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*SHORT FORM ORDER*

*SUPREME COURT - STATE OF NEW YORK*

*Present:*

*HON. THOMAS P. PHELAN,*

*Justice*

TRIAL/IAS PART 4
NASSAU COUNTY

DAVID FELLS & ALLISON FELLS,

Plaintiff(s),

ORIGINAL RETURN DATE:09/14/09
SUBMISSION DATE: 10/26/09
INDEX No.: 66/08

-against-

KAREN SCHNEIDER,

MOTION SEQUENCE #1

Defendant(s).

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion..... | 1 |
| Answering Papers..... | 2 |
| Reply..... | 3 |
| Plaintiffs' Memorandum of Law..... | 4 |
| Defendant's Memorandum of Law..... | 5 |

Motion by defendant for an order pursuant to CPLR 3211(a)(7) dismissing plaintiffs' complaint or, in the alternative, pursuant to CPLR 3212 granting summary judgment on the issue of liability is decided as follows:

Plaintiffs and defendant own contiguous, residential properties on Circle Drive in Syosset, New York. Plaintiffs purchased their home approximately nine years ago, while defendant has been residing in her home for approximately 25 years (D. Fells Dep., pp. 8-9). The previous owners of plaintiffs' home had installed a four-foot high wooden fence which runs along the parties' property line.

According to plaintiffs, immediately before they moved into their home, certain neighbors noticed defendant applying white paint to her side of the fence (Id.). Plaintiff David Fells approached defendant and inquired about the fence. Defendant allegedly informed Mr. Fells that it was her fence and asked if he had any objection to her painting it. Mr. Fells replied that he did not so long as she maintained it (Id., pp. 14-18; Schneider Dep., pp. 42-43). According to defendant, however, she asked Mr. Fells about painting the fence because it was his fence (Schneider Dep., p. 48).

Plaintiffs contend that over the ensuing years, defendant did not maintain or repaint the fence and that, as a result, the white paint she had applied chipped, peeled and deteriorated. Although plaintiffs assert that defendant is wholly responsible for the deterioration which occurred, defendant contends that plaintiffs themselves caused or contributed to the peeling by using a power washer on their side of the fence (Id., pp. 44-47). Moreover, defendant contends that she did, in fact, ask plaintiffs if she could repaint the fence, but they never responded to her requests (Id., pp. 51-53).

It is undisputed that within a year after they purchased the home, and without obtaining variance or permit, plaintiffs installed their own six-foot high fence, which exceeded the code-prescribed, four-foot height limit (D. Fells Dep., pp. 10-13). In September 2007, the Town of Oyster Bay issued a notice of code violation to plaintiffs based on (1) the six-foot fence they had installed, which exceeded the four-foot height limitation; and (2) the deteriorated and peeled condition of the painted fence which faced defendant's property (A. Fells Dep., pp. 59, 60-63, 117-118).

The parties' relationship further deteriorated when defendant and her gardeners allegedly, and without license to do so, cut and damaged plaintiffs' hemlock trees and arborvitaes, which are planted on or near the parties' property lines (D. Fells Dep., pp. 10-13). According to defendant, however, she cut only those branches which had grown beyond the fence and extended over her property and did so exclusively while standing on her side of the fence (Schneider Dep., pp. 74-81, 92).

The record indicates that at some point in 2005, defendant acquired a Rottweiler-Golden Retriever mix dog from an animal shelter, which defendant allegedly allows to roam free and unleashed near plaintiffs' property (Id., pp. 6-11, 14-15; A. Fells Dep., pp.107-110). According to plaintiffs, the dog is large and frightens both plaintiffs and their two young children. Moreover, the dog habitually climbs up on defendant's open and unscreened window sills and then hangs its head and paws out of the window (Schneider Dep., pp. 14-21; A. Fells Dep., pp. 105-111, 124; D. Fells Dep., pp. 66-69).

