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CYNTHIA BIRKITT, Plaintiff, v. MOHAMMAD ADWAN and HL BUILDERS, LLC. Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART BERGEN COUNTY DOCKET NO. C-147-23 **OPINION**

Argued: April 19, 2024
Decided: May 1, 2024

Appearances: Cynthia Birkitt, *pro se*, for Plaintiff.
Onal Gallant & Partners, P.C. (Crew Schielke, Esq., appearing) for Defendants.

HON. EDWARD A. JEREJIAN, P.J.Ch.

This instant matter is before the Court by way of a Motion for Summary Judgment, filed on January 9, 2024 by Defendants Mohammad Adwan and HL Builders, LLC, by and through their attorneys, Onal Gallant & Partners, P.C. (Crew Schielke, Esq., appearing). Plaintiff Cynthia Birkitt, *pro se*, filed opposition on February 20, 2024. Defendants thereafter submitted a reply on March 11, 2024. Oral argument was heard on April 19, 2024.

BACKGROUND

The matter before this Court concerns the removal of a tree resting on the border of two neighboring properties (the "Tree"). To Plaintiff, the Tree holds great sentimental value. However, certain construction and improvements on the property adjoining Plaintiff's property were commenced by Defendants. Hence, Plaintiff brought this action in order to preserve the Tree by

enjoining Defendants from removing it. The parties major point of contention – whether the Tree is a "boundary tree" or an "encroachment tree" – is an issue of first impression in New Jersey.

Plaintiff is a resident of Bergen County, residing at 45 Knox Avenue, Cliffside Park, New Jersey 07010 ("Plaintiff's Property" or "45 Knox").

Defendant Mohammad Adwan ("Defendant Adwan") owns the property adjacent to Plaintiff Property, located at 52 Knox Avenue, Cliffside Park, New Jersey 07010 ("Adwan's Property" or "52 Knox"). On or around January 12, 2023, Defendant Adwan hired Defendant HL Builders, LLC ("Defendant HL") to perform certain services consisting of the demolition of the former structure on Defendant's Property and constructing a new dwelling. These services were detailed in construction plans, which also contemplated the erection of retaining wall in order to stabilize Defendant's Property. (See Certification of Harry Liapes ("Liapes Cert.") ¶ 2, Ex. A.)

On or about January 19, 2023, Defendant HL communicated to Plaintiff, via letter, that the home located at 52 Knox Avenue, Cliffside Park, N.J. was to be demolished. (Complaint Ex. A.)

On or around February 24, 2023, Defendants obtained permits from the Borough of Cliffside Park to demolish the existing structure located on Adwan's Property, construct a new two-family residential structure, and to remove three trees, including the Tree at issue in this litigation. (See Complaint ¶ 15; Liapes Cert. ¶ 5; and Certification of Mohammad Adwan ("Adwan Cert.") ¶ 3.)

Thereafter, as permitted by the Borough of Cliffside Park, Defendants undertook the removal of the trees. However, due to Plaintiff's filing of the Complaint and Order to Show Cause on July 31, 2023, in which Plaintiff sought to enjoin Defendants from removing or cutting down the Tree and the Borough of Cliffside Park to rescind the permits authorizing the Tree's removal, the Tree has remained on Adwan's Property. Despite this, the construction of the two-family

residential duplex and much of the retaining wall has been completed and m. (See Liapes Cert. ¶ 12.)

In the instant motion, Defendants seek to dissolve the prior restraints entered on consent in this matter and move forward with the removal of the Tree in order to complete the construction of the retaining wall.

Defendants argue that, as a matter of law, they are entitled to remove the Tree. Specifically, Defendants reason that the Tree is an encroachment tree, meaning that the Tree has originated on Adwan's Property and encroached across the boundary of Plaintiff's Property. As a result, Defendants contend that they may remove the Tree without the consent of Plaintiff. In support of their arguments, Defendants heavily a Colorado case which specifically defined encroachment trees – Defendants note that the distinction between "boundary trees" and "encroachment trees" are a matter of first impression in New Jersey. Defendants cite Love v. Klosky, arguing that there, the court defined an encroachment tree as one which grew entirely on one person's property only to migrate partially to another's. Love v. Klosky, 413 P.3d 1267 (2018).

In addition, Defendants argue that several experts have opined that the Tree is unhealthy and poses a hazard. Moreover, it is argued that Defendants maintain a responsibility under Cliffside Park Ordinance § 22-6 to keep their premises free of safety hazards.

Lastly, argument is made to Defendants' use and enjoyment of their property. Specifically, Defendants contend that the Tree prevents the completion of the retaining wall needed to stabilize Adwan's Property. In other words, Defendants argue that Plaintiff is pursuing a remedy which has disrupted Defendants' fundamental rights to use, enjoy, and dispose of their property.

