SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cornrich Justice PART 54

0108149/2003

GOLUB, BENJAMIN J.
VS
SIMON, MICHAEL

SEQ 3

SUMMARY JUDGMENT

MOTION NO. 108149/03
MOTION DATE 11/18/04
MOTION SEQ. NO. 3
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	3,3,4,5,6
Replying Affidavits	7,8

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision and order.

FILED
MAR 31 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/24/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BENJAMIN J. GOLUB

Plaintiff,

Index No.: 108149/03

DECISION and ORDER

-against-

MICHAEL SIMON and KAREN SIMON,

Defendants.

----------X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for damage alleged as a result of the obstruction of plaintiff's bathroom window. Plaintiff is the owner of Unit 9A at 248 East 31st Street, a condominium building in New York City. Plaintiff's complaint, dated April 30, 2003, alleges that the "picture windows" of his apartment's "upstairs bathroom" overlook a portion of the building's roof. The complaint further alleges that defendants, the owners of Unit 9C in the building, created and/or maintained a structure on the roof, and deposited various "junk" items on the roof, all of which improperly obstructed plaintiff's view from his bathroom shower window. The complaint asserts causes of action for impairment of plaintiffs' "right of enjoyment, use and occupation" of his property, in the amount of $2,000,000; for nuisance in the amount of $2,000,000; for diminution of property value in the amount of $250,000; for mental anguish in the amount of $2,000,000;[1] for punitive damages in the amount of $5,000,000; and also for injunctive relief.

[1] The mental anguish claim was withdrawn by order dated July 22, 2004. See Affirmation of G. Parker, Exhibit F.

Background

Plaintiff testified that he has owned his apartment continuously for approximately 20 years. EBT of B. Golub at p. 8. Plaintiff testified that his apartment has an "exclusive easement to a portion of the roof," which is accessed by a door. Id. at 15. According to plaintiff, the roof is a common area, but the top units have exclusive use of it. Id. at 16. He further testified that one of the reasons he purchased his apartment was that it had a "nice big window that [he] could look out of when [he] was taking a shower." Id. at 24. The shower window is situated one or one-and-one-half feet above the floor of the roof. Id. When he bought the apartment, there was nothing on the roof except some chairs. Id. at 26.

When asked to describe the shed-like structure alleged in his complaint, plaintiff described a structure on the part of the roof opposite his shower window, connected in part to the terrace of unit 9C and also, to the elevator housing room. Id. at 31. Plaintiff also described lattice work and a plastic bag enclosure to the structure. Id. He stated that the wooden slats were probably erected in the late 1980s or early 1990s, by the previous owner of unit 9C. Id. at 33. According to plaintiff, the additional part of the structure, consisting of lattice and garbage bags, was erected one or two years prior to plaintiff's deposition. Id.

Mr. Simon testified that he owns unit 9B with his wife, and is the owner of unit 9C alone. EBT of M. Simon at p. 6. Mr. Simon bought unit 9B in the late 1980s; and bought unit 9C in 1998. Id. Simon testified that when he bought 9C, there was nothing on the roof abutting the unit, opposite plaintiff's bathroom window. Id. at 8. Simon further testified that he had put up the wooden planks, lattice, and some black tape about 2 to 3 years before his deposition. Id. at 9. He stated that he did not get consent of the Board for this, and thought that none was required.

Id. Simon testified that he put up the structure for privacy and aesthetic reasons. Id. at 14. Specifically, Simon did not want to see into plaintiff's bathroom window, particularly when plaintiff and his family were in a state of undress. Id. at 14.

The Board commenced an action against defendant Michael Simon in 1998, and another one against both Simons in 2003, in connection with structures defendants had constructed and/or maintained on the roof of the building. Both actions were discontinued with prejudice pursuant to a settlement agreement executed in July 2004. Simon Aff., Ex. G. The settlement provided that the building's board of managers ("Greentree"), would restore the "underlayment" of the 9B terrace at its cost. Id. The settlement further provided as follows:

> Greentree shall allow Simon to install privacy screens/strips on the current common terrace fencing overlooking the 9-B Terrace and 9-C Terrace. The privacy strips and the installation of same must be pre-approved by Greentree at the signing of this agreement ...
>
> Should the privacy screen and/or the Wooden Structure, currently existing on the 9-C Terrace and/or thereabouts, which was the subject of the Screen Action, be determined by governmental and/or municipal and/or Fire Department authorities and/or Greentree's Insurance carrier to be in violation of any governmental law or regulation or policy, or otherwise be an insurance risk, the Parties agree that such Screen/Wooden Structure shall be removed and replaced with a screen at Simon's expense, providing the same amount of privacy granted by the original screen, but approved by Greentree in compliance with applicable governmental laws and/or regulations and the By-Laws."

Id.

Andrew Miltenberg, the attorney who represented Greentree in the settlement, avers that the settlement was not intended as a written approval of Mr. Simon's "wooden and plastic shed structure," unless same had "all governmental, municipal and fire department approvals and the

approval of Greentree's insurance carrier." Affidavit of A. Miltenberg. To Miltenberg's knowledge at the time of his affidavit, such approvals had not been provided. Id. There is no evidence submitted as to whether the wooden structure referred to in the settlement was ever found to be in violation of any governmental law, regulation or policy, or designated an insurance risk. Greentree is not a party to this action.

II. Motions

Defendants now move for summary judgment dismissing the complaint. In support of their application, they submit their attorney's affirmation, deposition testimony of plaintiff and Mr. Simon, copies of pleadings, a copy of the settlement agreement, and photographs of plaintiff's bathroom. In opposition, plaintiff cross-moves for summary judgment on all his causes of action. Plaintiff submits his affirmation, the affidavit of Greentree's previous attorney Andrew Miltenberg, a copy of the building's by-laws, deposition testimony, and additional photographs.

III. Conclusions of Law

A. Summary Judgment

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and "lay bare his proofs" of any alleged triable issues of fact. See In re Dissolution of Rencor Controls, Inc., 263 A.D.2d 845 (3rd Dept. 1999) citing Hanson v. Ontario Milk Producers Coop., Inc., 58 Misc.2d 138 (Sup.Ct. Oswego County 1968)

(Aronson, J.). Defendants argue that plaintiff's allegations "boil down to breach of easement (to light, air and view), nuisance and intentional infliction of emotional distress," and that plaintiff has failed to make out a prima facie case as to these claims. With the exception of that part of plaintiff's nuisance claim alleging a dangerous condition on the roof, the Court agrees, and will address each cause of action.[2]

B. Breach of Easement

It is undisputed that the structure complained of does not physically encroach on plaintiff's property. Instead, plaintiff alleges that defendants' structure improperly blocks the view from his shower window. "New York does not recognize an easement for light and air, except where created by express agreement." Chatsworth Realty 344 LLC v. Hudson Waterfront Co. A, LLC, 309 A.D.2d 567 (1st Dept. 2003) citing Lafayette Auvergne Corp. v 10243 Mgt. Corp., 35 N.Y.2d 834, 836 (1974). Plaintiff has put forward no evidence demonstrating any express agreement granting him an easement which would prevent defendants from constructing or maintaining a structure on their property which blocks plaintiff's view from his shower window. Plaintiff argues that defendants' structure violates various provisions of the building by-laws, including provisions concerning the building's consent to alterations or improvements, the requirement of obtaining approval of regulatory authorities, and various use restrictions, for example, those prohibiting condominium owners from using their property to create a "nuisance" or "source of annoyance." These arguments are not germane to the causes of action plaintiff has alleged because the by-laws do not create a private right of action for plaintiff. Therefore,

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[2]The Court will not address plaintiff's cause of action for "mental anguish," since that claim has been withdrawn by this Court's order dated July 22, 2004.

defendants are granted summary judgment dismissing plaintiff's cause of action for interference with his view.

C. Nuisance

"[O]ne is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities. Copart Industries, Inc. v. Consolidated Edison Co., 41 N.Y.2d 564, 569 (1977) (citations omitted). With the exception of determining whether a plaintiff has a property interest to be interfered with, the Copart factors are questions for the trier of fact. See Weinberg v. Lombardi, 217 A.D.2d 579 (2nd Dept. 1995). As discussed above, plaintiff has no property interest in the view from his shower window. However, plaintiff has also alleged that defendants' structure has caused certain dangerous conditions such as "standing water" and the creation of a "breeding site for mosquitos, bugs, rats and vermin." The Court cannot determine the validity of these allegations as a matter of law. See McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 47 (1907) ("Whether the use of property by one person is reasonable, with reference to the comfortable enjoyment of his own property by another, generally depends upon many and varied facts; such as location, nature of the use, character of the neighborhood, extent and frequency of the injury, the effect on the enjoyment of life, health and property and the like."); Weinberg, supra. Therefore, defendants' motion for summary judgment is granted only to the extent of dismissing plaintiff's cause of action for nuisance caused by the obstruction of plaintiff's view.

D. Punitive Damages

Punitive damages "are intended as punishment for gross misbehavior for the good of the public and have been referred to as a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine.... The nature of the conduct which justifies an award of punitive damages has been variously described, but, essentially, it is conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." Home Ins. Co. v. American Home Products Corp., 75 N.Y.2d 196, 203-204 (1990) (citations, internal quotation marks omitted). Here, plaintiff has come forward with no evidence that defendants acted with a "high degree of moral culpability." Indeed, the Board discontinued its actions against the Simons and allowed the structure to remain. At worst, Mr. Simon erected a structure, on his own property, without getting the necessary board approval and regulatory permits. Under the circumstances, plaintiff has failed to demonstrate that defendants acted in such an egregious manner as to call for public reprimand by way of punitive damages. Therefore, plaintiff's cause of action for punitive damages is dismissed.

E. Injunctive Relief

To be entitled to temporary injunctive relief a plaintiff must prove: (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in its favor. W. T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517 (1981). As discussed above, plaintiff's only remaining cause of action is for nuisance solely in connection with the alleged dangerous conditions on the roof. Plaintiff has submitted no proof of these conditions or any damage suffered as a result. Therefore, the Court concludes that plaintiff has failed to establish a likelihood of success on this claim warranting entry of an injunction in

plaintiff's favor. Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the Verified Complaint is granted only as to plaintiff's first, second, fifth, sixth and seventh causes of action, and otherwise denied, and said causes of action are severed and dismissed; and it is further

ORDERED that the third and fourth causes of action in plaintiff's Verified Complaint shall continue; and it is further

ORDERED that plaintiff's motion for summary judgment on all his causes of action is denied.

The foregoing constitutes the decision and order of the Court.

Date: March 23, 2005
New York, New York

SHIRLEY WERNER KORNREICH