[Cite as *Rababy v. Metter*, 2015-Ohio-1449.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101445

DAVID RABABY

PLAINTIFF-APPELLANT

vs.

ROY C. METTER

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-810430

BEFORE: Celebrezze, A.J., Blackmon, J., and McCormack, J.

RELEASED AND JOURNALIZED: April 16, 2015

ATTORNEY FOR APPELLANT

David A. Valent
Reminger Co., L.P.A.
101 West Prospect Avenue
Suite 1400
Cleveland, Ohio 44115

ATTORNEY FOR APPELLEE

Colin P. Moeller
1100 Superior Avenue, East
1120 Oswald Centre
Cleveland, Ohio 44114

FRANK D. CELEBREZZE, JR, A.J.:

{¶1} Appellant, David Rababy, appeals from the grant of summary judgment in favor of appellee, Roy C. Metter. Rababy argues that he is entitled to summary judgment and the court erred in holding otherwise. After a thorough review of the record and law, we affirm.

I. Factual and Procedural History

{¶2} Rababy and Metter are next-door neighbors. The driveway of Rababy's home abuts Metter's property in certain places and nearly abuts in others. A fence separates the properties. A stand of mature coniferous and deciduous trees runs along the fence on Metter's property.

{¶3} On July 11, 2013, Rababy filed a complaint in the Cuyahoga County Common Pleas Court sounding in negligence, nuisance, trespass, and interference with a business contract. There, Rababy asserted that trees at the edge of Metter's property extend onto Rababy's property, and dropped leaves, needles, sap, and branches onto his car and home. He further alleged that some of the trees are rotted. These trees cast shadows over his property and cause mold growth on his roof. He also asserted that tree roots encroach on his property and damaged his driveway and foundation. The complaint also asserted that at some point in the past, Rababy hired a company to trim the overhanging branches, but Metter's daughter prevented the unnamed landscape service

company from properly performing this work. The complaint alleged the trees constitute an ongoing nuisance and trespass and that Metter negligently maintained the trees. Rababy sought damages in the amount of $52,500: $37,000 for future tree trimming services and $15,000 in compensatory damages. Metter answered with leave of court on September 18, 2013. The trial court set a pretrial schedule requiring dispositive motions to be filed by March 14, 2014. On January 24, 2014, Rababy filed a motion for partial summary judgment arguing that Metter negligently failed to maintain the trees and such trees constitute a nuisance. In support, Rababy attached an improperly sworn affidavit. The affidavit was not signed by Rababy, the affiant, but by his attorney. This affidavit provides, in part, that "[o]n an ongoing basis, [Metter's] trees encroach onto my property, specifically over my home and driveway. [Metter's] trees deposit leaves, debris, and sap onto my property, causing damage." Rababy also averred that he hired unnamed landscapers to trim the encroaching trees, but "[Metter's] daughter, on behalf of [Metter], objected to the landscapers, which caused the landscapers to stop their duties under my landscaping agreement and vacate the premises."

{¶4} Metter filed a combined motion for summary judgment and brief in opposition on March 3, 2014. There he argued that he owed no duty to Rababy to trim otherwise healthy trees on his property. He further averred in a properly executed affidavit that the trees are mature and preexisted either party's ownership of the property. He also averred that approximately a year before, Rababy hired Cartwright Tree Service to trim the row of pine trees that ran along Rababy's driveway. He asserted that

Cartwright trimmed the overhanging branches from Rababy's property free from any objection by Metter or his daughter. It was only when Cartwright began trimming branches and trees back further than the property line that Metter's daughter objected. Metter averred that he has no objection to Rababy trimming the overhanging branches back to the property line. Metter's daughter, Cheryl Metter, filed an affidavit offering a more detailed statement of the events that led to her objecting to Cartwright's trimming of trees. She averred that she only objected to this trimming when Cartwright employees began trimming limbs on Metter's side of the property line.

{¶5} On March 6, 2014, Rababy filed a "notice of filing original affidavit" that contained the same averments as Rababy's original affidavit attached to his motion for partial summary judgment, but this affidavit was signed by Rababy and notarized. Rababy also filed a reply brief where he asserted new allegations that the trees in question were decaying or dead. Attached to the reply was a new affidavit purportedly from Rababy that averred that the trees were decaying and dangerous and that one had fallen on his property. He included a picture of a tree that appears to have fallen across a driveway. However, the affidavit does not bear the signature of Rababy and is not notarized. Rababy also filed a brief in opposition to summary judgment on April 4, 2014. The trial court denied Rababy's motions on April 30, 2014, and granted Metter's the same day.

