

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY, ILLINOIS

JEFFREY HARTNESS, JUDY HARTNESS,)
and JEFFREY HARTNESS AND)
JUDY HARTNESS as next friend of)
SEAN HARTNESS, a minor,)
Plaintiffs,)

v

2011 L 10

WEST GALENA DEVELOPMENT, INC,)
CHAINS AND LINKS INCORPORATED,)
LOIS WIENEN KNAUTZ, JOAN PECINA,)
individually, JOAN PECINA of the)
VINCENT VARSEK TRUST, TOM WIENEN,)
CONNIE WIENEN, AND GOLD FIELDS)
MINING, LLC)
Defendants)

FILED

MAY 19 2015

Sharon Ward
CLERK OF THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY ILLINOIS

ORDER ON MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

THIS MATTER COMING ON FOR HEARING, on May 11, 2015,
Plaintiffs, present by their attorneys, James Newman, and
Defendants, WEST GALENA DEVELOPMENT, INC, CHAINS AND LINKS
INCORPORATED, VINCENT VARSEK TRUST (aka TRUST #2000), present by
their attorneys, Robert Roth and Carey Rosemarin, (all the
foregoing defendants hereafter referenced as "the Original
Defendants"), and GOLD FIELDS MINING, LLC, present by its
attorney, Kirk Marty, for hearing on issues remaining pursuant
to the Original Defendants' Combined Motions, filed August 6,
2014, Motion to Supplement Motion to Dismiss, filed January 9,
2015, and Second Motion to Supplement Motion to Dismiss, filed
February 3, 2015, and Defendant, GOLD FIELDS, LLC's "joining" in

the foregoing motions, by its filing of March 6, 2015, and its Motion for Summary Judgment, filed March 6, 2015, and the Court, hearing arguments of Counsel, having jurisdiction of the parties and the subject matter, and being otherwise advised in the premises FINDS:

1. This court has previously ruled on all issues raised in Original Defendants' Combined Motions, filed August 6, 2014, except their Motion to Dismiss, pursuant to 735 ILCS 5/2-619(a)(9), per order filed December 29, 2014.

2. Original Defendants should be permitted to supplement their Motions and the supplemental issues, pursuant to 735 ILCS 5/2-619(a)(5)&(9), should be addressed on their merits.

3. A section 2-619 motion is similar to a motion for summary judgment, although it is usually presented early in a case, before there is an opportunity for discovery. Section 2-619 allows for the dismissal of a complaint on the basis of issues of law or easily proven issues of fact, while disputed questions of fact are reserved for trial proceedings, if necessary. In a section 2-619 proceeding, the defendant bears the burden of proving any affirmative defense it relies upon. Under section 2-619, the defendant admits to all well-pled facts in the complaint, as well as any reasonable inferences which may be drawn from those facts, but asks the court to conclude that there is no set of facts which would entitle the plaintiff to recover. As long as there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law, the complaint may be properly dismissed. The parties may ask the court to consider the pleadings, as well as any affidavits and deposition evidence, and to take judicial notice of facts contained in public records where such notice will aid in the efficient disposition of the case. However, the court must construe all the pleadings and supporting matter in the light most favorable to the party opposing the motion for involuntary dismissal.

Advocate Health & Hosps. Corp. v. Bank One, N.A., 348 Ill. App. 3d 755, 759, 810 N.E.2d 500, 504-505, 2004 Ill. App. LEXIS 399, 7-9, 284 Ill. Dec. 710, 714-715, 53 U.C.C. Rep. Serv. 2d (Callaghan) 175 (Ill. App. Ct. 2004) (internal citations omitted)

4. Because of prior rulings, the only counts currently remaining in the Plaintiffs' Amended Complaint are Count I (Trespass, 8-09 rain event), Count II (Trespass, 7-10 rain event), Count III (Trespass, 7-11 rain event), and Count IV, described as "Continuing Private Nuisance". All four counts request a permanent injunction, compensatory damages, other and further relief, and court costs.

5. A private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land. The invasion must be: substantial, either intentional or negligent, and unreasonable. The standard for determining if particular conduct constitutes a nuisance is the conduct's effect on a reasonable person. The type of invasion that nuisance protects differs from the type of invasion that trespass protects. "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. * * * A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession."

