

STATE OF NEW YORK  
SUPREME COURT

ULSTER COUNTY

JOHN R. NACCARATO and  
PATRICIA NACCARATO,

Plaintiffs,

-against-

**Decision & Order**  
**Index No.: 13-3290**

ROBERT SINNOTT and  
KATHLEEN SINNOTT,

Defendants.

---

Supreme Court, Ulster County  
Motion Return Date: May 11, 2018  
RJI No. 55-13-02146

**Present: Christopher E. Cahill, JSC**

Appearances: DOUGLAS J. ROSE, ESQ.  
Attorney for Plaintiffs  
75 North Street Suite 310  
The Central Block  
Pittsfield, Massachusetts 01201

MAYNARD O'CONNOR SMITH & CATALINOTTO, LLP  
Attorneys for Defendants  
6 Tower Place  
Albany, New York 12203  
By: Justin W. Gray, Esq.

**Cahill, J.:**

The parties are neighboring property owners in the Town of Saugerties, New York. Plaintiffs allege that a subsurface drainage system constructed by defendants in the upper portion of defendants' backyard in the Spring of 2007 created an inundation of water, causing extensive and successive damage to their property. They further allege that defendants had removed/damaged landscaping materials, trees, electrical wires and

survey pins from their property. Accordingly, they commenced this action in 2013 seeking damages and injunctive relief under theories of trespass, nuisance and negligence.

After joinder of issue and the completion of discovery, defendants have moved for partial summary judgment seeking a dismissal of those causes of action sounding in trespass and nuisance due to the diversion of water, trespass due to defendants' physical invasion of their property, and negligence due to the construction of the system.

Annexing, among other items, depositions of the parties and a non-party, affidavits from Gregory P. Gifford, a civil engineer, Paul A. Rubin, a geologist with a specialty in hydrogeology, and David Dibenedetto, the designer and installer of the drainage system, they contend that plaintiffs' claims are barred by the statute of limitations and/or the doctrine of laches. They further contend that such proffer establishes that the drainage system was properly constructed and installed in good faith and that no evidence supports any contention that defendants acted with actual malice involving an intentional wrongdoing or a wanton, willful or reckless disregard of plaintiffs' rights, thereby warranting their further request for a dismissal of all claims seeking an award of punitive damages. Plaintiffs have opposed the motion.

Addressing first the issue of timeliness, pursuant to CPLR § 214 (4), an action to recover damages for injury to property must be commenced within three years of accrual. With it established that an injury to property is deemed to accrue "when the damage [was] apparent" (Alamio v Town of Rockland, 302 AD2d 842, 844 [2003], quoting Mandel v Estate of Frank L. Tiffany, 263 AD2d 827, 829 [1999]), plaintiffs contend that

they did not notice any problems when defendants first installed the drainage system. Months later, in the Spring of 2008, plaintiffs conceded that they did notice an inundation of water in their backyard due to such system. By the following year, they observed that the bank at the edge of their lawn had collapsed and then continued to collapse each year thereafter. Upon these facts, defendants maintain, and the court agrees, that plaintiffs' failure to have commenced this action, whether sounding in negligence, trespass or nuisance, within three years of when the damage to their property was "apparent" warrants this Court to conclude that the claims alleging negligence, trespass and nuisance due to the diversion of water onto their property are untimely (see Alamio v Town of Rockland, supra at 844; Mandel v Estate of Estate of Frank L. Tiffany, supra at 829).

Nor can the claims survive under the theory of a continuing trespass and nuisance due to the continuous flow of water onto their property. As explained by the Court of Appeals in Capruso v Village of Kings Point (23 NY3d 631, 639 [2014]), the continuing wrong doctrine will only be applied "in certain cases...where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed" (id at 639, quoting Covington v Walker, 3 NY3d 287, 292 [2004], cert denied 545 US 1131 [2005]; see also EPK Properties, LLC v Pfohl Brothers Landfill Site Steering Committee, 159 AD3d 1567 [2018]). With the undisputed testimony clarifying that plaintiffs first noticed the issues with their property within months of the installation of the drainage system and continued to attribute the continuing damage to their property due to that system, the damage can be traced to the "day when the original objectionable

act was committed” (Capruso v. Village of Kings Point, supra at 639), i.e., defendants installation of the drainage system. Hence, “the accrual date does not change as a result of continuing consequential damages” (EPK Properties, LLC v Pfohl Brothers Landfill Site Steering Committee, supra at 1569, quoting New York Seven-Up Bottling Co. v Dow Chem. Co., 96 AD2d 1051, 1052 [2<sup>nd</sup> Dept 1983], affd 61 NY2d 828 [1984]).

Similarly, such testimony supports the dismissal of the negligence claim since “an action for injury to ...property accrues at the time the injury is sustained, notwithstanding the actual damage is not suffered until later” (Johnson v. Marianetti, 202 AD2d 970, 970 [4<sup>th</sup> Dept 1994]; see also Cranesville Block Co. v Niagara Mohawk Power Corp., 175 AD2d 444, 446 [1991]). Accordingly, the commencement of this action in 2013 renders this claim untimely (CPLR § 214 [4]).

Hence, with defendants having established their entitlement to judgment as a matter of law on these issues and with plaintiffs having failed to raise a triable issue of fact by their opposition, even giving deference to plaintiffs as the non-moving parties and assuming all facts alleged to be true, the causes of action in trespass, private nuisance and negligence based upon the alleged diversion of water must be dismissed as untimely.

Next reviewing the cause of action alleging a trespass due to allegations that defendants entered upon their property without permission and, inter alia, damaged trees, removed landscaping materials, cut electrical wires and removed surveying pins, this court must conclude that since defendants failed to establish their entitlement to judgment as a matter of law by establishing that there are no triable issues of fact, this

court need not review the opposition submitted by plaintiffs. As to the further contention by defendants that such acts, even if true, would not warrant an award of punitive damages, it is settled that in an action alleging trespass on real property, the burden would be on plaintiffs to prove that defendants acted “with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of [their] rights” (Ligo v Gerould, 244 AD2d 852, 853 [4<sup>th</sup> Dept 1997]). As these claims are alleged in the complaint, the determination as to the propriety of such an award, should the trespass claim be successful, must await a trial.

Accordingly, defendants’ motion for partial summary judgment is granted, in part, and denied, in part.

This shall constitute the Decision and Order of the court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

**SO ORDERED.**

Dated: Kingston, New York

June 27, 2018

ENTER,

  
CHRISTOPHER E. CAHILL, JSC

Papers considered: Notice of Motion dated March 16, 2018 with affirmation in support by Justin W. Gray, Esq., dated March 14, 2018 with exhibits; memorandum of law in support

dated March 14, 2018; affidavit of David DiBenedetto dated March 13, 2018 with exhibit affidavit of Gregory P. Gifford dated March 14, 2018 with exhibits; affidavit of Kathleen Sinnott dated March 15, 2018 with exhibits; affidavit of Paul A. Rubin dated March 17, 2018 with exhibits; affidavit in opposition from Brent M. White dated May 2, 2018 with exhibits; affirmation in opposition by Douglas J. Rose, Esq., dated May 3, 2018 with exhibits; memorandum of law dated May 3, 2018; reply affirmation dated May 10, 2018 with exhibit.