IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GREY FOX PLAZA, THOMAS KROUSE, DONNA KROUSE and STEVEN KROUSE, Plaintiffs	:	NO. 13 – 00,961
vs.	:	
	:	CIVIL ACTION
HERBERT, ROLAND & GRUBIC, INC., Defendant	:	Motion for Summary Judgment

OPINION AND ORDER

Before the court is a motion for summary judgment filed by Defendant on November 30, 2015. Argument thereon was heard January 19, 2016.

Plaintiffs succinctly stated their claim in their Complaint: "Plaintiffs bring the instant action seeking damages and injunctive relief as a result of Defendants' tortious conduct in installing and/or permitting a water main service line ("subject water line") to be installed through and under Plaintiffs' private property without permission or right of way in a location at which Defendants knew or should have known would interfere with Plaintiffs' planned development of Grey Fox Plaza. Despite the fact that the subject water line is undeniably encroaching upon Plaintiffs' private property, the Defendants have failed to remove or relocate the encroaching subject water line to a non-interfering location which has resulted in significant delays to the development of Grey Fox Plaza Phase II and the concomitant lost business profits from the sales/leases of that property."[1]

Originally, the action was brought against the Lycoming County Water & Sewer Authority (which authority owns the water line at issue), Defendant Herbert, Roland & Grubic, Inc. (the engineering firm hired by the Authority to

[1] Plaintiffs' Complaint, paragraphs 2 and 3.

design and supervise, *inter alia*, the installation of the water line), and an employee of that firm. The Authority and the employee have been dismissed from the action, and remaining are Plaintiffs' claims against the firm, for trespass and negligence. In its motion for summary judgment, Defendant asserts several grounds to support entry of judgment in its favor, including that (1) no trespass has actually occurred and (2) the lack of expert witnesses prevents Plaintiffs from pursuing their negligence claim. The court will focus on these two issues as it agrees with Defendant that on such basis, summary judgment in favor of Defendant is appropriate.

The relevant background is explained in Paragraphs 23 and 24 of the Complaint: "In or about October 14, 2009, Plaintiffs agreed to convey approximately one (1) acre of land in Grey Fox Plaza located to the west of Grey Fox Drive to the LCWSA for the purpose of installing a water tower on that site. In consideration for the conveyance of the lot in Grey Fox Plaza, the LCWSA agreed to install water and sewer main service to all of the lots within Grey Fox Plaza that did not already have water and sewer main service." In furtherance of the conveyance, a subdivision plan was prepared by Defendant and approved by the Township Planning Commission in February 2010.[2] On that Plan appears a Certificate of Ownership, Acknowledgment of Plan and Offer of Dedication signed by Plaintiffs in which they "dedicated the "streets" shown on the 2010 Plan to the "public use"."[3] The allegedly offending portion of the water line, running from the water tower and across and under Grey Fox Drive (a street shown on the Plan), was installed in September 2011.

[2] Plaintiffs' Complaint, paragraph 25.
[3] Plaintiffs' Complaint, paragraph 30.

Plaintiffs' trespass claim asserts that Defendant did not receive Plaintiffs' permission to "enter upon *Plaintiffs' land* to construct the subject water line in a location that would interfere with the known planned development" and that "Defendants' invasion upon *Plaintiffs' land* was intentional".[4] The claim fails, however, for the simple reason that the water line was not placed on Plaintiffs' property. As shown on the Subdivision Plan, Plaintiffs dedicated Grey Fox Drive to "the public use." Although they now argue that "the certification upon which Defendant HRG relies clearly states that only lands that are "proposed for public use" are being dedicated", and that "no such designation was made by Plaintiffs in the Subdivision Plan",[5] this argument is disingenuous as the certification states: "all streets and other property identified as proposed public property (excepting those areas labeled as 'not for dedication') are hereby dedicated to the public use." The phrase "identified as proposed public property" clearly applies only to "other property" and not to "all streets"; otherwise, the certification makes no sense as (as Plaintiffs point out) there is nothing on the Plan labeled as "proposed public property" and thus nothing would be included in the dedication. Clearly, Plaintiffs dedicated the street of Grey Fox Drive when they signed the Plan's Certificate of Ownership, Acknowledgment of Plan and Offer of Dedication. The "public use" granted by the dedication included the right of the Authority to place thereunder the subject water line. *See* Pittsburgh National Bank v. Equitable Gas Company, 220 A.2d 12 (Pa. 1966).