In re Chicago Flood Litigation, Ill., 1997, 680 N.E.2d 265, 176 Ill.2d 179, 223 Ill. Dec. 532 (internal citations omitted)

2-619(a)(9) Mootness

6. Original Defendants' Motions, as supplemented, essentially argue first that because USEPA has forced remediation of the environmental problems caused by the migration of mine tailings from Original Defendants' property onto Plaintiffs' property, the case is moot.

7. A trespasser is responsible for all the consequences of the trespass. Ariola v. Nigro, 16 Ill. 2d 46, 156 N.E.2d 536, 543 (1959).

8. A plaintiff is entitled to recover at least nominal damages if he or she proves a trespass. Krejci v. Capriotti, 16 Ill. App. 3d 245, 305 N.E.2d 667, 669 (1st Dist. 1973).

9. In their Amended Complaint, Plaintiffs have alleged an invasion of their interest in the exclusive possession of their land by entry of mine tailings from Defendants' property. They have also alleged a substantial, negligent, unreasonable invasion of their interest in the use and enjoyment of their land.

10. Defendants admit the well pled facts. Their motion assumes an opinion of USEPA is unassailable. Whether the effects of the alleged trespass/nuisance have been fully remediated is a genuine issue of material fact. And, even if evidence ultimately shows full remediation subsequent to a proved trespass, Plaintiffs would still be entitled to, at least, nominal damages.

11. Construing the pleadings and other supporting matter in the light most favorable to plaintiffs, Original Defendants' motion arguing mootness due to environmental remediation as affirmative matter defeating Plaintiffs' claims should be denied.

2-619(a)(5)&(9) Consent/Limitations/Mere ownership

12. Original Defendants' Motions next argue that because Plaintiffs must have been aware of the migration of tailings at least a decade before they filed suit, by being silent during this period, they "effectively consented to the invasions". Defendants rely largely on Restatement (Second) of Torts, § 839, to support the underlying proposition that, because these Defendants are mere owners of land, and acquired the land after the mining activity which is the alleged cause of nuisance/trespass, the plaintiffs' "consent" has now ripened into an expiration of the statute of limitations.

13. The restatement has been addressed once by the Illinois appellate court in Willmschen v. Trinity Lakes Improvement Ass'n, 362 Ill. App. 3d 546, 553-554, 840 N.E.2d 1275, 1281-1283, 2005 Ill. App. LEXIS 1289, 14-18, 298 Ill. Dec. 840, 846-848 (Ill. App. Ct. 2d Dist. 2005), which reversed the granting of a 2-615 motion to dismiss. In the instant matter, the question as to whether the Plaintiffs consented to be victims of an alleged trespass/nuisance presents a genuine issue of material fact.

14. To the extent Defendants also argue that, to mere owners of land, who acquired the land after the mining activity which is the alleged cause of nuisance/trespass, there should be no liability, the restatement also says "...When, however, the

condition is created before the possessor acquires the land and he comes into possession with the condition then existing he may often reasonably assume the consent of those who are affected..."(underline emphasis added). This implies that, sometimes, such possessor may not reasonably make such an assumption. The question as to whether this is a situation where the Defendants could reasonably assume the consent of the Plaintiffs presents a genuine issue of material fact.

15. Construing the pleadings and other supporting matter in the light most favorable to plaintiffs, Original Defendants' motion arguing consent, taking the matter outside the statute of limitations, and no liability in a mere owner who acquired the land after the mining activity which is the alleged cause of nuisance/trespass as affirmative matter defeating Plaintiffs' claims should be denied.

2-619(a)(9) Mootness

16. Original Defendants' Motions next argue, as they first argue, but in greater factual detail, that because of the remediation of the soil and water problems caused by the migration from Original Defendants' property onto Plaintiffs' property, the case is moot.

17. Defendants admit the well pled facts. Whether the effects of the alleged trespass have been fully remediated is a genuine issue of material fact. And, even if evidence

ultimately shows full remediation subsequent to a proved trespass, Plaintiffs would still be entitled to, at least, nominal damages.

18. Construing the pleadings and other supporting matter in the light most favorable to plaintiffs, Original Defendants' motion arguing mootness due to environmental remediation as affirmative matter defeating Plaintiffs' claims should be denied.

