

STATE OF MICHIGAN
COURT OF APPEALS

VENICE SQUARE, INC.,

Plaintiff/Counter Defendant-
Appellant,

and

ALPHONSO LIEGHIO and ANNA M. LIEGHO,

Plaintiffs-Appellants,

v

FIVE STAR LAND CO,

Defendant/Counter Plaintiff-
Appellee,

and

MICHAEL D. SCHWARTZ and GRANT V.
SCHWARTZ,

Defendants-Appellees.

UNPUBLISHED

August 26, 2008

No. 276513

Macomb Circuit Court

LC No. 2003-005521-CZ

Before: Wilder, P.J., Saad, C.J., and Smolenski, J.

PER CURIAM.

Plaintiff/counterdefendant Venice Square, Inc., and plaintiffs Alphonso Lieghio and Ann M. Lieghio, appeal as of right the trial court's order granting defendant Michael D. Schwartz's motion for summary disposition under MCL 2.116(C)(10) of plaintiffs' trespass claim. We reverse and remand.

This dispute concerns adjacent properties located in Clinton township. Plaintiff, Venice Square, Inc. (Venice Square), owns a shopping center on its property. Defendant Five Star Land Company (Five Star) owns the property to the north of the Venice Square property. During the time of the claims alleged here, two new office buildings were built on Five Star's property.

Enzo Lieghio is a shareholder of Venice Square who supervised and managed its property. Defendant Michael D. Schwartz (Schwartz) is the owner, president and financial backer of Five Star, and father of defendant Grant Schwartz.

Beginning in September of 2003, Five Star initiated a construction project on its property. Plaintiffs alleged that Five Star trespassed on the Venice Square property by using it as a construction staging area for the Five Star construction project. Lieghio testified that Five Star dumped concrete on Venice Square's parking lot, had an office trailer, construction equipment and construction materials on Venice Square property for a month and a half, and that Five Star accessed its property by crossing over Venice Square property. Plaintiff also alleged that the trespass by Five Star occurred with the direction, approval, concurrence and/or ratification of Schwartz, and that Schwartz was also observed personally trespassing on Venice Square property. According to Schwartz, however, Grant Schwartz was the only employee/agent of Five Star who was responsible for generally supervising this project. Schwartz claims that he played no active role in the construction project at issue, and was rarely on site.

Schwartz moved for summary disposition pursuant to MCR 2.116 (C)(10), arguing that there was no genuine issue of material fact as to his active involvement with the Five Star construction project, and that accordingly, he could not be held individually liable for any trespass that resulted during the project. In support of his motion, Schwartz relied upon his affidavit that asserted that he played no active role in the project, that he was rarely on the construction site, and that he did not encourage Five Star to trespass onto Venice Square's property. Plaintiffs opposed the motion, relying on deposition testimony of one of Five Star's contractors, Gerald Martin, that Schwartz was on the project site to check progress every couple of days, and the deposition testimony of Lieghio that he had discussed the issue with Schwartz and that Schwartz contended Five Star was using a public easement for its equipment, and that if Venice Square had a different view, Lieghio needed to formally notify him of that by certified letter.

The trial court granted the motion, finding no genuine issue of material fact with regard to whether Schwartz participated in the alleged trespass. We review de novo a trial court's ruling on a motion for summary disposition. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73; 737 NW2d 332 (2007). In considering a motion granted pursuant to MCR 2.116(C)(10), the evidence must be considered in a light most favorable to plaintiffs. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007).

"Generally, all who wrongfully contribute to the commission of a trespass are equally liable with the person committing the act complained of." *Hesel v Morcom*, 219 Mich App 14, 22-23; 555 NW2d 852 (1996) (citations omitted). However, "[p]ersons who do not actively participate in the commission of the trespass must do something by way of encouragement, advice, or suggestion that leads to the commission of the trespass in order to render them liable as joint trespassers." *Id.* at 23 (internal quotation marks and citation omitted; emphasis added). "There is no joint trespass where defendant's independent acts contributed to the result or where they cooperated to do a lawful act and in doing it some of them committed a trespass." *Id.* (internal quotation marks and citation omitted).

On the record before us, the trial court erred in granting summary disposition in favor of Schwartz. Taking the evidence in a light most favorable to plaintiffs, *The Healing Place at*

North Oakland Med Ctr, supra at 56, there was a genuine issue of material fact regarding whether Schwartz participated in committing the alleged trespass. Schwartz' affidavit testimony that he was rarely on site was directly contradicted by Martin's testimony that Schwartz was on site every couple days, and by Leighio's testimony about his conversations on the site with Schwartz, and that he observed Schwartz trespassing on the property.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Henry W. Saad

/s/ Michael R. Smolenski