According to plaintiffs, defendant regularly and deliberately leaves the windows and screens open all day while she is away at work (Schneider Dep., 16). Plaintiffs claim that the dog growls and barks for extended periods of time and thereby interferes with their ability to quietly enjoy and use their property (A. Fells Dep., pp. 110-113; D. Fells Dep., pp. 57-58, 82-85). Defendant testified that although in the beginning, the dog was a barker, he became acclimated to his surroundings and cut down on his barking (Schneider Dep., pp. 18, 22).

Plaintiffs also contend that defendant has been confrontational, petty and has made it a part-time job to call the police, register numerous complaints and file violations against plaintiffs with the Town of Oyster Bay (A. Fells Dep., pp. 63-65, 71-72, 116; D. Fells Dep., pp. 75-78; Schneider Dep., pp. 60-66, 82-84, 88, 98-102).

Plaintiff commenced the within action setting forth causes of action sounding in trespass, nuisance and damage and destruction of property (Cmplt.,¶¶ 38, 53). Defendant interposed an answer containing several affirmative defenses, including a defense alleging that the claims are time barred (Ans., ¶ 26). Defendant's motion is granted to the extent indicated below.

It is alleged in plaintiffs' complaint that defendant has done nothing to remedy the currently deteriorated condition of the fence; that the paint in its present condition has created a nuisance reducing the value of their property; and that the Town of Oyster Bay issued a Code violation in 2007, requiring plaintiffs to retain counsel and expend fees in defending against the violation (Cmplt., ¶¶ 32-33).

As to the fence-based nuisance and trespass claims, it is settled that the "[t]he essence of trespass is the invasion of a person's interest in the exclusive possession of land" (*Zimmerman v. Carmack*, 292 AD2d 601, 602), and that, accordingly, a person who enters "upon the land of another without permission, 'whether innocently or by mistake, is a trespasser'" (*Kaplan v. Incorporated Village of Lynbrook*, 12 AD3d 410, 412 *quoting from*, *Golonka v. Plaza at Latham*, 270 AD2d 667, 669, *and*, 104 N.Y. Jur. 2d, Trespass, § 10, at 464 *see, Hill v. Raziano,* 63 AD3d 682; *Curwin v. Verizon Communications (LEC),* 35 AD3d 645, 645; *Gellman v. Seawane Golf & Country Club, Inc.*, 24 AD3d 415, 418; *Schwegel v. Chiaramonte*, 4 AD3d 519, 521; *cf., Bloomingdales, Inc. v. New York City Transit Authority*, 13 NY3d 61, 65-66 [2009]).

To "recover damages based on the tort of private nuisance, a plaintiff must establish an interference with the use or enjoyment of land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendants' conduct" (*Anderson v. Elliott*, 24 AD3d 400, 402 *see also*, *Domen Holding Co. v. Aranovich*, 1 NY3d 117, 123-124 [2003]; *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564, 569 [1977]; *Mangusi v. Town of Mount Pleasant*, 19 AD3d 656, 657; *Ward v. City of New York,* 15 AD3d 392, 393). Nevertheless, "'things merely disagreeable, however, which simply displease the eye * * * no matter how irritating or unpleasant, are not nuisances" (*Dugway, Ltd. v Fizzinoglia*, 166 AD2d 836, 837, *quoting from*, 81 NY Jur2d § 17 *see also*, *Balunas v. Town of Owego*, 56 AD3d 1097; *Ruscito v. Swaine, Inc.*, 17 AD3d 560, 561).

Actions sounding in trespass and to recover damages for injury to property must be commenced within three years of accrual (CPLR 214(4); *Jemison v. Crichlow*, 139 AD2d 332, 336, *affd,*74 NY2d 726 [1989]; *Ferran v. Williams*, 194 AD2d 962, 963 *cf.; Ruddy v. Citibank, N.A.*, 224 AD2d 509, 510; *see*, *Russell v. Dunbar,* 40 AD3d 952, 953-954; *Mandel v. Estate of Frank L. Tiffany*, 263 AD2d 827, 829; *Cranesville Block Co. v. Niagara Mohawk Power Corp.*, 175 AD2d 444, 445; *see also*, *Sova v. Glasier*, 192 AD2d 1069, 1070).

