

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

JOANNE ENG and DAVID TAVELLA

Plaintiffs,

-against-

ELIYAHU SHIMON, IGAL BIRENBAUM,
MIRIAM BIRENBAUM, JOHN DOES and
JANE DOE

Defendants

Index No:27583/05

Motion Date: 3/29/06

Motion Cal. No.: 13

The following papers numbered 1 to 11 read on this motion by defendants for an order dismissing the complaint pursuant to CPLR 3211(a)(5) and (7).

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Memorandum of Law.....	5
Answering Affidavits-Exhibits.....	6 - 8
Memorandum of Law.....	9
Replying Memorandum of Law.....	10 - 11

Upon the foregoing papers it is ordered that this motion is granted to the extent that the first, fourth and sixth causes of action are dismissed and denied as to the remaining causes of action.

Plaintiffs commenced this action for declaratory and injunctive relief based on causes of action for public and private nuisance, prescriptive easement and intentional infliction of emotional distress. The defendants now move by this preanswer motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(7), the court must accept the factual allegations of the complaint and in any supporting affidavit as true, accord the

plaintiff all favorable inferences which may be drawn therefrom, and determine only whether the facts as alleged fit within any cognizable legal theory (Leon v. Martinez, 84 NY2d 83, 87-88[1994] Morone v. Morone, 50 NY2d 481, 484 [1980]; Rovello v. Orofino Realty Co., 40 NY2d 633, 634 [1976]). The criterion is whether the plaintiff has a cause of action not whether he may ultimately succeed on the merits. (See, Stukuls v. State of New York, 42 NY2d 272, 275 [1977]; Detmer v. Acompara, 207 AD2d 477 [1994].) Under CPLR 3211(a)(1), a dismissal is warranted only where the documentary evidence is "...such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Trade Source, Inc. v. Westchester Wood Works, Inc., 290 AD2d 437 [2002]; see, Held v. Kaufman, 91 NY2d 425, 430-431 [1998]; Leon v. Martinez, supra; Teitler v. Max J. Pollack & Sons, 288 AD2d 302 [2001].)

The underlying facts as alleged in the complaint are as follows. On January 27, 1997 plaintiffs purchased the property located at 76-35 175th St., Fresh Meadows, N.Y. from the prior owner who obtained the property in 1985. The defendant purchased the property located at 76-31 175th St., Fresh Meadows, N.Y. on or about December 16, 1998 from the previous owner who allegedly obtained it since 1939. The north side of plaintiffs property and the south side of defendants property adjoin such that the plaintiffs' driveway directly abuts the walkway of the plaintiffs' property. The plaintiffs and their predecessors used the driveway to access the garage and to park vehicles. The driveway is six feet wide and the plaintiffs and their predecessors in interest, when using the driveway for parking, used the defendants' walkway to open the car door and to exit the vehicle. In June of 2005, the defendants erected a fence along the south edge of their property beginning five feet from the edge of the public sidewalk and extending the length of plaintiffs' driveway making it impossible to open the door of a car parked in the driveway. Further it is alleged that the fence blocks plaintiffs' view of the sidewalk and street as they back the car out of the driveway and was erected solely to harass the plaintiffs.

The complaint asserts six causes of action, to wit one for a public nuisance, two for private nuisance, two for constructive easement, and a cause of action for intentional infliction of emotional distress.

The first cause of action based on the allegation that the fence is a public nuisance does not state a cognizable cause of action for a public nuisance. The plaintiffs, as private individuals, seeking to recover damages based on a public nuisance must plead and prove by clear and convincing evidence (1) the existence of a public nuisance; (2) conduct or omissions

by a defendants that create, contribute to or maintain that public nuisance; and (3) special or different injury beyond that suffered by the community at large as a result of the public nuisance. (532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 NY2d 280, 292 [2001], reargument denied, 5th Ave. Chocolatiere, Ltd. v. 540 Acquisition Co., LLC., 96 NY2d 938 [2001]; see, also, N.A.A.C.P. v. Acusport, Inc., 271 F.Supp.2d 435, 483 [E.D.N.Y.2003].) A public nuisance "consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons." (Copart Industries, Inc. v. Consolidated Edison Company of New York, Inc., 41 NY2d 564, 568 [1977].) The presence of the fence, which does not encroach upon or block the sidewalk and is not even alleged to be built in violation of any building or zoning laws, codes or ordinances is not conduct which offends or impacts upon the public.