{¶6} Rababy filed a timely notice of appeal raising one assignment of error for review:

I. The trial court erred to the prejudice of Plaintiff David Rababy when it granted Defendant Ray C. Metter's motion for summary judgment.

II. Law and Analysis

A. Summary Judgment

{¶7} The trial court granted summary judgment for Metter. This court reviews the grant of summary judgment de novo. *Snyder v. Ohio Dept. of Natural Resources*, 140 Ohio St.3d 322, 2014-Ohio-3942, 18 N.E.3d 416, ¶ 2. Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. This occurs when it appears from the evidence that reasonable minds can come to but one conclusion, viewing such evidence most strongly in favor of the non-moving party, that the moving party is entitled to judgment. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Once a moving party satisfies its burden, Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the party's pleadings, but has a reciprocal burden of setting forth specific facts demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996).

{¶8} Civ.R. 56(E), which sets forth the requirements for affidavits submitted on summary judgment, provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show

> affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶9} The Ohio Revised Code defines an affidavit as "a written declaration under oath, made without notice to the adverse party." R.C. 2319.02.

> "The general rule is that an affidavit must appear on its face to have been taken before the proper officer, and in compliance with all legal requisitions. * * * A paper purporting to be an affidavit, but not to have been sworn to before an officer, is not an affidavit. * * * '[I]t can only be regarded as the mere draft of an affidavit, never sworn to by the person by whom it purports to have been made.'" (Citations omitted.)

Humphrey v. Ohio Water Parks, 97 Ohio App.3d 403, 404-405, 646 N.E.2d 908 (9th Dist.1994), quoting *Benedict v. Peters*, 58 Ohio St. 527, 536-537, 51 N.E. 37 (1898).

{¶10} In order to constitute a valid affidavit, the statement must be signed by the affiant and notarized. *See Rarden v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin Nos. 12AP-225 and 12AP-227, 2012-Ohio-5667, ¶ 29 ("Although plaintiff responded with what purported to be an affidavit, it was not notarized and therefore did not qualify as an affidavit or any other form of evidence permitted under Civ.R. 56(C).").

{¶11} During dispositive motion practice, Rababy submitted three affidavits. The first was signed by his attorney, apparently under some authority granted by Rababy but without disclosing what bestowed that authority, and notarized without any indication that Rababy properly swore to the truth of the statements made therein. The second affidavit filed after Metter raised objections to the affidavit in his brief in opposition appears to have been properly signed and notarized. The third affidavit was again signed by Rababy's attorney and was not notarized. Therefore, only the second affidavit constitutes valid evidence for consideration in summary judgment.

i. Negligence and Nuisance

{¶12} In order to succeed in a negligence action, Rababy must demonstrate that Metter owed a duty to Rababy, this duty was breached, and Rababy suffered damages that proximately resulted from this breach. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998).

{¶13} "'The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability.'" *Kacsmarik v. Lakefront Lines Arena*, 8th Dist. Cuyahoga No. 95981, 2011-Ohio-2553, ¶ 16, quoting *Adelman v.*

Timman, 117 Ohio App.3d 544, 690 N.E.2d 1332 (8th Dist.1997). Here, Rababy has offered evidence that falling pine needles, leaves, sap, and sticks have damaged his car, driveway, and roof. He also alleges, without evidentiary support, that encroaching tree roots have damaged his driveway and home.

{¶14} A landowner is generally not responsible for the losses caused by the natural condition of the land. *Heckert v. Patrick*, 15 Ohio St.3d 402, 405, 473 N.E.2d 1204 (1984).

> "[T]he Restatement of the Law of Torts sets forth the general rule that '[n]either a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.' 2 Restatement of the Law 2d, Torts (1965) 258, Section 363(1). This is contrasted with the principle applied to structures or objects placed upon the property by owners which occasion an injury to others outside the land. Section 364 of the Restatement of Torts 2d, supra, at 259, states that a possessor of land is subject to liability to others outside the land for physical harm caused by a structure or artificial construction on the land which the possessor realizes or should realize will involve an unreasonable risk of harm. A typical example of such artificial structure is a sign which overhangs a street or sidewalk that falls, thereby causing injuries to passing pedestrians. See Annotation (1957), 55 A.L.R.2d 178, 190; 39 American Jurisprudence 2d (1968), Highways, Streets and Bridges, Section

453, and cases cited therein."