In opposition, Plaintiff argues that Defendants' motion is flawed both procedurally and substantively, containing factual inaccuracies. Plaintiff's response consists of support from two

certified arborists. In their own reports, both arborists assessed the Tree as healthy, but confirming that partial damage has occurred due to the construction and excavation on Adwan's Property.

In addition, Plaintiff strongly disputes the Tree being considered an "encroachment tree." Mainly, Plaintiff argues that a substantial portion of the Tree – 20-25% as provided by Defendants – lies on Plaintiff's Property. (See Def. Br., Ex. 1.) Moreover, it is argued that more than 80% of the Tree's leaves and branches overhang the Plaintiff's Property.

Where Defendants cite to cases from other jurisdictions, Plaintiff follows suit in response. Significantly, Plaintiff points to the California Civil Code which states, "Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common." CAL. CIV. CODE § 834 (Deering 2024). Plaintiff argues that jurisdictions like California consider trees, such as the one at issue here, to be common property of bother landowners.

In sum, before the Court is a dispute amongst neighbors in which one party seeks to prevent the removal of the Tree in part due to her great sentimental attachment to it. While Defendants are seeking to utilize and enjoy Adwan's Property as they had intended. In doing so, this would require removal of the Tree, which Defendants further claim is necessary in order to complete their improvements on Adwan's Property.

ANALYSIS

Summary judgment is designed to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Under New Jersey's summary judgment standard, as set forth it in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), a movant is entitled to summary judgment if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a relevant material issue in dispute. Thus, the court shall grant a

summary judgment motion "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Id. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Id.

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Id. at 528–29. Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Ibid. "A certification will support the grant of summary judgment only if the material facts alleged therein are based, as required by R. 1:6-6, on 'personal knowledge.'" Ford, 418 N.J. Super. at 599 (citing Claypotch v. Heller, Inc., 360 N.J. Super., 472, 489 (App. Div. 2003)). The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014); see also Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014) ("Bald assertions are not capable of either supporting or defeating summary judgment."). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6

as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial. If the non-moving party "points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment." Brill, 142 N.J. at 529.

In determining whether the existence of a genuine issue of material fact precludes summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

As noted above, the most significant point of contention in this matter is how to characterize the Tree, which is also an issue of first impression in New Jersey. How the Court distinguishes the Tree will, in essence, determine the parties' ownership rights regarding the Tree. Plaintiff argues that the Tree is a boundary tree where both parties would have an interest in it, whereas Defendants strongly advocate for the notion that the Tree is an encroachment tree similar to that in Love v. Klosky. There, the Colorado Supreme Court was tasked with determining whether neighbors of adjacent parcels of land are co-owners of a tree which originated on one party's property. In Love, the plaintiffs sought to prevent the defendants from removing a tree that sat on the border of their adjacent properties. Love v. Klosky, 413 P.3d 1267, 1268 (Colo. 2018). The base of the tree at issue in Love sat three-quarters on the defendants' property and one-quarter on the plaintiffs' property. Id. at 1269. Moreover, the tree started its life on the defendants' property,

then grew and encroached upon the plaintiffs' property. Id. Additionally, the parties had not jointly planted the tree, nor did they jointly maintain the tree. Id. Faced with these pertinent facts, the Colorado Supreme Court determined that the tree at issue was an encroachment tree. Id. at 1274. In so deciding that, the Love further held that,

> [A] landowner may remove a tree on his property that grew onto his neighbor's land without first securing the approval of his neighbor, unless the landowners jointly planted, jointly cared for, or treated the tree as a partition between the properties. Here, the Loves did not prove such joint activity implying shared ownership of the encroaching tree.

Id. Significantly, in relying on its own relevant case law, the Love court held that a property interest does not transfer simply because the tree happens to be touching a property line. Id. at 1273.

The facts before this Court are substantially similar, if not exactly analogous, to those in Love. It is undisputed among the parties that three-quarters of the Tree here lies on Adwan's Property. (See Adwan Cert. ¶ 5, Ex. 1; see also Pl. Counterstatement of Material Facts ¶ 3.) When examining the survey provided by Defendants, which Plaintiff relies on in her opposition, most of the trunk of the Tree lies on Adwan's Property. (See Adwan Cert. ¶ 5, Ex. 1.) There is no showing by Plaintiff that the Tree's life began on her property then encroached upon Adwan's Property. See Love, 413 P.3d at 1274. Plaintiff argues that the majority of the Tree hangs over onto Plaintiff's Property. Yet, an inspection of Plaintiff's photographs as well as Defendants' survey and photographs clearly establishes that much of the Tree leans towards Adwan's Property. (See Pl. Opposition at 6-7; see also Liapes Cert., Ex. B.) The proofs submitted by both parties clearly establishes that the Tree does not merely straddle the property line, but in fact lies significantly upon Adwan's Property.

