Dated

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
Civil No. 17-863

WELLESLEY CONSERVATION COUNCIL, INC.
Plaintiff

vs.

ROBERT W. PEREIRA, II, & another[1]
Defendants

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NORFOLK COUNTY
6/13/18

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Wellesley Conservation Council, Inc. ("the Council") filed this action after defendants Robert W. Pereira, II and Cheri L. Pereira cut trees and constructed a sports court on their Wellesley property in violation of a long-standing conservation restriction. The Council seeks declaratory and injunctive relief, restoration of the property, its reasonable attorneys' fees and costs, and monetary damages under G.L. c. 242, § 7 and G.L. c. 184, § 32. Defendants have largely capitulated. Defendants acknowledge their actions were wrong, agree they must restore the property and pay the Council's reasonable attorneys' fees and costs under G.L. c. 184, § 32, and agree to the Council's requested declaratory and injunctive relief.

Given defendants' many concessions, there is only one issue before me on the parties' cross-motions for summary judgment: whether the Council, as grantee of the conservation restriction on defendants' property, may recover monetary damages from defendants because defendants cut trees on their property in violation of the conservation restriction. For the following reasons, I conclude the Council may not recover monetary damages.

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[1] Cheri L. Pereira. Both plaintiffs are named as Trustees of 19 Pembroke Road Realty Trust.

BACKGROUND

In 2013, Robert and Cheri Pereira purchased the home where they now live at 19 Pembroke Road in Wellesley. They formed 19 Pembroke Road Realty Trust ("the Trust") to hold their real estate interests in the property at 19 Pembroke Road. In this memorandum, I refer to the Trust, and Robert and Cheri Pereira, as trustees, together as "defendants."

In 2015, defendants purchased 2.755 acres abutting 19 Pembroke Road. At the time of the purchase, the abutting parcel designated as 15R Pembroke Road ("15R") was burdened by a Massachusetts conservation restriction ("the 15R Restriction"), which was granted to the Council under G.L. c. 184, §§ 31-33, and recorded at the Norfolk County Registry of Deeds on or about December 26, 1975.[2] The 15R Restriction, which "run[s] with the property" and is "binding upon all future owners of an interest" in 15R, was "intended to retain the property in its natural, scenic and open condition." It generally precludes, among other things, construction, "removal or destruction of trees, shrubs or other vegetation," "removal of loam," and "other acts or uses detrimental to such retention of land and water areas predominantly in their natural condition." See also G.L. c. 184, § 31, first par. The 15R Restriction grants the Council a "perpetual right to enforce" it, and authorizes the Council and its agents to enter the property to inspect it and to enforce the 15R Restriction, without diminishing "any other remedies available to the [Council] for the enforcement of the foregoing restriction." (Emphasis added).

Although they were aware of the 15R Restriction, defendants in or about 2016 violated the conservation restriction by clearing trees and vegetation from a portion of 15R, excavating and grading part of 15R, and installing a sports court and associated fencing and lighting on 15R.

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[2] The parties agree the 15R Restriction was approved by the Council, the Wellesley Board of Selectmen, and the Secretary of the Executive Office of Environmental Affairs for the Commonwealth of Massachusetts.

Defendants took these actions intentionally. The Council did not license, permit or authorize any such work.

The Council filed this action in July 2017, asserting claims for breach of the conservation restriction (Count I), wrongful cutting of trees under G.L. c. 242, § 7 (Count II), unjust enrichment (Count III), declaratory relief (Count IV), and permanent injunction (Count V). It prays for the following relief: declarations that defendants violated the 15R Restriction in various ways (Prayer 1), a permanent injunction ordering immediate restoration of the disturbed property at 15R (Prayer 2) and barring further breaches of the 15R Restriction (Prayer 3), "[d]amages as permitted by law, including interest, as well as any multiple damages under law, including treble damages under G.L. c. 242, § 7" (Prayer 4), attorneys' fees and costs, including under G.L. c. 184, § 32[3] (Prayer 5), and other relief the court deems appropriate.

The parties have cross-moved for summary judgment. In moving for summary judgment, defendants agree to entry of summary judgment in the Council's favor on Counts I, III, IV and V and for entry of judgment on Prayers 1, 2, 3 and 5. At issue is Count II for damages under G.L. c. 242, § 7, and so much of Count I as might support a theory that the Council may be entitled to recover monetary damages under Prayer 4.

DISCUSSION

I. The Summary Judgment Standard

Summary judgment is appropriate when "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c). See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 712-716 (1991). Once the moving

[3] If the Council were to prevail on Count II, G.L. c. 242, § 7, would also authorize recovery of reasonable attorneys' fees and costs.

party establishes the absence of a triable issue, the opposing party must respond with specific facts establishing the existence of a genuine issue of material fact. Mass. R. Civ. P. 56(e). The nonmoving party may not merely rest on assertions of dispute, but must show the existence of actual disputes of fact. LaLonde v. Eissner, 405 Mass. 207, 209 (1989). The court must resolve doubts about the existence of a genuine issue of material fact against the moving party. Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 112 (1990). Here, the parties agree that the issue before the Court is an issue of law. The parties' statement of undisputed facts submitted under Superior Court Rule 9A(b)(5) contains virtually no facts that are disputed.

II. Plaintiff's Theories of Damages

The Council advances two theories under which it says it is entitled to recover damages caused by defendants' actions. First, it contends it is entitled to enforce the statute authorizing recovery of damages for trespass to trees, G.L. c. 242, § 7. Indeed, this is the basis for Count II. Alternatively, it argues it may pursue monetary damages beyond the cost of restoring the property under G.L. c. 184, § 32, particularly if the restoration plan that is viable and most prudent given the current status of the property does not immediately restore the property to its prior condition. I address each of these arguments in turn.

A. G.L. c. 242, § 7

Count II of the Complaint asserts a claim for the wrongful cutting of trees in violation of G.L. c. 242, § 7. Section 7, which is entitled "Willful trespass to trees, etc.; damages," states:

> A person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the defendant had good reason to believe that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only.

G.L. c. 242, § 7 (emphasis added). While the Council concedes defendants hold legal title to 15R, it argues its unique status as a holder of a conservation restriction on 15R allows it to enforce § 7 against the owner of 15R for cutting trees in violation of the 15R Restriction. This novel argument has not been addressed in the reported case law.

Interpretation of a statute begins with the language of the statute, and the terms of statutes are usually construed in light of their ordinary meaning. Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 271 (2018); Millis Public Schools v. M.P., 478 Mass. 767, 775 (2018). Here, § 7 is drafted in the language of trespass, both in its title ("[w]illful trespass to trees"), and in the text of the statute. The statute defines both who may be sued, G.L. c. 242, § 7 ("[a] person who . . . cuts down . . . trees . . . on the land of another"), and who may recover, id. ("the owner"), in the language of trespass, with ownership of the land being the pivotal factor.

On the question of whether defendants may be sued, the issue based on the plain language of the statute is whether defendants cut down the trees "on the land of another." Plainly, they did not. The trees in question were all on 15R, which was land of the defendants, i.e. land to which defendants held legal title.

The Council also runs headlong into the plain language of the statute on the question of whether it may bring an action under § 7. Liability in tort under § 7 is only "to the owner." The term "owner" is generally defined as "[s]omeone who has the right to possess, use, and convey something." Black's Law Dictionary 1280 (10th ed. 2014). "An owner may have complete property in the thing or may have parted with some interests in it (as by granting an easement or making a lease)." Id. Similarly, "ownership" is defined as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others." Id. See also, e.g., www.merriam-webster.com/dictionary/owner (last viewed Jun. 7, 2018) ("owner" defined as

"one who has the legal or rightful title to something: one to whom property belongs"). Under this plain meaning of the term "owner," only defendants, who own 15R, could recover in tort under § 7. See Evans v. Mayer Tree Serv., Inc., 89 Mass. App. Ct. 137, 147 (2016) ("The statute provides a tort remedy through which property owners can seek damages from 'person[s]' who cut down or otherwise destroyed their trees 'without license'" (emphasis added)); Glavin v. Eckman, 71 Mass. App. Ct. 313, 316 (2008) ("nor did he seek permission from . . . any other property owners in the area" (emphasis added)). See also, e.g., Krieger v. Lanark LJS LLC, 2016 WL 5637126 at **10-11 (Land Ct. Sept. 23, 2016) (where tree straddles property line, owners of both properties "own the whole tree as tenants in common" and one owner may maintain action under § 7 against another for cutting whole tree without authorization).