With these principles in mind, the Court finds that defendant has *prima facie* established that plaintiffs' trespass and damage to property claims, to the extent based upon the specific act of fence painting, are time barred, since the discrete, one-time painting incident occurred over

eight years ago in the fall of 2000 (*see, Cranesville Block Co. v. Niagara Mohawk Power Corp.*, 175 AD2d at 445; *Mandel v. Estate of Frank L. Tiffany, supra; see generally, Hebrew Institute for Deaf and Exceptional Children v. Kahana,* 57 AD3d 734; *Savarese v. Shatz*, 273 AD2d 219, 220).

Plaintiffs' opposition does not address the limitations issue and does not set forth "evidentiary facts' establishing that the case falls within an exception to the [s]tatute of [l]imitations" (*Assad v. City of New York*, 238 AD2d 456, 457 *see, Lessoff v. 26 Court Street Associates, LLC,* 58 AD3d 610; *Garcia v. Peterson,,* 32 AD3d 992, 992). Moreover, to the extent that plaintiffs' complaint pleads a nuisance theory relative to the fence-painting incident, that claim is miscast and should also be dismissed.

The record establishes that neither the initial fence painting nor its currently existing condition has created a substantial "interference with the [plaintiffs'] use or enjoyment of land" within the meaning of applicable case law governing nuisance claims (*Dugway, Ltd. v Fizzinoglia*, *supra*; Ruscito v. Swaine, Inc., 17 AD3d at 561; *see, Anderson v. Elliott*, 24 AD3d at 402; *Ward v. City of New York*, 15 AD3d 392, 393). Significantly, "[n]uisance imports a continuous invasion of rights, 'a pattern of continuity or recurrence of objectionable conduct'" (*Domen Holding Co. v. Aranovich, supra*, 1 NY3d at 123, *quoting from, Frank v. Park Summit Realty Corp.*, 175 AD2d 33, 34, *mod. on other grounds,* 79 NY2d 789 [1991]).

With respect to the foliage claims, the complaint sets forth theories sounding in both trespass and damage to property. It has been generally held that "[r]ecovery for damages from overhanging branches depends upon the presence of actual injury to plaintiff or plaintiff's property (*Turner v. Coppola*, 102 Misc.2d 1043, 1046 [Sup. Ct., Nassau Co. 1980], *affd*,78 AD2d 781; *Adams v. Hahne,* 59 Misc.2d 827, 830-831 [Sup. Ct., Queens Co. 1969] *see generally*, 1 NY Jur2d, Adjoining Landowners, § 56, *Trees and shrubs on boundary* line"). It has also been held that that "[s]ummary abatement by self-help" which entails the "removal of overhanging tree branches, is permissible" although this right "does not extend to destruction or injury to the main support systems of the tree" (*Turner v. Coppola*, *supra*; *Accord, 1212 Ocean Ave. Housing Development Corp. v. Brunatti*, 50 AD3d 1110, 1112).

Here, while plaintiffs' complaint and opposing papers allege that defendant physically entered upon their property, there is no evidence indicating that defendant or her agents performed any cutting or trimming other than from her own side of the fence (D. Fells Dep., pp. 58-59). Plaintiffs also suggest, however, that defendant (1) reached over the fence so as to cut limbs and branches on their side; and (2) tossed whatever branches she cut over the fence onto their property (A. Fells Dep., pp. 73-84; D. Fells Dep., p. 48).

In support of the motion to dismiss the foliage claims, defendant submitted the expert affidavit of a certified arborist who has opined, *inter alia*, that plaintiffs' hemlocks were not damaged by defendant's alleged cutting but rather were diseased and infested by the so-called "wooly adelgid" insect, a common pest, which has caused widespread damage to hemlocks on Long Island (Daley Aff., Def's Ex. H, ¶¶ 10-12).

