

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF SARATOGA

FOX WANDER WEST NEIGHBORHOOD ASSOCIATION, INC.,

Plaintiff,

-against-

THE LUTHER FOREST CORPORATION,

Defendant.

**NOTICE OF APPEAL TO
THE APPELLATE
DIVISION, THIRD
JUDICIAL DEPARTMENT**

Index No. 20171767

PLEASE TAKE NOTICE that Plaintiff Fox Wander West Neighborhood Association, Inc. hereby appeals to the Appellate Division of the Supreme Court, Third Judicial Department, from the August 19, 2019 decision and judgment of Hon. Ann C. Crowell, J.S.C., of the Supreme Court, entered in the office of the clerk of Saratoga County on the 30th day of August, 2019, and from each and every part thereof.

Dated: Saratoga Springs, New York
September 24, 2019

WALSH & WLASH, LLP
Attorneys for Plaintiff/Appellant

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STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

FOX WANDER WEST NEIGHBORHOOD
ASSOCIATION, INC.,

Plaintiff,

-against-

THE LUTHER FOREST CORPORATION,

Defendant,

**NOTICE OF ENTRY OF
DECISION AND JUDGMENT**

RJI # 45-1-2048-110
Index # 2017-1767

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SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

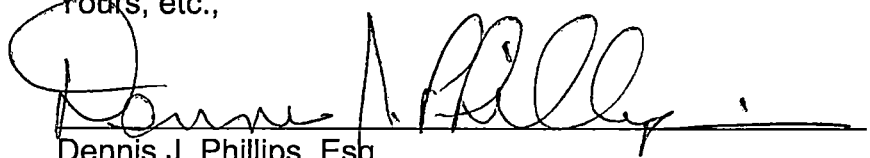
FILED

PRESENT: HON. ANN C. CROWEL, J. S.C.

PLEASE TAKE NOTICE, that the annexed Decision and Judgment is a copy of a Decision and Judgment duly entered in the above entitled action and filed in the office of the Clerk of the County of Saratoga on the 30th day of August, 2019.

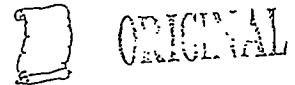
Dated: September 5, 2019

Yours, etc.,



Dennis J. Phillips, Esq.
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 ORIGINAL

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

FOX WANDER WEST NEIGHBORHOOD
ASSOCIATION, INC.,

Plaintiff,

-against-

THE LUTHER FOREST CORPORATION,

Defendant.

DECISION and JUDGMENT
RJI #45-1-2018-1167
Index # 2017-1767

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SARATOGA COUNTY
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FILED

ANN C. CROWELL, J.

Plaintiff, Fox Wander West Neighborhood Association, Inc. ("Fox Wander") requests an Order pursuant to CPLR § 3212 granting summary judgment and making various declarations. Defendant, the Luther Forest Corporation ("Luther Forest") opposes the requested relief.

Fox Wander is a duly incorporated homeowner's association. The Association is comprised of over 500 homeowners. Their homes are located in the Luther Forest in Malta, New York. The Fox Wander development is the fee owner of approximately 100 acres of common-area woods with an interconnected system of walking and hiking trails. Luther Forest owns the timber rights to Fox Wander's common areas. Luther Forest logs those areas every

10-15 years. Luther Forest's predecessors in interest deeded the common areas to Fox Wander.

The deeds and declarations to Fox Wander include the following language:

"AND FURTHER RESERVING to the Grantors all timber rights including the right to harvest, manage, thin and prune trees in accordance with good forestry practices upon lands designated as common areas on said maps"

"In FURTHERANCE of the aforesaid rights the Grantors reserve a permanent easement of access and egress upon the Neighborhood Common Area lands together with any such rights of use and/or construction, maintenance, and repair as may be necessary to exercise the rights so reserved."

Declaration of Covenants, Conditions, Restrictions and Easements, Article IV, Section

2 Purpose of Assessment at Book 998, Page 987, states:

"A. The assessments levied by the Association shall be used exclusively to promote the recreation, health, safety and welfare of the residents in the Properties and for the improvement and maintenance of the Neighborhood Common Areas; and

"B. to pay the costs of management of the Neighborhood Association; and

"C. to carry out the powers and perform the duties as same may appear in the Certificate of Incorporation."

