

**St. Regis Mohawk Tribal Court**

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**Dorothy Costello,**  
**Plaintiff**

**-V-**

**Kenneth Cree, Jr.,**  
**Defendant**

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**DECISION AND ORDER**

**Case No.: 10-CIV-0008**

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**Procedural History**

A trial was held on October 23, 2015. Both Dorothy Costello (Plaintiff) and Kenneth Cree, Jr. (Defendant) were present and offered evidence and argument.

**The Complaint**

In her first cause of action, Plaintiff alleges that Defendant, since February 2011, trespassed, nuisanced upon, caused damage to, and otherwise interfered with the real property known as Lot #99, which is situated on the St. Regis Mohawk Indian Reservation and is owned by the Plaintiff. Plaintiff alleges that this trespass and nuisance included personal trespass, digging, construction and attempted construction on Plaintiff's property, including placing and removing a septic tank and lines, removal of Plaintiff's survey makers, debris deposits, and causing improper drainage, runoff and flooding on Plaintiff's Lot #99. Plaintiff alleges that the Defendant continued such actions in contradiction of a Tribal Council Cease and Desist Order issued on February 18, 2011. Plaintiff further alleges that the conduct of the Defendant resulted in harm to the value of Plaintiff's property and that the continuing boundary dispute impaired Plaintiff's good and marketable title to the property. Plaintiff seeks an Order quieting title to the property, affixing the boundaries and granting injunctive relief restraining and prohibiting further trespass upon Plaintiff's Lot #99

In her second cause of action, the Plaintiff further alleges that the Defendant impaired the value, status, and appearance of her property due to large holes, divots and debris on her land, in addition to her land being the subject of constant flooding and pooling of water due to improper drainage and runoff from the Defendant's structure on his property. Plaintiff alleged that due to the impaired condition of her property, she sought the opinion of a builder as to what could be done to improve the condition of her property and protect her from further damage due to improper drainage and runoff. Plaintiff alleges the needed grading on her property would cost her an estimated \$10,000.

## Applicable Law

The SRMT Civil Code delineates the applicable law for civil disputes and the order in priority of which they should be applied. The Civil Code allows for application of “[g]enerally recognized principles of the law of torts, as reflected by the most recent Restatement of Torts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine.”<sup>1</sup> The Civil Code further states that the Restatement may only be applied if it is “consistent with principles of Tribal sovereignty, self-government, and if (but only if) consistent with principles of law identified earlier in this section, New York State laws on contracts and torts.”<sup>2</sup> There are no written Mohawk laws which would supersede the use of general principles of tort law that are consistent with New York laws on torts.<sup>3</sup> The remaining question is whether the general principles of tort law contained in the Restatement are consistent with Tribal sovereignty, self-government, and self-determination.

The issue may also be defined as whether the legal concept of trespass to land, as recognized by the Restatement (3<sup>rd</sup>) of Torts and New York State law is consistent with Mohawk Tribal sovereignty and self-government. A trespasser is defined by the Restatement (3<sup>rd</sup>) of Torts as “person who enters or remains on land in the possession of another without the possessor’s consent or other legal privilege.”<sup>4</sup> New York’s definition is consistent and is defined as “an intentional infringement of a real property right of another. To be liable, the trespasser must have intended the act that is or produces the unlawful invasion to real property, although he or she need not have intended or expected the invasion caused.”<sup>5</sup>

This Court has early on and consistently recognized the right of tribal members to hold land. The Court in *White v. White* stated “there existed both a customary ‘and holding pattern’ by individual St. Regis Indians on the St. Regis Mohawk Indian Reservation and a mechanism by which leases were entered into for certain St. Regis Indian Reservation lands.”<sup>6</sup> The Court has also recognized an individual’s property right cannot be interfered with by the tribal government without due process of law.<sup>7</sup> The Tribe has also enacted the Land Dispute Resolution Ordinance which purpose is to “provide a fair and equitable procedure for resolving land disputes within the St. Regis Mohawk Tribe’s jurisdiction.”<sup>8</sup> The LDRO recognizes that Tribal members are “permitted to possess a use and occupancy deed or to otherwise own land on the Reservation.”<sup>9</sup>

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<sup>1</sup> SRMT Civil Code § V.A.5.

<sup>2</sup> SRMT Civil Code § V.A.B.

<sup>3</sup> SRMT Civil Code § V.A.2-3.

<sup>4</sup> Restatement (Third) of Torts § 50.

<sup>5</sup> 14 N.Y. Prac., New York Law of Torts § 2:2.

<sup>6</sup> *White v. White*, 10-LND-00009 (July 25, 2012) 11.

<sup>7</sup> *Thompson v. Terrance*

<sup>8</sup> LDRO § III.

<sup>9</sup> LDRO § V.B.

Our cases and written tribal law recognize the right to hold land and inherent in the right to hold land, is the right to hold the land free from trespassers or people who do not have consent to enter or invade that land. Thus, the Restatement (Third) of Torts and New York State law on torts is consistent with Tribal sovereignty and self-government, thus the Court shall apply the basic principles of tort law regarding trespass contained within the Restatement (Third) of Torts, which are consistent with New York law.

Although no party has specifically asked that New York State law be applied in this case, as noted above, the Civil Code authorizes the use of the Restatement of Torts, as long as it is consistent with Mohawk sovereignty and New York State principles. Thus given that the Court must, by law only use principles from the Restatement of Torts that are consistent with New York law on torts, the Court will use New York State law not as binding law, as it is not binding on the Tribe, but rather as persuasive authority to shed light on this issue as there is no written Mohawk law, statutory or case law, on this issue. As noted above, Tribal law has consistently protected an individual property right to hold property and within that right is an inherent right to use and maintain your property as you wish, as long as you're within bounds of the law. Also inherent in the right to hold property is that one's property is to be free of trespassers, which includes having material cast upon one's property.

### **Factual Findings**

The Plaintiff bears the burden of proof by preponderance of the evidence.<sup>10</sup> Preponderance of the evidence is met “by providing superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”<sup>11</sup> The Court finds the following facts were proven by a preponderance of the evidence.

1. Plaintiff is the owner of Lot #99 located at 295 N. Raquette Road and borders State Route 37.
2. When Plaintiff bought the property in 1996, the property was graded evenly with the surrounding lots.
3. Defendant's property, owned by his relatives and which he manages adjoins Plaintiff's property to the left and in front of #99 and facing south from State Route 37.
4. Defendant is the care taker of the property to the left of the Plaintiff. Although his name is not the deed, he is the manager and is in charge of the upkeep and business conducted on the lot. He caused the improvements and building to be placed on the property.
5. During the years of 1996-2010 Plaintiff did not have any problems with drainage on Lot #99. There were no standing pools and no puddles of water.
6. Defendant caused his adjoining property to be raised which resulted in embankments that border the property line with the Plaintiff.

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<sup>10</sup> SRMT Rules of Civil Procedure, Rule 17A-B.

<sup>11</sup> SRMT Rules of Civil Procedure, Rule 17B.

7. Defendant caused a building to be built on his property which is to the left of Plaintiff's property around 2010. It is a large two story building. There are no gutters on this building and the roof slopes towards the Plaintiff's property.
8. The Defendant's building sits extremely close to the property boundary with Plaintiff's property on two sides.
9. There is now a significant difference in the elevation between Plaintiff's Lot #99 and Defendant's lot, as demonstrated by the photos entered into evidence by the Plaintiff.
10. Defendant's property is level with State Route 37 which borders both parcels to the north.
11. The markers from Plaintiff's property have been removed. Plaintiff never offered evidence as to who removed the markers.
12. Dirt from Defendant's foundation was pushed onto Plaintiff's property.
13. A septic tank was placed on Plaintiff's property by Defendant and was subsequently removed. A hole was left behind and Defendant admitted he never had the hole filled in.
14. After the change in elevation in Defendant's property there was pooling of water and areas on her Plaintiff's property which became inaccessible because it was too wet. Although Defendant refutes the change in his property's elevation is the cause of the water. Plaintiff introduced photos showing pooling of water on her property near Defendant and Plaintiff's property line.
15. Run-off from Defendant's roof runs onto Plaintiff's property as Defendant's property is so close to the property line.

### **The Trespass**

At issue in this case are two separate trespasses, the placing and removal of the septic tank and the puddling of water. The facts stated above, and by Defendant's own admission, prove by a preponderance of evidence that the placing and removal of the septic tank by the Defendant's workers on the Plaintiff's property constitutes a trespass. Defendant admitted that the septic tank for his building was placed upon Plaintiff's property and when he found out it was placed in the wrong location, he had it removed. Defendant also admitted upon removal of the septic tank from Plaintiff's property, he did not fill in the hole left behind by the septic tank. As noted above, there exists a common law right not to have items thrown upon their property, thus the Plaintiff had a right not to have a septic tank placed on her property and also to not have holes left upon her property upon removal of the septic tank.

Now we must turn to the water problems on the Plaintiff's property which Plaintiff alleges is caused by the Defendant. Plaintiff testified and Defendant admitted that the roof to his building has no gutters and the water runs directly off his roof onto Plaintiff's property. Water running from Defendant's roof onto Plaintiff's property is a trespass, as it an action by the Defendant that causes something to be placed upon the Plaintiff's property.