While Plaintiff does contend that she alone maintained the Tree and Defendants have merely caused harm by way of their construction, this alone cannot establish a property interest in

the Tree. (See Pl. Opposition at 11-12.) No joint action was taken on behalf of the parties to plant the Tree nor treat it as a partition of the properties. (See Adwan Cert. ¶ 5.) Defendants opine that "the Tree originated, and most of its trunk is situated on, [Adwan's Property]," which Plaintiff does not dispute. (See id.) It does not follow that simply because Plaintiff undertook some maintenance of the Tree, that Defendants therefore transferred a property interest in the Tree. As was rationally stated in Love, "[a] tree does not automatically become a boundary-line tree, and thus joint property, merely by touching a property line." Love, 413 P.3d at 1273.

Although, the Court's finding that the Tree is an encroachment tree is dispositive, it nonetheless will address the health and safety concerns which are disputed amongst the parties. Plaintiff submitted the report of Wayne Cahilly ("Cahilly Report"), a Certified Arborist and a licensed New Jersey Tree Expert. Defendants submitted the reports of Deniss Murphy ("Murphy Report"), a licensed New Jersey Tree Expert, and Jaime Galvez ("Galvez Report"), also a licensed New Jersey Tree Expert. All three tree experts assessed the Tree and proffered separate opinions regarding its health. With respect to Defendants' experts, Plaintiff argued that they are not qualified experts whose assessments adequately supports Defendants' arguments. However, Plaintiff's own expert, Mr. Cahilly, relied upon Mr. Muprhy's assessment and even concurred in his opinion regarding a potential path of recovery for the Tree. (See Cahilly Report.)

While the reports of Mr. Murphy and Mr. Cahilly both provided certain plans for possibly maintaining the health of the Tree, they also opined that the root system of the Tree was "rather compromised." (See Complaint, Ex. B and C.) The Galvez Report further concluded that the Tree "has a rotten core and it needs to be removed." (See Adwan Cert., Ex. 2.) Based on the reports submitted by the parties, it is clear that the Tree is not in good health, particularly, the Tree's root system is significantly compromised.

Furthermore, based on the Murphy Report, and in an effort to resolve the dispute over the Tree, the Borough of Cliffside Park permitted the removal of the Tree. (See Pl. Order to Show Cause Br., Ex. 1; see also Complaint ¶ 15.) In the approval to remove the Tree, the Borough of Cliffside Park noted that the Murphy Report recommended that the Tree be removed. (See Adwan Cert., Ex. 3.) As stated above, all the reports state with certainty that the Tree's health, in particular the root system, is damaged and compromised.

Moreover, according to Defendants' engineer's report, as well as the Certification of Harry Liapes, the retaining wall cannot be completed until the Tree is removed. (See Def. Reply Br., Ex. A.; see also Liapes Cert. ¶ 6.) As a result of the Tree's continued presence, Adwan's Property cannot be properly stabilized, nor can the entire improvement of the property be completed until the Tree is removed. While Mr. Murphy, based on his own assessment, does proffer that an amicable solution could maintain the health of the tree, he, and Mr. Galvez both **recommend** that the Tree be removed. Mr. Cahilly concurs in the assessment of Mr. Murphy but provides a proposed plan to help the Tree recover. However, the expected recovery as stated in the Cahilly Report may take five to seven years. (See Complaint, Ex. B.)

Moreover, Plaintiff fails to appreciate the consequences of an automatic transfer of a property interest in a tree which merely touches an adjoining property line. If such a rule were adopted, there would be circumstances under which a neighbor may become an unwilling joint owner of the tree, thereby becoming liable for any hazards posed by a damaged tree. For that reason, the Court does not see the rationale in finding that the parties here are joint owners of the Tree.

In light of the unique and irreparable nature of this matter involving the removal of the Tree and Plaintiff's status as a *pro se* litigant, the Court shall temporarily stay the accompanying

Order twenty (20) days to allow Plaintiff the opportunity to determine whether to file an appeal. Pursuant to R. 2:4-1, Plaintiff may file an appeal within forty-five (45) days of the entry of the accompanying Order. Plaintiff may file an application to the trial court to stay the matter pending appeal. If the Court were to grant Plaintiff's application, then the removal of the Tree would be stayed pending appeal; however, if the Court were to deny Plaintiff's application, then same may be made to the Appellate Division.

CONCLUSION

In light of the foregoing, the Tree should be classified as an encroachment tree. Plaintiff has failed to dispute that most of the Tree lies on Adwan's Property and that the parties acted in a joint manner which would imply shared ownership of the Tree. Thus, Defendants' motion for summary judgment is granted.

An Order accompanies this decision.