Fox Wander contends the reservation of rights in the parties' deeds mandate that Luther Forest is responsible for any dangerous trees on the common lands. Luther Forest contends that Fox Wander should be responsible for any dangerous trees with the accompanying cost payable from Fox Wander's assessments for the health, safety and welfare of the residents as well as the maintenance of the common areas.

CPLR § 3001 Declaratory Judgment states, in pertinent part:

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

Plaintiff specifically seeks an Order of this Court declaring:

(1) that Luther Forest, as the legal owner of all standing trees and timber on Fox Wander's common lands, has the legal duty to regularly inspect its free stands for potentially dangerous trees susceptible to falling and damaging private property or posing a danger of falling on persons using Fox Wander's trails;

(2) that Luther Forest is solely responsible for the cost of removing any dangerous trees;

(3) that Luther Forest must remove any dangerous trees that it has notice of, or has been given notice of by Fox Wander, or member, lot owners of Fox Wander as soon as reasonably practicable;

(4) that Fox Wander, as the owner of the trail system that was created by the parties' common grantors, is not responsible for restoring any damage or destruction to its trail system caused by Luther Forest's timber harvesting operations on Fox Wander's common lands that occur at intervals of every 15-20 years;

(5) that Luther Forest is and shall be responsible for restoring Fox Wander's trails if the trails are or were damaged or obstructed by Luther Forest's timber harvesting operations, or, if Luther Forest does not undertake such restoration work on its own, then Luther Forest shall be responsible to Fox Wander for the reasonable costs incurred by Fox Wander to clear and restore the trails;

(6) that Luther Forest is and shall be responsible for removing and clearing slash and tree debris from the common areas, at its expense, or if Luther Forest fails to do so it shall be liable for Fox Wander's costs incurred to remove and clear such slash and debris; and

(7) that Luther Forest is required to provide advance written notice of any tree maintenance or harvesting operations Luther Forest intends to undertake on the common areas and to provide proof of insurance and to undertake safety precautions requested by Fox Wander.

Fox Wander's laundry list of requested declaratory relief is overbroad and substantially lacking in legal support. The rights of the parties are governed by a combination of the reservation of rights in the deeds, the Declaration of Covenants, Conditions, Restrictions and Easements affecting the members of Fox Wander. The parties' also have a history of past practices over the last forty (40) years that appear to have been mutually beneficial. Luther Forest's reservation of all timber rights and a permanent easement to exercise those rights is a reservation of an interest in land that constitutes a freehold estate. *Fischer v Zepa*

Consulting, 95 NY2d 66 [2000]. The seminal case regarding the liability of adjoining landowners with respect to falling trees is *Ivancic v Olmstead*, 66 NY2d 349 [1985]. “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*, at p. 350-351. “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*, at p. 351. Guided by these legal concepts, the Court will address the seven requests for declaratory relief:

(1) that Luther Forest, as the legal owner of all standing trees and timber on Fox Wander’s common lands, has the legal duty to regularly inspect its free stands for potentially dangerous trees susceptible to falling and damaging private property or posing a danger of falling on persons using Fox Wander’s trails.

The reservation of all timber rights in the common areas establishes that Luther Forest is the owner of all of the living trees within those common areas. It is declared that all living trees within the common areas are owned by Luther Forest. Whether the word “timber” as used in Luther Forest’s reservation of rights and as commonly understood refers to “all standing trees,” including dead trees, or only living trees is an issue of fact requiring expert testimony. The Appellate Division, Third Department recently agreed with a trial court’s non-jury determination based upon expert testimony regarding the meaning of “timber” in the New York State Constitution. *Protect the Adirondacks! Inc. v NYS DEC*, ___ AD3d ___ [3d Dept. 2019]. Plaintiff’s request for a declaration that Luther Forest has an affirmative duty to regularly inspect its trees is denied and dismissed. No statute, case law or agreement between the parties

creates such an affirmative duty. To the contrary, the Court of Appeals has stated that “there is no duty to consistently and constantly check all trees for nonvisible decay.” *Ivancic v Olmstead*, at p. 351.

(2) that Luther Forest is solely responsible for the cost of removing any dangerous trees; and

(3) that Luther Forest must remove any dangerous trees that it has notice of, or has been given notice of by Fox Wander, or member, lot owners of Fox Wander as soon as reasonably practicable.