GOLD FIELDS' Motion for Summary Judgment

19. 735 ILCS 5/2-1005(c) states, in pertinent part: The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

20. The purpose of summary judgment procedure is to determine whether a genuine issue of material fact exists, and to summarily dispose of cases where none exist. Loveland v. City of Lewistown, 84 Ill. App. 3d 190, 192, 39 Ill. Dec. 700, 702, 405 N.E.2d 453, 455 (3d Dist. 1980)

21. While use of summary judgment is to be encouraged, as it aids in expediting disposition of lawsuits, it is a drastic means of disposing of litigation and should be

allowed only when the right of the moving party is clear and free from doubt. Hedlund & Hanley, L.L.C. v. Bd. of Tr. of Cmty. Coll. Dist. No. 508, 376 Ill. App. 3d 200, 205, 315 Ill. Dec. 1, 5, 876 N.E.2d 1, 5 (1st Dist. 2007)

22. As between Plaintiffs and Defendant, Gold Fields Mining, LLC, there is no genuine issue of material fact. Plaintiffs do not dispute the recitation of facts in Gold Fields' Motion for Summary Judgment. Most significantly, they do not dispute that: Plaintiffs' property and Original Defendants' property were originally part of a larger parcel which was leased and mined by Gold Fields' predecessor, that lease terminated in 1963, the larger parcel was leased by a different mining entity for a period of years thereafter, and Plaintiffs took their property, a split from the larger parcel, in 1992. The only remaining question is whether Gold Fields is entitled to a judgment as a matter of law.

23. The question of duty is a question of law for the court, to be determined from consideration of a number of factors: the likelihood of the injury, the magnitude of the burden of guarding against it, the consequences of placing that burden upon the defendant, public policy, and social considerations

Dealers Serv. & Supply Co. v. St. Louis Nat'l Stockyards Co., 155 Ill. App. 3d 1075, 1079-1082, 508 N.E.2d 1241, 1244-1245, 1987 Ill. App. LEXIS 2526, 7-13, 108 Ill. Dec. 664, 667-668 (Ill. App. Ct. 5th Dist. 1987)

24. As a general rule, in Illinois, the liability of a landowner for injuries occurring in connection with the

property ends with the cessation of ownership, possession, and control of the property.

Maisenbach v. Buckner, 133 Ill. App. 2d 53, 56, 272 N.E.2d 851 (1971)

25. Section 352 of the Restatement (Second) of the Law of Torts, which also sets forth the general rule that the liability of a landowner for injuries occurring in connection with the property ends with the cessation of ownership, possession, and control of the property, has been acknowledged by our supreme court as stating the law in Illinois.

Martin v. 1727 Corp., 120 Ill. App. 3d 733, 737, 458 N.E.2d 990, 992-993, 1983 Ill. App. LEXIS 2653, 8-9, 76 Ill. Dec. 336, 338-339 (Ill. App. Ct. 1st Dist. 1983)

26. Section 352, entitled Dangerous Conditions Existing at Time Vendor Transfers Possession, states: Except as stated in sec. 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

27. As Gold Fields argues, there is no sound reason this rationale should not extend to a former lessee of property with the same force as it does to a former owner of property.

28. Therefore, as a matter of law, in light of the undisputed facts of this case, and in consideration of the factors relating to whether a legal duty exists, Defendant, Gold

Fields, can have no liability for the injuries alleged to have occurred to Plaintiffs herein. Per Section 352, Plaintiffs' property is "the land" leased by Gold Fields' predecessor. Plaintiffs are vendees who took possession of the land. Any dangerous condition involving Gold Fields existed at the time Plaintiffs took possession of their land.

29. Gold Fields' lease ended almost 30 years before Plaintiffs took their property and almost 50 years before the alleged injuries. Under the facts of this case, it would be unreasonable to impose a burden on Gold Fields to foresee, decades later, the subdividing of the leased parcel, or that migration might occur from one subdivided subparcel to another, or to take steps to prohibit the possibility of those things happening at any future time. For these reasons and because of the cessation of Gold Fields' lease, and its relinquishment of possession and control of the parcel, Gold Fields has no duty to Plaintiffs.

30. Defendant, Gold Fields Mining, LLC's Motion for Summary Judgment should therefore be granted.

WHEREFORE the Court DENIES the 2-619(a)(9) motion remaining in Original Defendants' Combined Motions, filed August 6, 2014, the substantive requests in their Motion to Supplement Motion to Dismiss, filed January 9, 2015, and the substantive requests in their Second Motion to Supplement Motion to Dismiss, filed February 3, 2015, and Defendant, GOLD FIELDS, LLC's "joining" in the foregoing motions, by its filing of March 6, 2015, and GRANTS Defendant, Gold Fields Mining, LLC's Motion for Summary Judgment, filed March 6, 2015.

DATED THIS 19TH day of May, 2015.

William A. Kelly
William A Kelly
Judge