during the relevant period and is not related to the acts allegedly committed by the Scalises, and there is no connection to subject Plaissay to personal long-arm jurisdiction in New York as a nondomiciliary tortfeasor (CPLR 302[a]; *Schenker, et al. v Assicurazioni General*, 2002 US Dist LEXIS 12845; *Wehringer v Brannigan*, 1990 US Dist LEXIS 16447).

Dated: October 28, 2005


RALPH F. COSTELLO
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION