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Fight over grading issues ends in court

Whenever a new subdivision is built, the subdivider is required to enter into a development agreement with the municipality. Part of each agreement is a requirement for the developer to implement a city-approved grading plan. The plan ensures that rainwater and snowmelt flow away from the homes and into storm sewers.

The agreements are always registered on title, binding all present and future owners. Compliance with the approved drainage plan was the central issue in a court decision released last year in London, Ont.

Margaret Dankiewicz owns a home on Shepherd Ave. in London. Todd Joseph Sullivan owns the property next door to the east. The properties were developed in 1993 and 1994, and both have a hill or berm at the rear of their yards, forming a buffer and sound barrier with the railway on the other side of the properties.

Dankiewicz purchased her home in 1997 and began to develop her back yard, installing a patio, a pond, a bog garden and a gazebo. She obviously has “a green thumb,” Justice Helen Rady noted in the court decision last year.

All was well until 2007, when Dankiewicz began to experience problems with drainage in the yard. After a rainfall and spring and winter thaws, water would accumulate in her backyard, flooding the patio and causing the pond to overflow.

Blaming her neighbour for the problems, she claimed in a court action that Sullivan had altered the grade in his backyard causing water to drain from his yard into hers, where it pools. Dankiewicz alleged that Sullivan’s actions were contrary to the original subdivision drainage plan, by which water was to drain from the Dankiewicz property, across the Sullivan property, another property and then easterly into a storm sewer.

At the trial last year, an expert witness testified that when the houses were originally completed in 1995, the grading of the lots generally conformed with the subdivision grading plans approved by the city.

Another expert testified that the lot grading of the Sullivan property had been altered so that the intended west to east drainage had been reversed. Sullivan had filled in a swale which ran across both yards, and installed a shed on the easterly boundary of his property.

As a result of those changes, water from the Sullivan property drained into the Dankiewicz yard, which is not what was contemplated by the original subdivision grading plan. The testimony of a soil engineer allowed the judge to conclude that the installation of the shed in the Sullivan yard was “the most probable cause” of the flooding in his neighbour’s property.

Rady was satisfied that the flooding constituted a nuisance in law, and in June last year awarded her $5,000 in recognition of the “distress, inconvenience and interference with her enjoyment of her land.”

The judge denied the plaintiff punitive damages in the absence of evidence that the defendant acted maliciously, oppressively, or in a high-handed way, but he did allow her $4,257 for water pumps, a hose, a replacement tree, and other expenses related to the damage in her yard.

The court ruled that Dankiewicz had “a right to have her surface water continue to flow” over the Sullivan property “by virtue of the development agreement registered on title.” That agreement “sets out the obligation to maintain grading, and is binding on present and future owners.

Sullivan was ordered by the court to take whatever steps were necessary to ensure that water from the Dankiewicz property drains across his property, but to date has not done anything.

Dankiewicz told me this week that the court case cost her $70,000 for legal and expert witness fees. She was awarded $33,000 in court costs by the judge, but to date she has received nothing from Sullivan.

“The court was a nightmare for me,” Dankiewicz added.

It is difficult to disagree with the judge: “It is most regrettable that this matter was not resolved without litigation.”

Dankiewicz v. Sullivan, 2011 ONSC 3485 (CanLII)

Date:	2011-06-24
Docket:	61869
URL:	http://canlii.ca/t/fm1wc
Citation:	Dankiewicz v. Sullivan, 2011 ONSC 3485 (CanLII)
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CITATION: Dankiewicz v. Sullivan, 2011 ONSC 3485
COURT FILE NO.: 61869
DATE: 2011/06/24

SUPERIOR COURT OF JUSTICE – ONTARIO

B E T W E E N:	)	
	)	
MALGORZATA DANKIEWICZ	)	Charles L. Mackenzie, Q.C. for the Plaintiff
	)	
	)	
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
TODD JOSEPH SULLIVAN	)	Peter Sengbusch for the Defendant
	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** March 23, 24 & May 25, 2011

RADY J.:

REASONS FOR JUDGMENT

Overview

[1] This is an unfortunate dispute between neighbours arising from a surface water drainage problem. The plaintiff alleges that the defendant has altered the grade in his backyard causing water to drain from his yard into the plaintiff's backyard where it pools. The plaintiff has been obliged to pump water from her backyard out to the front of her house and into the storm sewer.

[2] It is alleged that this is contrary to the original drainage pattern by which water drained from the plaintiff's property east over the defendant's property and thereafter continuing in an easterly direction.

[3] She seeks a declaration that she has an easement across a swale in her neighbour's property for draining surface water from her property; and for a mandatory order compelling the defendant to restore his land to the grades approved by the City of London in 1992. She asks for damages for nuisance and negligence, and punitive damages.

The Facts

[4] The plaintiff, her former husband, a surveyor and an engineer testified. Mr. Sullivan and a number of his neighbours and his sister also testified. He called no expert evidence.

[5] All of the witnesses gave their evidence in a reasonably straight forward way, although Ms. Dankiewicz was prone to exaggeration. Having said that, I do not doubt that she has and continues to experience flooding in her backyard. The defendant does not contest this. The issue is whether Mr. Sullivan bears responsibility for it.

[6] The burden of proof, of course, rests on Ms. Dankiewicz to establish on a balance of probabilities that Mr. Sullivan is liable.

[7] Many of the following facts are not controversial.

[8] The plaintiff owns a home located at 51 Sheppard Avenue in London. The defendant owns the property immediately to the east at 55 Sheppard Avenue. The properties were developed in 1993 and 1994 by Imperial Homes. The rear of the properties are somewhat unusual because their backyards are flat behind the homes but then slope upward, where they are fenced along the top and fall away to railroad tracks below.

[9] The plaintiff purchased her home in 1997 and began to develop the rear yard, installing a patio in 1998 and a pond, a bog garden and a gazebo over time. She planted flowers and shrubs. Exhibit 3 is a photograph album showing the extensive improvements made. Ms. Dankiewicz obviously has a green thumb. The backyard is, in a word, a paradise and is clearly a source of great pleasure and pride.

[10] All was well until 2007 when the plaintiff began to experience problems with drainage. After a rainfall and during winter and spring thaws, water would accumulate in her backyard, flooding the patio and causing her pond to overflow even permitting fish to escape. These difficulties have continued unabated to the present. The problem is so extreme that she has discovered tadpoles in the flood water from time to time.

[11] The plaintiff believes that Mr. Sullivan has altered the swale in his backyard so that it interferes with the easterly drainage of surface water. She has alternately alleged that he has raised the surface of his rear yard by trucking in "tons" of fill; or that the installation of a shed on the easterly boundary of his property has either blocked drainage or has caused a clog in a drainage tile system that the defendant installed earlier.

[12] Originally, there was a swale across the rear yards of 51 and 55 Sheppard Avenue. Mr. Sullivan decided to fill in the swale because it often had water in it, constituting a hazard and attracting mosquitoes. In order to do so, he dug a trench; installed crushed stone; laid what is called "Big O" tiling atop the stone; and then covered it with soil. From his perspective, the tile has performed satisfactorily. He denies trucking in fill or making changes to his backyard that interfere with drainage. The witnesses who testified on his behalf corroborated that Mr. Sullivan has not brought in large quantities of fill and there is no good reason to doubt their evidence. He believes that the plaintiff is the author of her own misfortune and that the extensive changes she has made to her backyard are the cause of her problems.

[13] However, the difficulty with the defendant's contention is that no drainage difficulties were encountered until 2007 when he installed a shed, which is located atop a portion of the Big O tile and cut into the hill to the rear of his property. Prior to that time, the plaintiff had no drainage problems, notwithstanding the installation of the patio and other improvements. This evidence was uncontroverted.

[14] Harold Robert Hern of Trueline Services Inc. "shot grades" on the plaintiff's property, and from her property onto the defendant's rear yard. He compared the survey results with the original lot grading plan prepared by Whitney Engineering Inc. (Exhibit #4) and concluded that the intended west to east drainage has been altered. He noted that Mr. Sullivan's garden shed on the east is higher than the property to the west. This is depicted in Exhibit #13 which shows a cross section of lots 47, 51, 55 and 59 and compares the Trueline findings to those set out in the Whitney plan. Consequently, water from the defendant's property drains onto the plaintiff's land, which is not what was contemplated by the Whitney grading plan. There is no reason to doubt the accuracy of Mr. Hern's observations.

[15] The plaintiff also called Colin Atkinson, who is a soils engineer with impressive credentials. His evidence was of considerable assistance to the court in resolving the issues raised. He was very fair and balanced in his testimony.

[16] He noted that the defendant had installed Big O tile into the swale and it must have functioned to drain water from west to east. He testified that the tile was performing well until 2007, when something occurred that caused a reversal of the prior surface water drainage. In his opinion, the tile has obviously failed. He believes that the construction of the shed in the defendant's backyard is probably the source of the problem. In his opinion, the plaintiff's landscaping changes are not the cause of the problems.

[17] I accept Mr. Atkinson's evidence. He was not shaken in cross-examination. While he agreed with Mr. Sengbusch that the grading in the rear yards of 51 and 55 Sheppard Avenue probably never accorded precisely with the Whitney Engineering proposed plan, he noted that there was still positive drainage until 2007. I pause here to note that Whitney Engineering Inc., by letter dated November 16, 1995, confirmed to the City that UMA Engineering Ltd. had reviewed the individual lot grading certificates and they were "in general conformity with the recently accepted subdivision grading plan(s)." This was again confirmed in a letter to Mr. Sengbusch dated March 16, 2011. It is reasonable to conclude therefore that the original grading generally accorded with the plan, with perhaps some minor deviations.