Motorists Mut. Ins. Co. v. Flynn, 4th Dist. Highland No. 11CA28, 2013-Ohio-1501, ¶ 17, quoting *Heckert* at 403. States generally allow one impacted by such growth the remedy of self-help. "A privilege existed at common law, such that a landowner could cut off, sever, destroy, mutilate, or otherwise eliminate branches of an adjoining landowner's tree that encroached on his land." *ALH Props. v. Procare Auto. Serv. Solutions*, 9th Dist. Summit No. 20991, 2002-Ohio-4246, ¶ 18. Whether a separate remedy exists is an open question.

{¶15} The Ohio Supreme Court has cited approvingly to the Restatement as indicated above but not for the precise issue raised here. The Restatement makes a distinction between naturally occurring trees and those that came to exist artificially, i.e. those planted by people. Restatement of the Law 2d, Torts, Sections 839, 840 (1979). The distinction made in the Restatement between natural and artificial vegetation has been criticized by a number of jurisdictions. *See Melnick v. C.S.X. Corp.*, 312 Md. 511, 518, 540 A.2d 1133 (1988). Whether a given tree is naturally occurring or was planted by a property owner is often not capable of determination. As a result, many states have rejected the Restatement. Wisniewski, *COMMENT: Vegetation as a Nuisance*, 8 J.L. Econ. & Policy 931, 932-933 (2012). For similar reasons, many states have rejected the "Virginia Rule," where plants that are found to be "noxious" may be ordered to be removed. *Id.* Two other approaches have found common application: The "Massachusetts Rule" and the "Hawaii Rule."

> [T]he Massachusetts Rule does not allow for the removal of offending vegetation, even in cases of actual damage, and limits property owners remedy to self-help — cutting back vegetation to the boundary line. * * * [T]he Hawaii Rule allows for removal of offending vegetation where there is a showing of actual or imminent harm to a neighbor's property. The Massachusetts and Hawaii Rules are the most commonly used.

Id.

{¶16} The Massachusetts Rule provides that in almost all circumstances, the sole remedy for damages resulting from the natural dropping of leaves and other ordinary debris from trees is the common law remedy of self-help. *Michalson v. Nutting*, 275 Mass. 232, 175 N.E. 490 (1931). The rule provides a limited exception for dead trees. *Melnick* at 521, fn. 10.[1]

{¶17} The reasoning set forth in support of the Massachusetts Rule is apt to the facts of this case: "[T]o grant a landowner a cause of action every time tree branches, leaves, vines, shrubs, etc., encroach upon or fall on his property from his neighbor's property, might well spawn innumerable and vexatious lawsuits." *Michalson* at 234. This court adopts the Massachusetts Rule as the law of this jurisdiction.

{¶18} Rababy also argues that in Ohio a "landowner in an urban area has a duty to

---

[1] A similar exception exists in Ohio law for urban landowners. *See Jackson v. Ervin*, 8th Dist. Cuyahoga No. 68842, 1995 Ohio App. LEXIS 5099 (Nov. 16, 1995). Ohio case law has established a duty for urban landowners: "[T]he urban owner has a duty of reasonable care relative to the tree [that overhangs a public street], including inspection to make sure that it is safe." *Heckert* at 405. *See also Estate of Durham v. Amherst*, 51 Ohio App.3d 106, 109, 554 N.E.2d 945 (9th Dist.1988). Where constructive or actual knowledge of an unreasonably dangerous condition exists on the land of an urban landowner, such as a dead tree, the duty prong of a negligence claim may be satisfied. *Id. See also Flynn*.

exercise reasonable care to prevent an unreasonable risk of harm to others from decaying, defective or unsound trees of which such landowner has actual or constructive notice." *Jackson*, 8th Dist. Cuyahoga No. 68842, 1995 Ohio App. LEXIS 5099. Rababy argues Metter's trees are in such a condition and constitute a nuisance. Rababy also cites *Durham*, 51 Ohio App.3d 106, 554 N.E.2d 945, for the proposition that Metter, an urban landowner, has a duty to inspect his trees and protect others from a dangerous condition created by any unsound trees. Even if such a duty exists, it only is breached when the owner has actual or constructive notice of a dangerous condition.

{¶19} Rababy has not put forth any evidence that any of the trees constitute a dangerous condition of which Metter is aware or should be aware. From Rababy's complaint, we know one landscaping company performed work on the trees and another offered an estimate to remove or trim the trees to the property line. Nothing from these companies exists in the record to suggest that the trees are in a dangerous or unsafe condition. No properly authenticated evidence exists in the record to rebut Metter's statements that the trees are healthy.[2] Rababy does not even offer pictures of the offending trees to support his claims, only a satellite image of the property. The conclusory statements in his complaint that some of the trees are rotten are insufficient to establish a material question of fact given Metter's averments that the trees are healthy.

