

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SCOTT H. McCLAIN,
Plaintiff

vs.

POOR SHOT HUNTING CLUB, INC.,
Defendant

: NO. 12 - 01,082
:
: CIVIL ACTION - LAW
:
:
:
: Motion for Summary Judgment

OPINION AND ORDER

Before the court is Defendant's Motion for Summary Judgment, filed October 10, 2012. Argument on the motion was heard December 3, 2012.

The parties own contiguous parcels of land and in his Complaint, Plaintiff alleges that Defendant has erected swales and ditches on its property, which swales and ditches divert storm water and accompanying sludge and silt through a culvert pipe and onto Plaintiff's property. Plaintiff also complains of damage to a number of trees as a result of Defendant's alleged trespass and erection of signs and wire on the trees.

In the motion for summary judgment, Defendant contends the claims are barred by res judicata, the statute of limitations and, finally, for failure to plead a cause of action for which relief may be granted. These contentions will be addressed in turn.

First, Defendant contends that the claims are barred by res judicata as having been already litigated. Defendant points to a district justice action which involved the alleged damage to the trees, and to a separate civil action filed by Plaintiff in 2011, No. 11 – 01,793, which made claims based on the alleged storm water runoff. As Plaintiff admits the trees for which he seeks damages in the

instant complaint are the same trees which were the subject of the district justice action, that claim is indeed barred by res judicata. Summary judgment on Count IV will thus be granted in Defendant's favor. With respect to the remaining counts, however, which are based on alleged diversion of stormwater runoff, while such were indeed the subject of another action, that action was terminated when Defendant obtained a judgment of non-pros. Such a judgment is not a bar to a new action. *See Gordon-Stuart, Ltd. v. Allen Shops, Inc.*, 361 A.2d 770 (Pa. Super. 1976)(plaintiff's subsequent suit not barred by prior action which was dismissed for failure to file more specific pleading). Therefore, Defendant is not entitled to summary judgment on this basis.

Next, Defendant contends that Plaintiff's claim is barred by the statute of limitations, based on its assertions that the culvert pipe was placed on their property more than two years before the action was commenced. In response, Plaintiffs contends the alleged trespass is a continuing trespass and thus not subject to the two-year limitations period. This same issue was addressed by the Commonwealth Court in *Graybill v. Providence Township*, 593 A.2d 1314, 1317 (Pa. Commw. 1991), and the Court held that where a plaintiff alleges intermittent injury, "depending on future conditions which may or may not arise", he has alleged a continuing trespass which is not subject to the statute of limitations which would otherwise run from the date of the construction which led to the injury. Graybill's claim that the defendant's construction led to intermittent flooding of his property was thus able to survive summary judgment and the court finds that the allegations in the instant case are sufficiently similar to those in Graybill such that the same rule of law must be applied. Defendant is therefore not entitled to summary judgment on this basis either.

Finally, Defendant argues that Plaintiff has failed to allege conduct which would entitle him to an award as the facts alleged do not constitute “actionable stormwater runoff” and he has not alleged “specific recoverable damage”. The court believes a fair reading of the Complaint provides a sufficient basis on which to proceed, however. Therefore, summary judgment on this basis is also not appropriate.

Accordingly, for the foregoing reasons, the court enters the following:

ORDER

AND NOW, this 6th day of December 2012, Defendant’s Motion for Summary Judgment is hereby granted in part and denied in part. Summary Judgment is entered in favor of Defendant and against Plaintiff with respect to Count IV only.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Andrew Smalley, Esq.
Marc Drier, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson