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SHORT FORM ORDER

INDEX No. 03-20528
CAL. No. 06-01731-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12/11/06
ADJ. DATE 12/22/06
Mot. Seq. #010 - MotD

CHRISTOPHER A. BAUDO and THERESA BAUDO, Plaintiffs, - against - JEROLD AXELROD and FLORENCE AXELROD, Defendants.	***Action No. 1*** Index No. 03-20528 ABRAMS, FENSTERMAN, FENSTERMAN, GREENBERG, FORMATO & EINIGER, LLP Attorney for Christopher & Theresa Baudo 1111 Marcus Avenue, Suite 107 Lake Success, New York 11042
JEROLD AXELROD and FLORENCE AXELROD, Plaintiffs, - against - CHRISTOPHER A. BAUDO and THERESA BAUDO, Defendants.	***Action No. 2*** Index No. 06-298 FLYNN & FLYNN Attorney for Jerold & Florence Axelrod 36 North New York Avenue, Suite 3 Huntington, New York 11743

Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10 ; Notice of Cross Motion and supporting papers ______; Answering Affidavits and supporting papers 11-23 ; Replying Affidavits and supporting papers 24-25 ; Other plaintiffs' memorandum of law; plaintiffs' reply memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by Christopher A. Baudo and Theresa Baudo, plaintiffs in Action No. 1, for an order pursuant to CPLR 3212 granting summary judgment dismissing defendants' remaining two counterclaims in Action No. 1, is granted to the extent of granting summary judgment dismissing defendants' first counterclaim alleging nuisance, and is otherwise denied.

These actions, which have been consolidated for a joint trial, arise from a series of disputes between the parties, owners of adjacent residential properties in St. James, New York, located within the Incorporated Village of Nissequogue. The plaintiffs in Action No. 1 seek injunctive relief, compensatory and punitive damages for the defendants' continuous playing of loud music outdoors. The defendants in Action No. 1, by way of counterclaim, likewise seek compensatory and punitive damages, alleging in relevant part (i) that the plaintiffs constructed a three-car garage and driveway extension on their property in a location "of minimal convenience" to them and "calculated to have the greatest possible negative impact upon the use, enjoyment and value of the defendants' property," (ii) that the plaintiffs "caused significant, illegal land clearing and re-grading to be performed, and a boulder retaining wall to be installed" on the portion of their property "in closest proximity to the defendants' residence," and (iii) that the plaintiffs created and have maintained an "unsightly" pile of logs and debris on their property "as near as possible to the defendants' residence."

By order dated March 19, 2004, this Court (Underwood, J.) granted the plaintiffs' motion to dismiss the defendants' counterclaims pursuant to CPLR 3211 (a) (7) only to the extent of dismissing the defendants' third and final counterclaim, alleging intentional infliction of emotional distress. As to the defendants' first and second counterclaims, sounding respectively in nuisance and prima facie tort, the Court found these sufficiently pleaded to withstand the motion.

Now, discovery having been completed and a note of issue having been filed, the plaintiffs move for summary judgment dismissing the remaining counterclaims.

To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct (*see*, ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]).

The Court finds as a matter of law that the plaintiffs' use of the property did not interfere, substantially or otherwise, with the defendants' use and enjoyment of their property. To constitute a nuisance, the use of the property "must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient" (***Campbell v Seaman***, 63 NY 568, 577 [1876]). Here, the record is devoid of evidence of physical discomfort caused by the claimed disturbance (*cf.*, ***Dugway, Ltd. v Fizzinoglia***, 166 AD2d 836, 563 NYS2d 175 [1990]). Nor is it enough, as the defendants contend, that the plaintiffs may have distorted certain facts relative to their obtaining a variance for the garage, or that the use may have been unsightly (*see*, ***Ruscito v Swaine, Inc.***, 17 AD3d 560, 793 NYS2d 475, *lv denied* 5 NY3d 704, 801 NYS2d 2, *cert denied* ___ US ___, 126 S Ct 557 [2005]; ***Dugway, Ltd. v Fizzinoglia***, *supra*). Accordingly, summary judgment is granted dismissing the first counterclaim.

Summary judgment is denied, however, with respect to the second counterclaim. The plaintiffs contend that this counterclaim, alleging prima facie tort, should be dismissed as a retaliatory "action involving public petition and participation," *i.e.*, a SLAPP suit, defined in Civil Rights Law § 76-a (1) (a) as "an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission" (*see*, CPLR 3212 [h]). In support of their contention, the plaintiffs point to allegations in the defendants' answer that plaintiff Christopher Baudo publicly objected to various applications made by the defendants to Village boards and officials with respect to landscaping and other work to be performed on the defendants' property. The defendants, however, contend that these allegations were intended only to support their claim of malice and to buttress their demand for punitive damages, not to establish any necessary element of the counterclaim. The defendants further represent that this counterclaim is premised on the same conduct–namely, the locating of the garage and driveway extension, the land clearing and regrading, and the wood and debris pile in unreasonably close proximity to the defendants' property–as supports their nuisance theory, and is pleaded solely as an alternative to the nuisance theory. Based on this representation, the Court finds that the counterclaim, as so limited, is not "materially related" to any efforts on the part of the plaintiffs to oppose the defendants' various applications and, therefore, does not fall within the statutory definition (*cf.*, ***Long Is. Assn. for AIDS Care v Greene***, 269 AD2d 430, 702 NYS2d 914 [2000]).

Finally, to the extent that the defendants request summary judgment dismissing the complaint in Action No. 1, the Court notes that because the plaintiffs' motion was addressed solely to the counterclaims and not to the complaint, it is without authority to search the record and grant such relief in the absence of a cross motion seeking the relief (*see*, ***Dunham v Hilco Constr. Co.***, 89 NY2d 425, 654 NYS2d 335 [1996]).

Dated: MAR 0 6 2007

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**