

DOCKET NO.: NNH-CV-23-6129556-S : SUPERIOR COURT
DIANE MULLANEY : JUDICIAL DISTRICT OF NEW HAVEN
V. : AT NEW HAVEN
THOMAS J. BANISCH AND MADISON :
CEMETERY ASSOCIATION : JUNE 3, 2024

MEMORANDUM OF DECISION

In Re: Defendants' Motion for Summary Judgment (#110.00 and #112.00)

This action is brought by the plaintiff, Diane Mullaney (“Mullaney”), against the defendants, Thomas Banisch (“Banisch”) and Madison Cemetery Association (“Madison Cemetery”) in connection with an alleged encroachment of burial plots owned by the plaintiff. On December 18, 2023, the defendant, Madison Cemetery, filed a Motion for Summary Judgment (#110) along with accompanying Memorandum of Law, Affidavit in Support and Exhibits (#111). On January 18, 2024, the defendant Banisch, filed a Motion for Summary Judgment (#112) along with accompanying Memorandum of Law and Affidavit in Support. Both defendants moved for summary judgment on the grounds that there is no genuine issue as to the material facts. The defendants assert that the subject headstone in dispute has been removed and is no longer encroaching upon the plaintiff’s plots. The defendants further claim that plaintiff may not assert a claim for attorney’s fees, costs, and punitive damages.

On January 19, 2024, the plaintiff filed an objection to defendant Madison Cemetery’s Motion for Summary Judgment (#116) and attached a number of exhibits in support of the objection (#117). On February 2, 2024, the plaintiff filed an objection to defendant Banisch’s

Motion for Summary Judgment (#120) and attached a number of exhibits in support of the Objection (#121).

The motions were argued at short calendar on May 20, 2024. For all of the reasons detailed below, the Court denies both defendants' Motions for Summary Judgment.

Material Facts and Procedural History

The plaintiff Mullaney and defendant Banisch were married prior to August 9, 1995. During the marriage, they purchased three burial plots at the defendant Madison Cemetery, known as plots 9G, 9H and 12 E. Upon the dissolution of the marriage on or about August 9, 1995, the parties executed a dissolution agreement in which the parties divided their interest, such that each party owned 1 and ½ of the 3 plots.

In March of 2021, the defendant Banisch purchased a headstone that was placed across the three subject plots. This placement served to encroach upon the plots owned by the plaintiff. Prior to the initiation of this lawsuit, the plaintiff had provided notice to the defendant Madison Cemetery with the new deed confirming the change of ownership of the plots pursuant to the Domestic Decree and requested the defendant, Madison Cemetery, to remove the headstone. The plaintiff also wrote to the defendant Banisch requesting the removal of the headstone. Plaintiff alleged that the defendants failed to remove the headstone despite her multiple requests for two years.

On January 4, 2023, the plaintiff initiated this action in a four-count complaint alleging intentional/negligent encroachment and injunctive relief and damages. The First Count is directed against the defendant Banisch and seeks exemplary and punitive damages for intentional encroachment on the plaintiff's property and willful disregard of plaintiff's rights and removal of the headstone. The Second Count is directed against the defendant Banisch and seeks damages

under a theory of negligence. The Third Count is directed against the defendant Madison Cemetery and seeks exemplary and punitive damages for willful and conscious disregard of plaintiff's rights and removal of the headstone. The Fourth Count is directed against the defendant Madison Cemetery and seeks damages under a theory of negligence.

In her prayer for relief, the plaintiff claims: (1) an injunction compelling the defendant for immediate removal of the headstone; (2) an order requesting the cemetery association take action for the removal of the headstone; (3) an order requesting defendant Banisch take action for the removal of the headstone; (4) attorney's fees; (5) punitive damages; (6) cost of suit incurred; (7) compensatory damages; and (8) such other relief as in law or equity may allow.

After the initiation of the lawsuit, the defendants cooperated to have the subject headstone permanently removed from the subject plots, and now there is no headstone encroaching upon the plaintiff's plots.

Legal Analysis

I. Standards and Law

The motion for summary judgment is designed to eliminate the delay and expense accompanying a trial where there is no real issue to be tried. *Dowling v. Kielak*, 160 Conn. 14, 16, 273 A.2d 716 (1970). The standard of review applicable to motions for summary judgment is well established in our law. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law... In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party... The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which,

under applicable principles of substantive law, entitled him to a judgment as a matter of law... and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact... [Issue]- finding, rather than issue determination, is the key to the procedure... [The] trial court does not sit as a trier of fact when ruling on a motion for summary judgment... [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist.” (Brackets in original; internal quotation marks omitted.) *Northrup v. Witkowski*, 175 Conn. App. 223, 230-31, 167 A.3d 443 (2017). “It is not enough for the moving party merely to assert the absence of any disputed factual issue; the moving party is required to bring forward... *evidentiary facts, or substantial evidence outside the pleadings* to show the absence of any material dispute.” (Emphasis in original; internal quotation marks omitted.) *Doty v. Shawmut Bank*, 58 Conn. App. 427, 430, 755 A.2d 219 (2000).