The branch of the defendants' motion to dismiss the second and third causes of action for private nuisance is denied. The elements of a cause of action for a private nuisance are: (1) an interference, substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with plaintiff's right to use and enjoy land; (5) caused by the defendant's conduct (Copart Inds. v. Consolidated Edison Co. of N.Y., 41 NY2d 564, 570[1977].) The factual allegations are sufficient to state a cause of action based upon a private nuisance. Contrary to the defendants' claim whether the alleged interference is "substantial" is not an issue to be determined on a motion to dismiss for failure to state a cause of action.

The fourth cause of action for a prescriptive easement of air over a portion of the defendants' property is dismissed inasmuch as New York does not recognize an easement for light and air, except where created by express agreement. (See Lafayette Auvergne Corp. v. 10243 Mgt. Corp., 35 NY2d 834, 836; Chatsworth Realty 344 LLC v. Hudson Waterfront Co. A, LLC, 309 AD2d 567 [2003].) Moreover, the fourth cause of action is duplicative of the plaintiffs' fifth cause of action insofar as plaintiffs seek is an unobstructed permanent right of way over a portion of the defendants' property rather to secure a right of light and air or air rights for development purposes.

The branch of the defendants' motion to dismiss the fifth causes of action for a prescriptive easement is denied. The necessary elements to prove a prescriptive easement are "adverse, open and notorious, continuous and uninterrupted for the prescriptive period." (See, Di Leo v. Pecksto Holding Corp., 304

N.Y. 505, 512 [1952]; Rozenberg v. Bacigalupo, 18 AD3d 854 [2005]; see also, Gravelle v. Dunster, 2 AD3d 964 [2003].) The plaintiffs' fifth cause of action, incorrectly denominated as one for a "constructive" easement, adequately stated a cause of action for a prescriptive easement.

_____The branch of the defendants' motion to dismiss the sixth cause of action to recover damages for intentional infliction of emotional distress is granted. Liability may be imposed for the intentional infliction of emotional distress " 'only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' " (Murphy v. American Home Products, 58 NY2d 293, 303, quoting Restatement [Second] of Torts § 46, comment d; see Howell v. New York Post, 81 NY2d 115; Zimmerman v. Carmack, 292 AD2d 601 [2002].) The conduct alleged "must consist of more than mere insults, indignities and annoyances." Liebowitz v. Bank Leumi Trust Company of New York, 152 AD2d 169, 182[1989].) In addition "[c]ourts are reluctant to allow recovery under the banner of intentional infliction of emotional distress absent a deliberate and malicious campaign of harassment or intimidation." (Citations omitted)." Cohn-Frankel v. United Synagogue of Conservative Judaism, 246 AD2d 332 [1998].

In support of this cause of action, the plaintiffs asserts that the defendants allowed their dog to roam freely without a leash; that they illegally converted their basement to an apartment and the tenants throw garbage onto the plaintiffs' property. The plaintiff, David Tavella's avers in his affidavit that the defendants have engaged in a campaign of harassment by reporting violations to the Building Department on plaintiffs and the plaintiff Eng's parent's property and by building the fence. The facts as alleged in the complaint taken together with the plaintiff, David Tavella's affidavit do not rise to level of conduct necessary to support a cause of action for intentional infliction of emotional distress. (See, Levine v. Gurney, 149 AD2d 473 [1986]; Vasarhelyi v. New School for Social Research, 230 AD2d 658 [1996]; Green v. Fischbein, Olivieri, Rozenholc & Badillo, 135 AD2d 415 [1987]; see also Nigro v. Pickett, 11 Misc.3d 1077(A), 2006 WL 940636 (Table) N.Y.Sup.,2006.)

Dated: May 1, 2006
D# 25

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J.S.C.