The Council contends rightfully that it has an interest in 15R, at least insofar as it has the right to enforce the conservation restriction; and that such a right is an "interest[ ] in land." G.L. c. 184, § 32, second par. The mere fact that the Council has a limited right in the property, however, does not make the Council an owner of the property for purposes of § 7. See, e.g., Larabee v. Potvin Lumber Co., 390 Mass. 636, 640 (1983) (although plaintiffs had a signed purchase and sale agreement, they could not sue under § 7 because they did not hold title); Time Terminals Inc. v. Egan, Flanagan and Cohen, P.C., 81 Mass. App. Ct. 1110, 2012 WL 7069275 at *2 & n.8 (Jan. 23, 2012) (Rule 1:28 decision) (plaintiff could only prevail on claim under § 7 if it prevailed on adverse possession claim because easement is "nonpossessory right to enter and use land," easement "cannot serve as the foundation for a trespass claim," and "only the owner of the land at issue can bring a claim under G.L. c. 242, § 7"). On the present facts, the Council is

not entitled to maintain a claim under G.L. c. 242, § 7.[4] Accordingly, defendants are entitled to summary judgment on Count II.

B. The Conservation Restriction Statute

Alternatively, the Council seeks damages for the cutting of the trees as a remedy for the violation of the conservation restriction, pointing to language in G.L. c. 184, § 32, para. 2 and in the 15R Restriction itself. In relevant part, the statute states:

> The [conservation] restriction may be enforced by injunction or other proceeding, and shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance. If the court in any judicial enforcement proceeding . . . finds there has been a violation of the restriction . . . then, in addition to any other relief ordered, the petitioner bringing the action or proceeding may be awarded reasonable attorneys' fees and costs incurred in the action proceeding.

G.L. c. 184, § 32, second par. (emphasis added). The 15R Restriction does not expand on these available remedies, but merely references them, making clear that the right expressly included in the 15R Restriction allowing the Council to enter the premises is "in addition to any other remedies available to the [Council] for the enforcement of the foregoing restriction." (Emphasis added).

The focus of the applicable statute and the 15R Restriction itself is on "enforcement," i.e., making sure the terms of the conservation restriction are followed and, if not, that the property is restored, as defendants have agreed to do in this case. Nothing in the conservation restriction or the enabling statute gives the Council any right to recover monetary damages in this context, nor

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[4] Even if the Council could bring a claim against defendants under § 7, it would not be entitled to treble damages. Defendants "had good reason to believe that the land on which the trespass was committed was [their] own." G.L. c. 242, § 7. See Krieger, 2016 WL 5637126 at **10-11 (good reason to believe tree located on own land due to erroneous land survey); Owens v. Buccheri, 2016 WL 4144193 at *5 (Land Ct. Aug. 3, 2016) (good reason to believe action on own land because defendant was record owner, but lost property due to adverse possession).

has the Council pointed me to any authority granting it the right to recover monetary damages. The cases cited by the Council, including Glavin v. Eckman, 71 Mass. App. Ct. 313, 317-322 (2008), and Ritter v. Bergmann, 72 Mass. App. Ct. 296, 303-307 (2008), see Opposition to Defendants' Motion for Summary Judgment at 11-12 (Docket #7.2), arose under G.L. c. 242, § 7, which, as described above, expressly authorizes an award of damages. Notably, G.L. c. 184, § 32, and the 15R Restriction are both silent on the issue of recovering monetary damages; instead, they authorize only enforcement of the restriction.[5]

ORDER

Defendants' Motion for Summary Judgment (Docket #7.0) is **ALLOWED** insofar as summary judgment shall enter for plaintiff on Counts I, III, IV and V by agreement; and for defendants on Count II and on plaintiff's Prayer 4. So much of plaintiff's Opposition to Defendants' Motion for Summary Judgment (Docket #7.2) as cross moves for summary judgment in plaintiff's favor on Count II is **DENIED**.

The Court shall conduct a further hearing on June 27, 2018 at 9 AM. If the parties are unable to agree in advance, the Court will hear from the parties about the scope of the judgment to be entered on Counts I, III, IV and V, including the appropriate restoration plan, the scope of the declaration and permanent injunction, and the amount of the reasonable attorneys' fees and costs; and whether further discovery and/or hearings will be necessary to resolve the case.

Dated: June 12, 2018

Peter B. Krupp
Justice of the Superior Court

[5] Given defendants' agreement to restore 15R, I need not address the situation that could be presented by a recalcitrant or impoverished landowner, who is either unwilling or financially unable to restore his/her property according to a reasonably prudent restoration plan given the then-altered condition of the property protected by a conservation restriction.