



LEGAL LIABILITY FOR TREES 26TH ANNUAL RELEAF CONFERENCE JULY 27, 2018

Laura E. Ayers, Esq.
186 Delevan Road
Delanson, New York 12053
(518) 895-1115
laura@lauraayerslaw.com



Landowners' Liability

For Tree Maintenance

Liability for Trees

- “no liability attaches to a landowner whose tree falls outside of his premises and injures another unless there exists actual or constructive knowledge of the defective condition of the tree.”
- *Ivancic v. Olmstead*, 66 N.Y.2d 349 (1985). Citing to *Harris v Village of East Hills*, 41 NY2d 446, 449 ;

Liability for Trees

- “Plaintiff was working on his truck in the driveway of his parents' home located in the Village of Fultonville, New York. Since 1970, defendant has owned and lived on the property adjoining to the west. A large maple tree stood on defendant's land near the border with plaintiff's parents' property. Branches from the tree had extended over the adjoining property. During a heavy windstorm on September 26, 1980, an overhanging limb from the tree fell and struck plaintiff, causing him serious injuries. As a result, plaintiff commenced this action, interposing causes of action in negligence and common-law trespass.”
- *Ivancic v. Olmstead*, 66 N.Y.2d 349 (1985).

Liability for Trees

- “Not one of the witnesses who had observed the tree prior to the fall of the limb testified as to observing so much as a withering or dead leaf, barren branch, discoloration, or any of the other indicia of disease which would alert an observer to the possibility that the tree or one of its branches was decayed or defective.”
- “Plaintiff's expert never saw the tree until the morning of the trial when all that remained of the tree was an eight-foot stump. He surmised from this observation and from some photographs of the tree that water invaded the tree through a "limb hole" in the tree, thus causing decay and a crack occurring below.”
- *Ivancic v. Olmstead*, 66 N.Y.2d 349 (1985).

Liability for Trees

- “At least as to adjoining landowners, the concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently and constantly check all trees for nonvisible decay. Rather, the manifestation of said decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm.”
- *Ivancic v. Olmstead*, 66 N.Y.2d 349 (1985).



Liability for Trees

Within an Easement or Highway Right of Way

Easements

- Definition of an Easement:
- “An easement is a permanent right conferred by grant or prescription, authorizing one landowner to do or maintain something on the lands of another which, although a benefit to the land of the former and a burden upon the land of the latter, is not inconsistent with general ownership.”
- *Trustees of Freeholders and Commonalty v. Jessup*, 162 N.Y.122 (1900).

Easement Holders' Liability

Easement holder has a right to make lawful and reasonable use of their rights, limited to those actions, which are necessary to effectuate the express purpose of the easement.

Lopez v. Adams, 69 A.D.3d 1162 (3rd Dept 2010).

Easement Holders' Liability

Easement under the exclusive control of the easement holder makes the easement holder liable for any defects in the property, including tree maintenance.

Tagle v. Jakob, 97 NY2d 165 (2001).

NYSEG easement for power lines, a child climbed tree and touched the wires and was electrocuted and fell to the ground, NYSEG, not the landowner was liable to the child

Highway Maintenance

- Highways are either fee owned or easements for highway purposes
- Regardless:
 - Public authority is liable for negligence where a decayed or defective tree or branch thereof falls on travelers upon the public highway. *Stevens v. State*, 21 Misc 2d 79 (Ct. of Claims 1959)

Highway Maintenance

- Adjoining owner to highway has an easement of shade from the trees along the public highway and the right to harvest fruit from fruit bearing trees within the highway right of way and has a right to recover for injury to the trees by third parties or by the public authorities themselves by conduct not connected with the use of the highway for highway purposes.
- *Crowell v. State* 18 A.D.2d 7 (4th Dept, 1963).

Highway Maintenance

- “As plaintiff was driving on a public highway, two large limbs from a tree located on defendant's property fell and struck plaintiff's vehicle, causing him injuries.”
- Defendant owed a duty to travelers on the adjacent highway to maintain her property in a reasonably safe condition, including correcting a defective condition relating to a tree.
- *Sleezer v. Zap*, 90 A.D.3d 1121 (3rd Dept 2011)

Highway Maintenance

- “Notably, the arborist did not indicate that an average person--as opposed to an expert--would have been able to conclude, upon reasonable inspection of this healthy tree, that a limb was structurally unsound and posed a danger based on the length, angle and weight of that limb.”
- *Sleezer v. Zap*, 90 A.D.3d 1121 (3rd Dept 2011).
- Defendant was not liable and the complaint was dismissed.



Trespass & Nuisance

Trespass & Nuisance

- Definitions:
- **Trespass**: A cause of action for trespass results from an individual's intentional entry onto another's property, whether by mistake or innocently, without permission or justification.
- *Woodhull v. Town of Riverhead*, 46 AD3d 802, 804 (2nd Dept., 2007);
- *Golonka v. Plaza at Latham*, 270 AD 667, 669 (3rd Dept., 2000)

Trespass & Nuisance

- Overhanging Branches are not a trespass
- Why? Not intentional!
- “In this case, there is evidence that defendant did not plant the tree, and the mere fact that defendant allowed what appeared to be a healthy tree to grow naturally and cross over into plaintiff's parents' property airspace, cannot be viewed as an intentional act so as to constitute trespass.”
- *Ivancic v. Olmstead*, 66 N.Y.2d 349 (1985).

Trespass & Nuisance

- Definition: **Nuisance**
- The elements of private nuisance “are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s right to use and enjoy land, (5) caused by another’s conduct in acting or failure to act.”
- *Copart Industries, Inc. v. Consolidated Edison Company of New York, Inc.*, 41 N.Y.2d 564 (1977).