The legal standard applicable to the movant is strict. See *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008) (“courts hold the movant to a strict standard”); *Anderson v. Gordon, Muir & Foley, LLP*, 108 Conn. App. 410, 416, 949 A. 2d 488 (2008). “The test is whether a party would be entitled to a directed verdict on the same facts.” (Internal quotation marks omitted.) *Doty v. Shawmut Bank, supra*, 431. In the context of a motion for summary judgment, a material fact “[is] a fact that will make a difference in the result of the case.” (Internal quotation marks omitted.) *Rompney v. Safeco Ins. Co. of America*, 310 Conn. 304, 313, 77A.3d 726 (2013).

II. The Defendants Are Not Entitled to Summary Judgment

Having considered the parties’ arguments, the court holds that the defendants have not established that they are entitled to judgment as a matter of law as summary judgment is an improper procedural vehicle with which to attack a prayer for relief.

A. Summary Judgment to Attack Prayer for Relief

It is clear to the court that there is no longer an issue of encroachment on the plaintiff's plots which is the subject of plaintiff's claim for relief (1)-(3) relating to injunctive relief and the removal of the headstone. However, as to the remainder of the plaintiff's claim for relief specifically relating to attorney's fees, costs, and punitive damages, the court concludes that summary judgment is an improper method by which to challenge a prayer for relief.

There is a split of authority on whether a summary judgment motion or a motion to strike is the proper procedural vehicle to attack a plaintiff's prayer for relief. "Because a prayer for relief does not constitute a cause of action upon which judgment may enter, a motion to strike, and not a motion for summary judgment, is the only pretrial method to attack a prayer for relief." W. Horton et al., Connecticut Practice Series: Superior Court Civil Rules (2022-23 Ed.) § 17-44, p. 864. Additionally, Practice Book § 10-39(a)(2) provides in relevant party: "(a) A motion to strike shall be used whenever any party wishes to contest: ... (2) the legal sufficiency of any prayer for relief in any such complaint, counterclaim or cross claim."

"There is no appellate authority on the propriety of doing so, but [n]umerous [trial] courts have held that a motion for summary judgment is an improper method by which to challenge a prayer for relief." *Gonska v. Highland View Manor, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-12-6030032-S, 2014 WL 3893100*10 (June 26, 2014, *Peck, J.*); *Frederick v. Gladview Health Care Center, Inc.*, Superior Court, judicial district of New London, Docket No., CV-11-6011350-S, 2014 WL 1876955 *8 (April 10, 2014, *Devine, J.*) (58 Conn. L. Rptr. 47, 51); *Trantolo & Trantolo, LLC, and Keith V. Trantolo, Esq. v. Carolanne Rowe*, Superior Court of Windham at Putnam, Docket No. CV22-6023233-S, 2023 WL 5216914 (August 9, 2023,

Lohr, J.) (“While [*Larobina v. McDonald*, 274 Conn. 394, 401-02, 876 A. 2d 522 (2005)] undoubtedly broadened our summary judgment procedure, the case does not stand for the proposition that partial summary judgment can be granted on a prayer for relief.”) but see *Secured Systems Technology, Inc., v. Vigilant Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-09-5021153-S, 2013 WL 541424, *13n.12 (January 16, 2013, *Sommer, J.*) (partial summary judgment granted as to plaintiff’s statutory claims for attorney’s fees).

The court finds the former cases more persuasive, and therefore holds that a motion to strike is the only appropriate vehicle to attack a prayer for relief, and that summary judgment is an inappropriate vehicle in that regard.

B. Attorney’s Fees and Punitive Damages

In Count One and Count Three of the plaintiff’s complaint, plaintiff alleged intentional encroachment on the plaintiff’s property and willful disregard of plaintiff’s rights and removal of the headstone against both defendants.

The defendants’ memorandums argue that they are entitled to summary judgment on the entire complaint, and they are entitled to judgment on plaintiff’s prayer for attorney’s fees, costs, and punitive damages. Under the “American Rule” each party is responsible for paying their own attorney’s fee, unless specific authority granted by statute or contract allows the assessment of those fees against the other party. There is no statute or contract in this matter which entitles the plaintiff to attorney’s fees and costs. Moreover, the defendants claim that plaintiff is not entitled to the claim of punitive damages as the plaintiff failed to allege additional facts that demonstrate that the defendants’ conduct was reckless.

The plaintiff, for her part, counters that there is intent and or indifference of the defendants to delay removal of the headstone for about two years until litigation was initiated, and that defendants acted with a willful and reckless misconduct which allows her to claim attorney's fees and costs under the exception to the "American Rule" when there is bad faith conduct of the other party. The plaintiff further asserts that the defendants were recklessly indifferent with her rights which entitles her to punitive damages.

Because this court agrees with the numerous courts that have held that a party may not move for summary judgment on a prayer for relief, the court declines to rule on the viability of the plaintiff's claim for attorneys' fees, costs, and punitive damages.

CONCLUSION

For all of the foregoing reasons, the court concludes that summary judgment is an improper procedural vehicle with which to attack prayers for relief. Defendant Madison Cemetery's motion for summary judgment (#110) is DENIED, and the plaintiff's objection thereto (#116) is SUSTAINED. Defendant Banisch's motion for summary judgment (#112) is DENIED, and the plaintiff's objection thereto (#120) is SUSTAINED.

By the Court,



Nicole J. Tung, Judge