[18] In my view, Mr. Atkinson's conclusions accord with common sense. The fact is that the plaintiff had no drainage difficulties until 2007 notwithstanding her earlier alterations to the property. I also accept that a portion of her property must drain to the west. However, there was no evidence of any changes made to the westerly property that would account for the problem. It is more likely than not that something happened in 2007 causing a reversal of drainage flow. The installation of the shed is the most probable cause.

[19] As a result, the plaintiff shall have judgment. The more difficult question is to what relief she is entitled.

[20] Ms. Dankiewicz testified about what a burden the drainage problems have created for her and I have no doubt that she has been very upset, stressed and inconvenienced. However, as noted, she was prone to exaggeration. For example, she considered that the breakdown of her long term marriage was not the source of most of her emotional upset, which is difficult to accept. She also attempted to paint Mr. Sullivan in the worst possible light. For example, she insisted that he cut her lawn twice daily and would not permit her to do so. That turns out not to be the case.

[21] Her photographs are another example. Prior to 2007, all of the photographs depict a virtual Garden of Eden. After 2007, the photographs depict only the destruction, yet undoubtedly there are times during the spring, summer and fall that the garden is not flooded.

Non-Pecuniary

[22] I am satisfied that the flooding of the plaintiff's backyard constitutes a nuisance, justifying an award of non-pecuniary damages. As noted in J. Cassels, Remedies: The Law of Damages (Toronto: Irwin Law, 2000):

> Torts affecting property may also attract compensation for non-pecuniary losses, as, for example, where the interference does not diminish the value of the property but does interfere with the plaintiff's enjoyment of it. The plaintiff may claim damages for loss of amenities. Similarly, in nuisance cases, where the nuisance seriously interferes with the plaintiff's enjoyment of his property, damages may also be awarded for inconvenience and loss of amenities.

[23] In the circumstances, I would award the plaintiff $5000 in recognition of the distress, inconvenience and interference with her enjoyment of her land, caused by the flooding. This is in line with the damages awarded in *Ivall v. Aguiar* 2007 CanLII 17379 (ON SC), (2007), 86 O.R. (3d) 111 (S.C.J.) which was another flooding case.

Punitive Damages

[24] The leading case on punitive damages is *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595 and the following passage is instructive on the approach to be taken to such an award:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[25] I do not consider this an exceptional case deserving of such an award. There is no evidence that Mr. Sullivan acted maliciously, oppressively or in a high handed way. Indeed, although the evidence was not as clear as it might have been, it appears that he installed a second section of Big O tiling along the shared fence in an effort to remediate the problem, to no avail. It is most regrettable that this matter was not resolved without litigation but that does not make such an award appropriate.

Special Damages

[26] The plaintiff shall have judgment for her out of pocket expenses for the water pumps, hose and a replacement tree totalling $973.35.

[27] I have made no allowance for the legal fees incurred to date ($33,638.61) all of which are more properly dealt with when costs are assessed. Similarly, the disbursements relating to expert fees and for the preparation of photographs for use at trial should be dealt with when costs are considered.

[28] A claim for $5332 is advanced for "estimated" expenses, including replacement trees, rubber boots, a rain coat, electricity, the installation of a sump pump and so on. I would allow the claim for replacement trees, pumps and the sump pump installation, which seem reasonable. The boots and jacket have a use unrelated to draining the backyard and can be used again and are therefore not allowed.

[29] There was no documentary evidence of the increase in the plaintiff's electrical bill. However, it stands to reason that some increase has been experienced and an allowance of $1000 is made. I fix this claim at $4,257.00 in total.

Mandatory Order

[30] At the opening of trial, the plaintiff asked for an order compelling the defendant to restore his property to the previously approved grades. In closing, a request was made to recognize the plaintiff's prescriptive right to have her surface water drain through the defendant's property. Authority for such orders is found in *Stroz v. Reid*, [1993] O.J. No. 2295, a case that is factually similar to this one.

[31] I find that the plaintiff has acquired a right to have her surface water continue to flow over the defendant's property by virtue of the development agreement registered on title (Exhibit #2, Tab 1) which sets out the obligation to maintain grading and which is binding on successors in title.

[32] Mr. Sullivan is ordered therefore to take whatever steps are necessary to ensure that the plaintiff's surface water drains across his property.

[33] I will receive brief written submissions on costs within 30 days with details of any offers of settlement that may have been exchanged.

"*Justice H. A. Rady*"
Justice H. A. Rady

Date: June 24, 2011

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