

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-359

JUNE TERM, 2005

Evelyn Mathews	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Superior Court
	}	
Eric Eklof	}	DOCKET NO. 475-11-03 Wmcv
	}	

Trial Judge: Karen Carroll

In the above-entitled cause, the Clerk will enter:

Defendant Eric Eklof appeals pro se from a superior court judgment in favor of plaintiff Evelyn Matthews. Defendant raises numerous claims, essentially contending: (1) the evidence failed to support the court’s findings; (2) plaintiff’s attorney improperly communicated with defendant’s witnesses prior to trial; (3) the court was biased; and (4) the court erroneously denied several post-judgment motions. We affirm.

This appeal arises out of plaintiff’s complaint against defendant, her neighbor in the Town of South Londonderry, for the wrongful removal of a fifty-year old sugar maple located on plaintiff’s property. Plaintiff testified that her husband, now deceased, had planted the tree on their property about fifty years ago, and that they had consistently mowed and maintained the area around the tree. She recalled that defendant had approached her at least once about cutting down the tree because it was interfering with utility and cable lines running to his house, and that she had told him never to cut down the tree. Nevertheless, on December 16, 2001, defendant, with the help of a friend, cut down the tree. Defendant acknowledged that he did so, but claimed that he had discussed the matter with plaintiff in October 2001, when a cable company was called to respond to a downed line, and that plaintiff had given him permission to cut down the tree. Plaintiff denied that she had ever given such permission.

Plaintiff was extremely upset by the downing of the tree, and ultimately filed this lawsuit under 13 V.S.A. § 3606, which provides that, if a person cuts any tree belonging to another person “without leave from the owner,” the injured party may recover treble damages.^[1] Following a hearing in February 2004, the court found that there was a reasonable likelihood that plaintiff would recover judgment, and issued a writ of attachment against defendant’s property. An evidentiary hearing on the complaint was held the following June. Defendant represented himself at the hearing. At the conclusion of the hearing, the court entered oral findings. The court found that the tree was located on plaintiff’s property, and that plaintiff had not given defendant permission to cut down the tree. The court specifically found that defendant’s claim of ownership was not credible, noting that he had not claimed ownership in his answer to the complaint, and that the claim of ownership was inconsistent with defendant’s own testimony that he had sought permission from plaintiff to remove the tree. The court also found that defendant did not remove the tree by mistake, or through a reasonable belief that the tree belonged to him, or on the basis that he had a legal right to removal. As the court stated:

In this case the Court has found that the Defendant was frustrated about the utility lines going to his house being interrupted by the tree and had a concern about his property being frozen up in the winter if the power went out. I don’t think there was any mistake. Again, I don’t think

there was any reason for the Defendant to believe the tree belonged to him otherwise there would have been no reason for him to ever have these conversations about cutting down the tree with the Plaintiff[.] [I]f he believed he had a legal right to do so or believed that he was a part owner of the tree or that the Plaintiff did not own the tree there would have been no reason for those conversations to have to occur.

The court also found, on the basis of a landscape architect's testimony, that the cost to replace the downed tree with a somewhat smaller sugar maple was \$7650. The court awarded treble damages under § 3606, for a total award of \$22,950. The court denied several post-judgment motions. This pro se appeal followed.

Defendant's principal contention is that the evidence, on the whole and in numerous particular instances, was not credible and failed to support the court's findings. We review the factual findings of a trial court in the light most favorable to the prevailing party below, disregarding the effect of modifying evidence, and will not set aside the findings unless they are clearly erroneous. N.A.S. Holdings Inc. v. Pafundi, 169 Vt. 437, 438 (1999). The findings will stand if there is any reasonable and credible evidence to support them. Id. The trial court is in the best position to judge the credibility of witnesses and weigh the evidence. Begins v. Begins, 168 Vt. 298, 301 (1998). Here, the court was well within its discretion in crediting plaintiff's testimony that the tree was located on her property and had been maintained by her husband since it was planted, and in further finding that defendant removed the tree without permission and, in fact, contrary to her expressed intent that defendant not cut down the tree. The court was also entitled to find that defendant's claim of ownership lacked credibility, and thereby conclude that the removal was not based on any mistake or "good reason" to believe that the tree belonged to him. 13 V.S.A. § 3606; see Pion v. Bean, 2003 VT 79, ¶ 29, 176 Vt. 1 (to avoid treble damages, defendant must show that he had good reason to believe that trees belonged to him). The court could also properly reject any claim of legal right, as defendant would not have been entitled to remove the tree even if, as he claimed, it straddled the parties' boundary line. See id. (holding that plaintiffs did not have good reason to believe that timber was on their land because, even under their own survey, the trees were straddling the property line). Accordingly, we conclude that the evidence and findings support the court's conclusion that defendant violated the statute, and that treble damages were warranted. The testimony of plaintiff's tree expert also fully supported the court's finding as to the value of a replacement tree. See id. at ¶ 30 (court may award damages under § 3606 based on testimony concerning replacement value of tree). Accordingly, we discern no basis to disturb the court's findings or the judgment based thereon.

Defendant's remaining claims also lack merit. He contends that plaintiff's attorney improperly "intimidated" two defense witnesses prior to the hearing. The record discloses that defendant raised an objection to counsel's "drilling" the witnesses prior to the hearing, that counsel explained she was merely seeking their identity, and that the court noted the witnesses would be heard momentarily at the hearing. Nothing in the record supports defendant's claim that the witnesses were intimidated, that counsel's conduct affected their testimony, or that defendant was prejudiced as a result. See Schmitt v. Lalancette, 2003 VT 24, ¶ 19, 175 Vt. 284 (party who claims error must demonstrate that it resulted in prejudice). Defendant further contends the trial court was biased, citing the court's adverse decision at the hearing and in connection with the post-judgment motions. The trial judge is "accorded a presumption of honesty and integrity, with [the] burden on the moving party to show otherwise in the circumstances of the case." Luce v. Cushing, 2004 VT 117, ¶ 18 (quotations omitted). Furthermore, bias is not demonstrated by a showing of adverse rulings, "no matter how erroneous or numerous." Gallipo v. City of Rutland, 163 Vt. 83, 96 (1994). Defendant here cites nothing in the record even suggestive of judicial bias, much less sufficient to overcome the presumption of judicial integrity. Finally, defendant contends the court erred in denying his post-judgment motions to modify, for a new trial, for findings, and to reopen for additional evidence. Defendant has not demonstrated any factual or legal ground on which to conclude that the court erred or abused its discretion in denying the motions.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

[\[1\]](#) Section 3606 provides in its entirety as follows:

If a person cuts down, destroys or carries away any tree or trees placed or growing for any use or purpose whatsoever, or timber, wood, or underwood standing, lying or growing belonging to another person, without leave from the owner of such trees, timber, wood, or underwood, or cuts out, alters or defaces the mark of a log or other valuable timber, in a river or other place, the party injured may recover of such person treble damages in an action on this statute. However, if it appears on trial that the defendant acted through mistake, or had good reason to believe that the trees, timber, wood or underwood belonged to him, or that he had a legal right to perform the acts complained of, the plaintiff shall recover single damages only, with costs.