Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

x

RITA R. GALCHUS

-against-

NEAL VICHINSKY

x

Index Number 19497 2005

Motion Date March 27, 2007

Motion Cal. Number 16

Motion Seq. No. 2

The following papers numbered 1 to 20 read on this motion by defendant for summary judgment dismissing the complaint, and cross claims and counterclaims, if any; and this cross motion by plaintiff for summary judgment granting a permanent injunction enjoining and restraining defendant and his agents, servants, employees, assigns and all persons acting on his behalf from maintaining any and all bird feeders within the close proximity of plaintiff's premises or property line, and for an award of costs and disbursements of the action.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-5
Notice of Cross Motion - Affidavits - Exhibits ...	6-11
Answering Affidavits - Exhibits	12-18
Reply Affidavits	19-20

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff, an owner of the property known as 69-22 261st Street, Little Neck, New York, commenced this action against defendant, the owner of the adjoining property known as 69-16 261st Street, Little Neck, New York, for private nuisance allegedly caused by defendant's maintenance of a bird feeder on his property. Plaintiff now alleges that defendant maintains two bird feeders, attached to his deck, within two feet to five feet of the boundary

line between the parties' properties. She alleges that the placement of the bird feeders interferes with her beneficial use and enjoyment of her property. According to plaintiff, the bird feeders attract a large quantity of birds, including pigeons, on a daily basis, which causes excessive bird droppings and feathers to fall onto her property, particularly in her rear and side yards. Plaintiff alleges that the bird droppings constitute an unhealthy condition, and produce an offensive, sickening odor, and that defendant has violated the New York City Health Code § 3.09, and the New York City Administrative Code § 17-142. She also alleges by virtue of the nuisance, that her property has been reduced in value, that she and her family and guests have suffered physical discomfort and that she has suffered damages in relation to the cleanup of the bird droppings. Plaintiff seeks monetary damages and a permanent injunction enjoining defendant from continuing the nuisance and maintaining any bird feeder within close proximity of her property.

Defendant served an answer denying the material allegations of the complaint, and asserting various affirmative defenses.

A motion for summary judgment may be made by any party to an action after the joinder of issue (CPLR 3212[a]). The court may set a date after which no such motion may be made, provided that the date is no earlier than 30 days after the filing of the note of issue (id.). In the event that the court sets no such date, a motion for summary judgment must be made no later than 120 days after the filing of the note of issue (id.). The submissions herein do not include a copy of any order, including the preliminary conference order, setting forth the date by which the parties had to make their summary judgment motion. Plaintiff admits to having made the cross motion for summary judgment 13 days beyond the 120-day period following the filing of the note of issue on October 27, 2006, and does not deny that defendant's motion is timely. Under such circumstances, it appears that the deadline for making a timely motion for summary judgment was no later than 120 days after the filing of the note of issue, i.e., by February 24, 2007, and that the cross motion is untimely (see Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Brill v City of New York, 2 NY3d 648 [2004]).

Where a party fails to make a motion for summary judgment in a timely manner, the motion may only be entertained by the court if the movant can show "good cause" for the delay in making the motion (i.e., satisfactory explanation for the untimeliness) (see Brill v City of New York, 2 NY3d at 648). However, an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on

nearly identical grounds because "the nearly identical nature of the grounds may provide the requisite good cause (see CPLR 3212[a]) to review the untimely ... cross motion on the merits" (Grande v Peteroy, 39 AD3d 590, 591-592 [2007]; see Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496, 497 [2005]; Boehme v A.P.P.L.E., 298 AD2d 540 [2002]; Miranda v Devlin, 260 AD2d 451 [1999]).

Under such circumstances, plaintiff has demonstrated that good cause exists for permitting her late cross motion. In addition, there is no showing of prejudice. The court, therefore, shall exercise its discretion and entertain the cross motion of plaintiff (see Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124, 129 [2004]; cf. Espejo v Hiro Real Estate Co., 19 AD3d 360 [2005]).

At the outset, the court notes that defendant has failed to establish there are any cross claims or counterclaims asserted against him. Under such circumstances, that branch of the motion by defendant for summary judgment dismissing the cross claims and counterclaims asserted against him is denied as moot.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

It is in the public interest that each landowner be free to lawfully use his or her property to the fullest possible extent consistent with the right of others to use their own property free from unreasonable interference (see 2 NY PJI2d 3:16 [2007]). Where there is an unreasonable use of the land, to the material injury of a neighbor's right to use and enjoy his or her land, a party may sue for the tort of private nuisance. The elements of the tort of 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 (see Copart Indus. v Consolidated Edison Co. of New York, 41 NY2d 564, 570 [1977]; Mangusi v Town of Mount Pleasant, 19 AD3d 656 [2005]; Weinberg v Lombardi, 217 AD2d 579 [1995]).