Fox Wander’s request for a declaration that Luther Forest has an affirmative duty to remove any dangerous trees and is solely responsible for the cost of removing any dangerous trees is denied and dismissed. No statute, case law or agreement between the parties creates such an affirmative duty. While Luther Forest may be liable for the damages caused by a tree falling, such liability needs to be predicated upon Luther Forest’s actual or constructive knowledge of the defective condition of the tree. *Ivancic v Olmstead*, at p. 350-351. Whether a tree constitutes a dangerous tree cannot rest within the sole control of Luther Forest. At times, an expert opinion is necessary to determine whether there is any defective condition in a tree. *Ivancic v Olmstead*, at p. 351-352. Even if the parties were to agree that any particular tree is a “dangerous tree”, Luther Forest would be free to bear the risk of not removing the tree. In order to force Luther Forest to remove a dangerous tree, Fox Wander would have to bring an action and establish that such tree is a public or private nuisance. Marissa C.N. Mackay, President of Luther Forest Corporation in her affidavit dated March 20, 2019 at paragraph 15 indicates Fox Wander may take immediate action without prior inspection and approval “to manage perceived immediate danger trees.” This provides Fox Wander means to control the problem it perceives exists. Fox Wander maintains a maintenance budget presumably for what

it determines are maintenance needs on its common lands. Of course, Fox Wander may always elect legal action to resolve its concerns.

(4) that Fox Wander, as the owner of the trail system that was created by the parties' common grantors, is not responsible for restoring any damage or destruction to its trail system caused by Luther Forest's timber harvesting operations on Fox Wander's common lands that occur at intervals of every 15-20 years.

(5) that Luther Forest is and shall be responsible for restoring Fox Wander's trails if the trails are or were damaged or obstructed by Luther Forest's timber harvesting operations, or, if Luther Forest does not undertake such restoration work on its own, then Luther Forest shall be responsible to Fox Wander for the reasonable costs incurred by Fox Wander to clear and restore the trails.

The Court questions the need for these declarations. If Luther Forest damages Fox Wander's trails during harvesting operations, Luther Forest is and should be liable for such damages. Luther Forest does not necessarily contest this. Luther Forest appears to be contesting that it's harvesting operations caused any damage to Fox Wander's trails. Over a period of months, the parties' counsel repeatedly advised the Court that the issue of damages to the trail system could be resolved by the parties. No such resolution ever materialized. It is declared that Luther Forest is responsible for any damages to Fox Wander's trails caused by harvesting operations. Whether Luther Forest did cause any damage to Fox Wander's trail system during its harvesting operations and the extent of those damages, if any, can be negotiated by the parties or litigated in a separate plenary action.

(6) that Luther Forest is and shall be responsible for removing and clearing slash and tree debris from the common areas, at its expense, or if Luther Forest fails to do so it shall be liable for Fox Wander's costs incurred to remove and clear such slash and debris.

Luther Forest reserved all timber rights including the right to harvest, manage, thin and prune trees in accordance with good forestry practices upon the lands designated as common

areas. During logging operations, a certain amount of waste is generated from the trees that are cut down. The tops of trees left behind are referred to as slash. Fox Wander contends that Luther Forest should be required to remove the slash and tree debris generated from the logging operation. Fox Wander's expert witness, Rick Percoco ("Percoco") states that Luther Forest left slash extending four feet or more from the ground. While Percoco admits that four feet is the industry standard, he opines that the piles should be reduced in height for fire safety due to the proximity of the large number of homes in Fox Wander. Percoco also opines that the tops should be cut to no more than three inches in diameter as required in the "Fire towns" in the Catskills and Adirondacks. Percoco also observed two large piles of slash and debris estimated to be 60 feet by 100 feet and 10 to 14 feet in height. Percoco recommends chipping and distributing the piles to reduce the risk of fire and improve appearances.

Luther Forest has submitted the affidavit of certified forester, Charles Gerber ("Gerber") asserting that the tree tops and piles left on the property following the 2017 harvesting operations was done in accordance with reasonable forestry management practices. On a motion for summary judgment, Gerber's opinion must be viewed in the light most favorable to Luther Forest. While Gerber does not specifically address the diameter of the tree tops left or the size of the two large piles of slash and debris, Gerber's opinion is sufficient to raise an issue of fact regarding whether the tree tops and large piles of slash and debris were left on the property in accordance with reasonable forestry management practices.