Trespass & Nuisance

- New York Real Property Actions and Proceedings §841: Action for Nuisance
- Allows for the removal of the nuisance or for damages or both



Trespass & Nuisance

- “Since the trees in this case are not poisonous or noxious in their nature, they are not a nuisance *per se*, in such a sense as to sustain an action for relief.”
- *Zimmerman v. Fredericks*, 2015 NY Slip Op 31991 (U) (Rye City Ct., Westchester Co.) citing to *Countryman v. Lighthill*, 24 Hun 405 [1881].
- “...no liability could be imposed [for nuisance] absent "real, sensible damage" resulting from the overhanging branches.”
Ivancic v. Olmstead, 66 N.Y.2d 349 (1985) citing to *Countryman v. Lighthill*, 24 Hun 405 [1881].



Timber Theft

“Line Trees”

- Trees which are located half on one property and half on the adjoining property are owned half and half by the two adjoining owners
- When one neighbor cuts down a line tree, they are liable to the neighbor for one half the cost of the tree
- Simple case of trespass *quam clausum fregit* See *Dubois v. Beaver*, 25 N.Y. 123 (1862)

“Line Trees”

- “Defendants concede that they **cut 12 trees** along the boundary line, but they claim that all 12 trees were on their property. After a nonjury trial, Supreme Court found that although nine of the trees were on defendants' property, **three of the trees were on the property line**. These property line trees were the property of the parties as tenants in common (see, *Dubois v Beaver*, 25 NY 123) and Supreme Court concluded that defendants were liable to plaintiff for **one half of the value of the trees**. Supreme Court also concluded that plaintiff was entitled to treble damages pursuant to RPAPL 861 (2). Defendants appeal from the judgment.”
- *Hollenbeck v. Genung*, 198 A.D.2d 677 (3rd Dept 1993)

“Line Trees”

- “Defendants believed that these two trees were on their side of the line because the barbed wire was attached to the back of the trees toward plaintiff's property.”
- “....a viable explanation for their belief that they had a right to harvest the trees and thereby met their burden of establishing that the trespass was the result of goodfaith negligence”
- *Hollenbeck v. Genung*, 198 A.D.2d 677 (3rd Dept 1993)

Adjoining Land Owners

- Defendants undeniably cut 29 trees on Plaintiffs' property in effort to prepare their property for building.
- Defendants had the burden of proof that they had cause to believe the land was theirs to avoid treble damages
- "Suffice it to say, defendants proof in this regard was woefully inadequate. Defendant Melinda Peters (hereinafter the wife) was the only defense witness to testify on this critical issue and her testimony was more damning than helpful in sustaining their burden."
- *Krieg v. Peters*, 46 A.D.3d 1190 (3rd Dept 2007) J. Carpinello.

Adjoining Land Owners

- Wife asked Realtor where BL's were, Realtor didn't know
- Never got a survey in the face of this uncertainty
- Never consulted the map referenced in their deed
- Husband did not testify.
- *Krieg v. Peters*, 46 A.D.3d 1190 (3rd Dept, 2007) J. Carpinello.

Treble Damages

- NEW YORK Real Property Actions and Proceedings Law (NY RPAPL)
- Section 861:
- **Action for cutting, removing, injuring or destroying trees or timber, and damaging lands thereon**



Treble Damages

- RPAPL §861(1) If any person, without the consent of the owner thereof, cuts , removes, injures or destroys, or causes to be cut, removed, injured or destroyed, any underwood, tree or timber on the land of another or on the common or other land of a city, village, town or county, or damages the land in the course thereof, an action may be maintained against such person for **treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation.** Such reparations shall be of such kind, nature and extent as will reasonably restore the lands affected by the violation to their condition immediately before the violation and may be made by physical restoration of such lands and/or by the assessment of monetary payment to make such restoration.

Treble Damages

- RPAPL §861 (2) In any action brought pursuant to subdivision one of this section, if the defendant establishes by clear and convincing evidence, that when the defendant committed the violation, he or she had cause to believe the land was his or her own, or that he or she had an easement or right of way across such land which permitted such action, or he or she had a legal right to harvest such land, **then he or she shall be liable for the stumpage value or two hundred fifty dollars per tree, or both and reasonable costs associated with maintaining an action pursuant to this section.** In such case, the defendant shall also be liable for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation. Such reparations shall be of such kind, nature and extent as will reasonably restore the lands affected by the violation to their condition immediately before the violation and may be made by physical restoration of such lands and/or by the assessment of monetary payment to make such restoration.

Treble Damages

- RPAPL §861 (3) For the purposes of this section "stumpage value" shall mean the current fair market value of a tree as it stands prior to the time of sale, cutting, or removal. Stumpage value shall be determined by one or more of the following methods:
 - the sale price of the tree in an arm's-length sale,
 - a review of solicited bids,
 - the stumpage price report prepared by the department of environmental conservation,
 - comparison with like sales on trees on state or private lands, or
 - other appropriate means to assure that a fair market value is established within an acceptable range based on the appropriate geographic area.

Treble Damages

- Injury to property has a three year Statute of Limitations
- Civil Practice Law and Rules (CPLR) §214: Actions to be commenced within three years:...for injury to property...
- CPLR 214(4) an action to recover damages for an injury to property except as provided in section 214-c.
 - (CPLR 214-c pertains to the discovery of the injury due to exposure to certain toxic substances, which may be more than 3 years after first exposed)



THE END

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