"The interference may take the form of (1) damage to plaintiff's land, buildings or vegetation (Copart Industries, Inc. v Consolidated Edison Co., [41 NY2d 564], supra; Dunlop Tire & Rubber Corp. v FMC Corp., 53 AD2d 150 [4th Dept 1976)], (2) annoyance, inconvenience or discomfort to one who has the

necessary property interest (Kavanagh v Barber, 131 NY 211 [1892]; Crawford v Tyrell, 128 NY 341 [1891]; Cogswell v New York, N.H. & H.R. Co., 103 NY 10 [1886]; see also State v Fermenta ASC Corp., 166 Misc 2d 524 [Sup Ct, Suffolk Co, 1995]), or (3) the threat of future substantial damage to plaintiff's property (Wall Street Transcript Corp. v 343 East 43rd Street Holding Corp., 81 AD2d 783 [1st Dept 1981]; Buchanan v Cardoza, 24 AD2d 620 [2d Dept 1965], affd in part and dismissed in part 16 NY2d 1029 [1965]). The interference must be substantial, not trifling, material and actual, not fanciful or sentimental (Copart Industries, Inc. v Consolidated Edison Co., [41 NY2d 564], supra; McCarthy v Natural Carbonic Gas Co., 189 NY 40 [1907]; Bohan v Port Jervis Gas-Light Co., 122 NY 18 [1890]; Dugway, Ltd. v Fizzingolia, 166 AD2d 836 [3rd Dept 1990], appeal withdrawn 77 NY2d 902 [1991])" (Osarczuk v Associated Universities, Inc.,, NYLJ, Sept. 11, 1996, at 25, col 5 [Sup Ct, Suffolk County], mod on other grounds 36 AD3d 872 [2007]; see 2 NY PJI2d 128 [2007]).

"The question of whether there has been a substantial interference with plaintiff's use and enjoyment of his/her property is one to be resolved by the trier of fact and involves a review of the totality of the circumstances based upon a balancing of the rights of the defendant to use his or her property against the rights of the plaintiff to enjoy his or her property (see e.g. Turner v Coppola, 102 Misc 2d 1043, 1047 [1980], affd 78 AD2d 781 [1980]; Walker v Wearb, 6 NYS2d 548, 552-553 [1938]). The balancing amounts to a risk-utility analysis weighing the social value of the conduct involved against the harm to private interests (Little Joseph Realty, Inc. v Town of Babylon, [41 NY2d 738, 744] [1977]; Kreindler, 14 NY Prac, New York Law of Torts § 4:4)" (Iny v Collom, 13 Misc 3d 75 [NY Sup App Term 2006]). In addition, "'[a]n invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct'" (Copart Indus. v Consolidated Edison Co. of New York [41 NY2d 564], supra at 571, quoting Restatement, Torts, § 825) (Higgins v Village of Orchard Park, 277 AD2d 989 [2000]).

The issue of whether a use constitutes a private nuisance ordinarily turns on questions of fact (see Copart Inds. v Consolidated Edison Co., 41 NY2d 564, supra; McCarty v Natural Carbonic Gas Co., 189 NY 40, supra; Murray v Young, 97 AD2d 958 [4th Dept 1983]). In this instance, the court notes that the writing found on the copies of the photographs submitted by plaintiff is inadmissible hearsay, and may not be considered upon her motion (CPLR 3212[b]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Nevertheless, the copies of the

photographs themselves, and the record of testimony taken at examinations before trial, reveal conflicting evidence as to the reasonableness of defendant's activities and the degree of interference with plaintiff's use and enjoyment of her land. Questions of fact exist as to whether defendant's admitted feeding of birds, by means of the bird feeders erected in close proximity to the property line shared with plaintiff, constitutes an interference, substantial in nature, intentional in origin and unreasonable in character, with plaintiff's right to use and enjoy her land.

To the extent defendant asserts plaintiff has suffered no actual damages, where a nuisance is found to exist, a plaintiff is entitled to recover at least nominal damages in an action in equity for relief against the nuisance (see Francis v Schoellkopf, 53 NY 152 [1873]; Carrabis v Brooklyn Ash Removal Co., 249 App Div [2d Dept 1936]; Murray v Archer, 52 Hun 613, 5 NYS 326 [1889]). Again, plaintiff seeks permanent injunctive relief herein.

To the extent plaintiff seeks attorney's fees, it is the general rule that each party bears the cost of its own attorney's fees absent a contractual or statutory liability (see Hunt v Sharp, 85 NY2d 883 [1995]; Chapel v Mitchell, 84 NY2d 345, 348-349 [1994]; Mighty Midgets v Centennial Ins. Co., 47 NY2d 12, 21 [1979]). Nevertheless, the courts have recognized exceptions when the party seeking an award of fees shows that the opposing party's malicious or tortious conduct proximately caused it to incur legal fees (see Central Trust Co., Rochester v Goldman, 70 AD2d 767 [1979], appeal dismissed 47 NY2d 1008 [1979]; United Pickle Co. v Omanoff, 63 AD2d 892 [1978]) and when the litigation creates a benefit to others (see Harradine v Board of Supervisors of Orleans County, 73 AD2d 118, 122 [1980]; see generally In re John T., 2007 WL 2002858 [2d Dept 2007]).

The issue of whether defendant's actions were "malicious acts [that caused] a person to incur legal fees" (Harradine v Board of Supervisors of Orleans County, 73 AD2d at 122), or "malicious or tortious conduct proximately caus[ing] [plaintiff] to incur legal fees" (Huling v Copp, 175 AD2d 572, 573 [1991]), or "tortious" (Central Trust Co., Rochester v Goldman, 70 AD2d at 768, or constituting "malice," or "actuated by evil or reprehensible motives" (Taylor v Leardi, 120 AD2d 727, 728 [1986]; see United Pickle Co. v Omanoff, 63 AD2d at 893 ["entirely motivated by a disinterested malevolence"]) shall be addressed at trial.

Accordingly, that branch of the motion by defendant for summary judgment dismissing the complaint is denied. That branch of the motion seeking dismissal of cross-claims and counterclaims

is denied as moot. The cross motion for partial summary judgment by plaintiff for a permanent injunction is denied.

Dated:July 30, 2007

J.S.C.