As to the pooling of water on Plaintiff's property, Plaintiff testified that her property was level with Defendant's prior to his grading and raising his property to the level of the road. However, Plaintiff's property was not level with the road and appears to naturally slope

downward from Route 37. Plaintiff testified that puddling did not occur until Defendant began building up his property. Plaintiff's photos entered into evidence show the puddling and the embankment from Defendant's property that then slopes down towards Plaintiff's property. Plaintiff and her witness, Timothy Papineau, testified that the slope of her property runs to the back of her property. Defendant disputed this and testified that the slope of Plaintiff's property is away from his property, which would naturally lead to water run-off from his property. But the slope of her property is not the true issue. The issue is that by grading and raising his property, Defendant caused dirt to be placed on Plaintiff's property and as a result of his improvements to his property there are now embankments on the edge of his property which would only encourage water run-off regardless of the slope of Plaintiff's land. Defendant also argued that the pooling is impacted by the fact that there is no ditch for the water run-off along State Route 37. However, if the water was from Route 37, Plaintiff would have had pooling on her property since she bought it.

The Court finds that Defendant committed a trespass by causing water from his property to run onto Plaintiff's property; by raising his property; and by not providing a mechanism for water run-off from his property to be drained somewhere other than Plaintiff's property.

### **Judgment**

For Plaintiff's first cause of action she alleged trespass, nuisance, and damage to her property and requested an Order quieting title to her property affixing the boundary, and granting injunctive relief. At trial the Plaintiff did not produce evidence as to the exact boundary line or that there was even a dispute as to where the boundary lie. Rather it appeared from the testimony that both Plaintiff and Defendant know exactly where the boundary line lays. Thus, the Court will focus on the trespass as proven above. The Court finds that there was a preponderance of the evidence provided by the Plaintiff that Defendant trespassed upon the Plaintiff's property by placing and then removing a septic tank, by causing water run-off from his roof to run onto the Plaintiff's property, and by causing water to collect upon her property by raising his property and not providing a runoff on his own property to prevent water from collecting upon Plaintiff's property. The Plaintiff is granted an injunctive order to restrain and prevent further trespass onto her property. Defendant is ordered to improve his property by placing gutters on his roof and by implementing other improvements that will prevent water from his property entering onto Plaintiff's property.

The Plaintiff's second cause of action seeks monetary damages in the amount of \$10,000 due to the amount of damage on her property caused by the water pooling, large holes, divots and debris by Defendant's placing and removing the septic tank and causing his water to spill onto the Plaintiff's property. As stated above, the Court finds the Defendant trespassed upon the Plaintiff's property by placing and removing the septic tank and causing water to spill onto her property from his roof and the embankments he created. At trial Plaintiff offered an estimate in the amount of \$10,000, however she did not call as a witness the person who gave that estimate. Rather she called Timothy Papineau who testified to his estimate to repair the damage to her property. His

estimate for repairing the damage to Plaintiff's property was \$6,800. Given that there was no evidence offered as to who prepared the \$10,000 and his/her expertise, the Court is not persuaded that \$10,000 is an accurate estimate to repair the damage caused by the Defendant.

As to the estimate for \$6800 provided by Mr. Papineau, the Defendant questioned Mr. Papineau as to his expertise and raised an issue with the amount of the damages because Mr. Papineau had done work for the Plaintiff in the past. The Defendant argued that Mr. Papineau's was merely seeking the Plaintiff's business and thus his testimony could not be trusted. However, given Mr. Papineau's expertise, as established by his testimony, that he testified to on the stand and that Mr. Papineau's estimate is lower than the \$10,000 estimate, it is deemed as a reasonable amount to repair the damage caused by the Defendant's trespass.

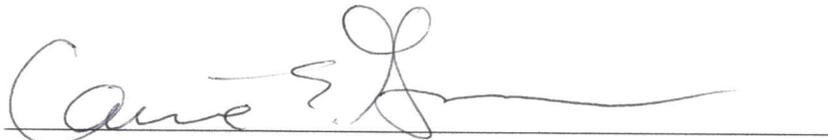
### **Order**

The Court hereby finds the Defendant guilty of trespass upon the Plaintiff's property and ORDERS the following:

1. The Defendant is hereby ORDERED to refrain entering the Plaintiff's property and causing the water from his roof and the water run-off from his property to run onto Plaintiff's property. The Defendant is ORDERED to place gutters on his roof and make other improvements upon his property to prevent further run-off of water on to Plaintiff's property.
2. Defendant is hereby ORDERED to pay damages to Plaintiff in the amount of \$6,800.

**The parties have 30 days from the entry of this Order to file an appeal with the St. Regis Mohawk Court of Appeals**

Signed by my hand this 4<sup>th</sup> day of January, 20 16



Carrie Garrow, Associate Judge St. Regis Mohawk Tribal Court