Over a period of months, the parties' counsel repeatedly advised the Court that the issues regarding the slash and debris piles could be resolved by the parties. Again, no such resolution ever materialized. Fox Wander's request for a declaration that Luther Forest shall be responsible for removing and clearing slash and tree debris from the common areas at its

expense is denied. Questions of fact exist with regard to whether the slash and debris left on the common lands was done so in accordance with good forestry practices. Aesthetics and good forestry practices may not always coincide. The standard is whether or not good and safe forestry practices were employed. The parties shall be given time to conduct discovery on whether Luther Forest left tree tops of excessive diameter or excessively large piles of slash and debris on the property. If necessary, a trial will be held to determine whether such treetops and slash and debris piles conform to good forestry practices.

(7) that Luther Forest is required to provide advance written notice of any tree maintenance or harvesting operations Luther Forest intends to undertake on the common areas and to provide proof of insurance and to undertake safety precautions requested by Fox Wander.

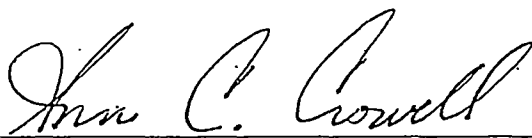
Fox Wander's request for a declaration that Luther Forest must provide advance notice of any tree maintenance or harvesting operations and provide proof of insurance and undertake safety precautions requested by Fox Wander is denied and dismissed. No statute, case law or agreement between the parties requires Luther Forest to take such measures. Although unable to do so, the parties are free to negotiate an agreement that includes such obligations.

The foregoing constitutes the Decision and Judgment of the Court with respect to those issues actually determined. The Court is scheduling a conference for **September 6, 2019 at 2:30 p.m.** to determine if the parties need additional time for discovery on the issues of whether the "timber" rights reserved include dead trees and whether the slash and debris left on the property was done so in accordance with good forestry practices. If no such additional discovery is needed, plaintiff is directed to file a Note of Issue and the Court will schedule a trial on those issues.

Any relief not specifically granted is denied. No costs are awarded to any party. The

original Decision and Judgment shall be forwarded to the attorney for defendant Luther Forest for filing and entry. The underlying papers will be filed by the Court.

Dated: August 19, 2019
Ballston Spa, New York


ANN C. CROWELL, J.S.C.
Craig A. Hayner

Papers Received and Considered:

Notice of Motion, dated August 24, 2018

Affidavit of Joseph M. Walsh, Esq., sworn to August 22, 2018, with Exhibits 1-7

Affidavit of Mary C. Mahoney, sworn to August 9, 2018, with Exhibit 1

Affidavit of Penny Kretchmer, sworn to August 9, 2018, with Exhibits 1-7

Affidavit of James C. Parker, sworn to August 14, 2018, with Exhibit 1

Affidavit of Thomas Kimball, sworn to August 17, 2018, with Exhibits 1-2

Plaintiff's Memorandum of Law, dated August 14, 2018

Affirmation of Eric C. Schwenker, Esq., dated November 9, 2018, with Exhibits A-F

Affidavit of Charles Gerber, sworn to November 6, 2018

Affidavit of Marissa Mackay, sworn to November 9, 2018

Defendant's Memorandum of Law, dated November 9, 2018

Affidavit of Penny Kretchmer, sworn to November 20, 2018, with Exhibits 1-6

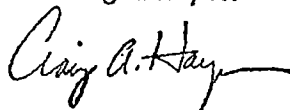
Plaintiff's Memorandum of Law, dated November 21, 2018

Affidavit of Marissa Mackay, sworn to March 20, 2019, with Exhibits A-G

Affidavit of Rick Percoco, sworn to April 10, 2019, with Exhibit 1

Affidavit of Joseph M. Walsh, Esq., sworn to April 11, 2019, with Exhibit 1

Dennis J. Phillips, Esq.'s letter dated June 28, 2019, with attachment


Saratoga County Clerk

2019 AUG 30 AM 10:59
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

Joseph M. Walsh, Esq.'s letter dated July 10, 2019, with attachments