Plaintiffs also assert in their trespass claim that "[i]n the alternative, Defendants recklessly relied on an improperly prepared survey prior to deciding

[4] Plaintiffs' Complaint, paragraphs 54 and 55 (emphasis added).
[5] Plaintiffs' Memorandum of Law in Support of Plaintiffs' Response in Opposition to Defendant Herbert, Rowland & Grubic's Motion for Summary Judgment, at p. 9.

to unlawfully enter Plaintiffs' land",[6] and it is this allegation, which speaks to negligence rather than trespass, which goes to the actual heart of this matter. According to Paragraphs 27 through 29 of the Complaint, the survey used in the 2010 Subdivision Plan was certified by an employee of Defendant even though it mistakenly included "the entire east side and most of the west side of Grey Fox Drive as an "existing right-of-way"," in spite of the fact that "[t]he then-existing legal right of way for the public use of Grey Fox Drive as a street … ended more than one hundred feet from the location where Defendants ultimately installed the subject water line underground." Plaintiffs' claim is thus properly one of negligence rather than trespass.

The negligence claim cannot be sustained, however, for evidentiary reasons. Contrary to Plaintiffs' assertion that the claim is one of ordinary negligence, the court finds that it is actually one of professional negligence. In Paragraphs 13 and 14 of their Complaint, Plaintiffs allege that "Defendant HRG is liable to plaintiffs for the negligent acts and/or omissions of its actual and/or ostensible agents, servants and/or employees *involved in the planning, design, and/or installation* of the subject water line" and "Plaintiffs are asserting a *professional liability claim* against Defendant HRG. The claim asserted against this defendant is *for the professional negligence* of its agents, employees, and servants *as stated more fully herein*." In addition to alleging that HRG's employee "mistakenly certified" the survey used in the subdivision plan, in the "Negligence & Recklessness" count of the Complaint Plaintiffs allege that the "negligent, grossly negligent, and/or reckless acts and/or omissions of Defendant HRG directly and/or by and through its actual and/or ostensible agents, servants

[6] Plaintiffs' Complaint, paragraph 56.

and/or employees *involved in the planning, design, and/or installation* of the subject water line" included "*failing to abide by standard and accepted principals of engineering, surveying, land use planning*".[7] While they also allege a "failure to exercise reasonable and due care to ensure that the subject water line was not installed in an encroaching location on private property",[8] which Plaintiffs seek to have the court interpret as setting forth only an ordinary negligence claim, as the "due care" involved arose in the context of providing professional engineering services, the claim is for professional negligence. *See* Yee v. Roberts, 878 A.2d 906, 913 (Pa. Super. 2005), where the Court rejected a similar argument, finding that in spite of allegations that the negligence of the defendant dentist included "failure to exercise reasonable care in the ownership, operation, maintenance, control of the high pressure water rinse equipment", the count "clearly seeks damages for negligence arising in the context of professional dental treatment" and constituted a claim for professional negligence.

