

=====
This opinion is uncorrected and subject to revision before
publication in the New York Reports.

No. 31
Paul Marinaccio, Sr.,
Respondent,
v.
Town of Clarence,
Defendant,
Kieffer Enterprises, Inc.,
Appellant.

Michael B. Powers, for appellant.
Joseph J. Manna, for respondent.

LIPPMAN, Chief Judge:

The question presented by this case is whether the evidence was sufficient to find defendant liable for punitive damages for intentional diversion of storm water onto plaintiff's property, which caused extensive damage to his land, constituting

the torts of trespass and nuisance. We find that although the injury was considerable and the tortious acts undeniably intentional, the evidence in this case was insufficient for an award of punitive damages.

Plaintiff Paul Marinaccio and defendant Keiffer Enterprises, Inc. (KEI) are adjoining landowners in the Town of Clarence, Erie County (Town). KEI was a small residential real estate company, operated by 82 year-old Bernard Keiffer. KEI sought to develop the second and third phases of a residential subdivision on his land called "Lexington Woods" and began the process of planning. KEI submitted a plan to the Town for its approval. The approved plan required that water from the west side of the development would flow into a storm sewer and then into a ditch, which was to create a mitigation pond on the northeast section of Lexington Woods. According to the Town Engineer, the ditch was on KEI's property. But as the Town later discovered, this ditch was actually located on plaintiff's property, and it was used without plaintiff's permission.

KEI also should have known that this ditch did not have the capacity to contain the large amount of water that KEI diverted. Worse, KEI's design of the mitigation pond bordering plaintiffs' property, the purpose of which was to retain water and prevent it from discharging downstream, was insufficient in size to handle the flow of water from the surrounding area. To address the problem, KEI installed two drainage pipes and routed

the quickly rising water into an abandoned farmer's furrow located on plaintiff's land, again, without plaintiff's permission, resulting in over 30 acres of flooded wetland.

This newly created wetland caused mosquitos to breed and frogs to gather on plaintiff's property, about which plaintiff is particularly phobic. Consequently, plaintiff had problems traversing his property without the assistance of his family and friends, whom plaintiff would often call on to remove frogs from his driveway and near the door of his home.

Plaintiff personally contacted Bernard Keiffer about the flooding, but was told that the flooding was "not [his] problem." Plaintiff's counsel also sent a letter to Mr. Keiffer, demanding assistance cleaning up the flooding, to which he received no response. However, according to KEI, plaintiff refused to allow the Town to clean out the ditch on his property, which would have significantly alleviated the flooding by allowing water to move through it more easily. In fact, when the Town arrived to clean the ditch, plaintiff became enraged and would not allow the Highway Superintendent, or any of the Town's workers to enter his property. Thereafter, the Town Engineer met with plaintiff to discuss the Town's assistance with other remedial efforts, but according to the Town and KEI, plaintiff again became enraged and ordered him to leave. The Town admittedly made no further efforts to clean the ditch.

Plaintiff commenced this action against KEI and the

Town alleging, among other things, trespass and nuisance and seeking money damages for alleged intentional diversion of water onto his property. KEI moved, at the close of proof, to dismiss the punitive damages claim against it based on insufficiency of the evidence. The trial court denied that motion. The jury returned a verdict of \$1,313,600 for plaintiff against the Town for compensatory damages. The jury also awarded plaintiff \$328,400 in compensatory damages and \$250,000 in punitive damages against KEI.

Following the denial of KEI's and the Town's post trial motions, the parties settled all but the punitive damages claim. KEI appealed that part of Supreme Court's judgment against it which awarded \$250,000 in punitive damages plus interest. The Appellate Division affirmed (90 AD3d 1599 [4th Dept]). The majority characterized KEI's argument as "a contention that the award of punitive damages is not supported by legally sufficient evidence" (id. at 1600) and concluded that a valid line of reasoning did exist to support "the jury's conclusion that KEI's conduct was sufficiently egregious to warrant an award of punitive damages" (id.).

Two Justices dissented on the basis that "insufficient evidence [existed] in this record that KEI was motivated by maliciousness or vindictiveness or that KEI engaged in such 'outrageous or oppressive intentional misconduct' to warrant a punitive damages award" (id. at 1604). For the reasons expressed

below, we now vacate the award of punitive damages.

Because the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases, the conduct justifying such an award must manifest "spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (Dupree v Giugliano, 20 NY3d 921, 924 [2012] [citation and quotation marks omitted]). As conceded by plaintiff, the trial court correctly charged the jury that punitive damages may only be awarded if defendant's acts were,

"wanton and reckless or malicious. Punitive damages may be awarded for conduct that represents a high degree of immorality and shows such wanton dishonesty as to imply a criminal indifference to civil obligations."

Plaintiff argues that KEI willfully and wantonly caused danger to the health, safety and welfare of the public because of the flooding. But the intent plaintiff would impute to KEI's actions cannot find support in the record. The facts in evidence do not demonstrate that KEI's actions "impl[ied] a criminal indifference to civil obligations." Defendant complied with all federal, state and local planning and development laws and regulations, and worked closely with the Army Corps, the Town Engineer and the Town Planner to secure all required permits and approvals; it hired a wetlands expert, an engineering expert, and soil expert to assist in those regards. Clearly, those measures

were ultimately unsuccessful in preventing damage to surrounding property. However, this planning, if not indicative of good faith, at least shows that KEI's actions could not be considered "wanton and reckless or malicious."

Certainly the Town and KEI's dealings with plaintiff and his property were not ideal, and both defendants have been held liable for compensatory damages for their transgressions. Defendants knew that overflow would be a problem along the furrow bordering plaintiff's property, and the Town told KEI that it would contact plaintiff regarding an easement along his west property line. Although it is undisputed that the Town did not obtain plaintiff's permission to allow water to flow onto his property, it does not follow that the acts resulting in overflow onto plaintiff's property were undertaken with the requisite malice or gross indifference. KEI failed to ensure that the Town followed through with its plan to obtain an easement, so that they were liable in nuisance and trespass, but "[s]omething more than the mere commission of a tort is always required for punitive damages" (Prozeralik v Capital Cities Communications, 82 NY2d 466, 479 [1993] [internal citation and quotation marks omitted]). Punitive damages are permitted only when a defendant purposefully causes, or is grossly indifferent to causing, injury and defendant's behavior cannot be said to be merely volitional; an unmotivated, unintentional or even accidental result of a legally intentional act cannot, alone, qualify (see Hartford Acc.

& Indemn. Co. v Village of Hempstead, 48 NY2d 218, 227-228 [1979]). Punitive damages are awarded to punish and deter behavior involving moral turpitude (see Rose v Louise Wise Servs., Inc., 8 NY3d 478, 489 [2007]). Here, KEI's behavior does not rise to that level.

Accordingly, the order of the Appellate Division should be reversed, with costs, and that part of the judgment awarding punitive damages vacated.

* * * * *

Order reversed, with costs, and that part of the judgment awarding punitive damages vacated. Opinion by Chief Judge Lippman. Judges Graffeo, Read, Smith and Pigott concur. Judge Rivera took no part.

Decided March 21, 2013