[2] Rababy does allege in his reply brief in opposition to Metter's motion for summary judgment that the trees are decaying and in an unsafe condition, but the accompanying affidavit on which these allegations rely is not properly executed.

There is no evidence of actual or constructive notice of a dangerous condition.[3]

{¶20} Rababy does not present any evidence that the trees are dead, decaying, or unsound. Rababy has not pointed to any case holding that the normal yearly life-cycle of a tree and the natural shedding of leaves, twigs, and sap[4] constitutes a nuisance. Rababy has also not provided any compelling justification for this court to hold that the trees in this case constitute a nuisance or a dangerous condition. The problems Rababy has experienced with the trees as set forth in his affidavit are the natural consequence of living in an area beautified by trees. Rababy's remedy is to trim tree limbs that overhang his property back to the property line, to which Metter averred he has no objection.

{¶21} The trees at issue in this case do not constitute a nuisance, and Metter is not negligent in regard to them.

ii. Trespass

{¶22} Rababy also asserts that the trees on Metter's property constitute a trespass. He properly defines a trespass as "the unlawful entry upon the property of another." *Chance v. B.P. Chems., Inc.*, 7 Ohio St.3d 17, 24, 670 N.E.2d 985 (1996). He argues that Metter's actions in failing to remove the trees or overhanging branches constitutes an intentional entry onto Rababy's property.

---

[3] "Constructive notice of a defective tree may be imputed to the landowner if the defect complained of is patent." *Jackson* at *7, citing *Heckert*, 15 Ohio St.3d at 405, 473 N.E.2d 1204.

[4] These are the only allegations made by Rababy in his properly executed affidavit about the cause of his damages that have resulted from Metter's trees.

{¶23} The elements of a successful trespass claim are an unauthorized intentional act, and entry upon land in the possession of another. *Brown v. Cty. Commrs.*, 87 Ohio App.3d 704, 716, 622 N.E.2d 1153 (4th Dist.1993). Here, there is no intentional act. Rababy claims, without citation to authority, that his arguments going to nuisance and negligence establish that Metter's actions of not removing or trimming the trees constitute an intentional act. As explained above, Rababy's remedy for intrusion by vegetation is to trim it back to the property line. *Michalson*, 275 Mass. 232, 175 N.E. 490, at the syllabus; *Melnick*, 312 Md. 511, 540 A.2d 1133.

iii. Tortious Interference with a Business Relationship

{¶24} Finally, Rababy argues that the trial court erred in granting summary judgment in favor of Metter on his tortious interference with a business relationship claim.

{¶25} "The elements of the tort of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E.2d 853 (1999), paragraph one of the syllabus.

{¶26} In his complaint and properly executed affidavit in support of summary judgment, Rababy asserts that "Defendant's daughter, on behalf of Defendant, objected to the landscapers [Rababy hired], which caused the landscapers to stop their duties under my landscaping agreement and vacate the premises." Rababy never named these

contractors, offered any evidence of a contract for services, or offered any evidence of damages that resulted from any improper interference. The amount of damages sought by Rababy does not include any specific claim related to this contract for tree trimming services.

{¶27} In order to survive summary judgment, a party must demonstrate that a material question of fact exists which makes judgment as a matter of law inappropriate. *Pavlick v. Cleveland Heights-University Heights Bd. of Educ.*, 8th Dist. Cuyahoga No. 101570, 2015-Ohio-179, ¶ 7. Rababy has not offered any evidence of damages that resulted from any presumed inappropriate interference. Therefore, the trial court did not err in granting summary judgment for Metter on this claim.

III. Conclusion

{¶28} Rababy's claims that detritus falling from trees from the neighboring property constitute a trespass, a nuisance, and negligence are not actionable. "[I]t is undesirable to categorize living trees, plants, roots, or vines as a 'nuisances' to be abated. Consequently, we decline to impose liability upon an adjoining landowner for the 'natural processes and cycles' of trees, plants, roots, and vines." *Melnick*, 312 Md. 511, 520-521, 540 A.2d 1133 (1988). Therefore, the trial court properly granted summary judgment in favor of Metter. Rababy also failed to demonstrate that a material question of fact existed sufficient to warrant trial for tortious interference with a business relationship in this case.

{¶29} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J., and
TIM McCORMACK, J., CONCUR