The court notes Plaintiffs' contention that their action has to be couched as one in ordinary negligence because a professional negligence claim may not be brought by a party not in privity with the professional (here, the engineering firm was hired by the Water Authority and not by Plaintiffs), citing Bruno v. Erie Insurance Company, 106 A.3d 48 (Pa. 2014), but Bruno does *not* stand for that proposition. In Bruno, the Court held that a party not in privity with the professional need not file a Certificate of Merit under Pa.R.C.P. 1042.3 to support their claim for professional negligence, *not* that the claim itself could not be maintained. In fact, the Court expressly stated, in a footnote, "in [Bilt-Rite Contractors v. Architectural Studios, 866 A.2d 270 (Pa. 2005)], we recognized a

[7] Plaintiffs' Complaint, paragraph 63a. (Emphasis added.)

cause of action against a professional by a party not in privity of contract with the professional". Id. at 75, n. 22. Plaintiffs also argue that Merlini ex rel. Merlini v. Gallitzin Water Authority, 980 A.2d 502 (Pa. 2009), which also involved an alleged negligent installation of a water line, requires the court to find the instant claim to sound in ordinary negligence only, but Merlini's facts did not include a subdivision plan showing that the property in question had been dedicated as a public street, and is thus completely inapposite.

Having concluded that the matter is a claim for professional negligence, expert testimony is required to establish "the level of care a reasonably prudent licensed professional should have demonstrated". Holbrook v. Woodham, 2007 U.S. Dist. LEXIS 50966 (W.D. Pa. 2007), citing Grossman v. Barke, 868 A.2d 561 (Pa. Super. Ct. 2005). Here, although requested in discovery, Plaintiffs have not identified any expert witness who will testify to the standard of care, and Defendant argues that under Pa.R.C.P. 4003.5(b), that failure now requires a ruling that no expert witness may be called to so testify. In response, Plaintiffs assert the right to call a former employee of the Water Authority as well as their own project engineer to give their opinions that "the water line at issue was installed in and through private property",[9] arguing that these opinions were not "acquired or developed in anticipation of litigation or for trial" and thus do not fall under the purview of Rule 4003.5.[10] While Plaintiffs may very well be

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[8] Plaintiffs' Complaint, paragraph 63c.

[9] Plaintiffs' Response in Opposition to Defendant Herbert, Rowland & Grubic's Motion for Summary Judgment, at p. 2.

[10] Rule 4003.5 provides, in relevant part, as follows: "(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows: (1) A party may through interrogatories require … any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify", and "(b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action." Pa.R.C.P. 4003.5.

correct, these opinions would not be sufficient. Plaintiffs must produce the testimony of an expert who will opine on the standard of care required of an engineering firm and that such standard was breached by Defendant in this case. Such an opinion is necessarily formed "in anticipation of litigation or for trial" and the expert giving that opinion must be identified in response to discovery requests and must provide a report explaining his opinion. The engineers identified by Plaintiffs in this case may be able to say that, in their opinion, the water line was installed on private property, but they have not been offered, nor could they be, for the purpose of saying that the professional engineering standard of care required in this case was not met by Defendant.[11]

Since Plaintiffs have not offered any evidence that Defendant breached the applicable standard of professional care, nor of the standard itself, their professional negligence claim cannot be sustained and Defendant is entitled to judgment as a matter of law.

[11] The court notes that an opinion that the water line was installed on private property must be interpreted as an opinion that the property should not have been included in the dedication, as the fact that it was included and thus the property was no longer private property cannot be ignored. Whether that "mistake" was the result of professional negligence, however, or whether it was simply a mistake for which no one can legally be held responsible (*see* Valley Motor Transit Company v. Allison, 33 A.2d 485 (Pa. Super. 1943)("the mere happening of an accident does not establish negligence upon the part of anyone")), cannot be determined without the aid of expert testimony.

ORDER

AND NOW, this day of February 2016, for the foregoing reasons, Defendant HRG's motion for summary judgment is hereby GRANTED. Judgment on Counts 1 and 3 of Plaintiffs' Complaint is hereby entered in favor of Defendant HRG and against Plaintiffs.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Robert Englert, Esq.
105 Rutgers Avenue, Swarthmore, PA 19081
Kevin C. Hayes, Esq.
217 Wyoming Avenue, Scranton, PA 18503
Gary Weber, Esq.
Hon. Dudley Anderson