The arborist stated that further damage to the hemlocks occurred since plaintiffs themselves allegedly "girdled" the trees by using rope to tie them together and to hold them in a stated position, a practice which allegedly chokes off "vascular tissue as branches increase in diameter" (Id., ¶¶ 11-12). The arborist concluded that plaintiffs' arborvitaes were in good health and were not afflicted with any malady or disease at all, an assertion buttressed by David Fells' own testimony to the effect that "the arborvitaes look pretty good. A couple of browning areas here and there, but they are in pretty good shape" (D. Fells Dep., pp. 64).

In opposition plaintiffs submit a brief, written statement from a landscape architect (Pls' Ex. E). The document is unsworn and therefore lacking in competence as an evidentiary submission on the motion (*see, Bright ex rel. Bright v. McGowan,* 63 AD3d 1239; *Alvarez v. American Intern. Realty Corp.,* 60 AD3d 793, 794; *1212 Ocean Ave. Housing Development Corp. v. Brunatti*, 50 AD3d 111). The Court notes that the expert's statement does not address the condition of plaintiffs' arborvitaes but attempts to rebut the claims made by defendant's arborist concerning the allegedly diseased state of the hemlocks.

Since plaintiffs have failed to rebut defendant's expert submissions, the foliage-based portions of the damage to property and trespass claims must also be dismissed.

With respect to the dog, the complaint alleges, *inter alia*, that defendant (1) has repeatedly allowed the dog to roam unleashed in front of their home, thereby intimidating and frightening their two young children; and (2) deliberately and virtually every day, permits the dog access to open, unscreened windows, from which it hangs and barks excessively down towards plaintiffs' yard and elsewhere (Cmplt., ¶¶ 26-30; Schneider Dep., 16-17).

Viewing the evidence "in the light most favorable to * * * [the plaintiffs], as is appropriate in the context of * * * [a] motion for summary judgment" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106 [2006]; *Mosheyev v. Pilevsky*, 283 AD2d 469), there exist triable issues of fact with respect to whether defendant's conduct in maintaining the dog created a private nuisance, by "substantially and unreasonably" interfering with plaintiffs' enjoyment of their property (*see generally, Zimmerman v. Carmack, supra,* 292 AD2d at 602; *cf., 980 Fifth Avenue Corp. v. Smith*, 295 AD2d 133; *Lewis v. Stiles*, 158 AD2d 589), *i.e.*, in particular, her alleged conduct in (1) regularly allowing her dog to roam unleashed in the manner and fashion alleged by plaintiffs; and (2) her deliberate and repeated practice of facilitating or encouraging the dog's propensity to bark through unscreened, opened windows overlooking plaintiffs' yard and the street (*see, Zimmerman v. Carmack*, 292 AD2d 601, 602; *see also, JP Morgan Chase Bank v. Whitmore*, 41 AD3d 433, 434; *see generally, Brodcom West Development Co. v. Best*, 23 Misc.3d 1140(A), 2009 WL 1664450 at 7 [New York City Civil Court 2009]; Crotona Park West v Aponte, NYLJ, March 20, 2002, p. 22, col., 2 [Civil Ct., Bronx Co.]; (Schneider Dep., 16-17 *cf., Schwegel v. Chiaramonte*, 4 AD3d 519, 520-521).

Although plaintiffs seek punitive damages in connection with their dog barking/nuisance claims, "[p]unitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as

to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally" (*Tartaro v. Allstate Indem.* Co., 56 AD3d 758; *see, Ross v. Louise Wise Services, Inc.*, 8 NY3d 478, 489 [2007]).

Here, the Court finds that defendant's alleged misconduct does not rise to a level which would support an award of punitive damages (*see, e.g., NPR, LLC v. Met Fin Management, Inc.*, 63 AD3d 1128, 1130; *Marlowe v. Ferrari of Long Island, Inc.*, 61 AD3d 645, 646; *Grazioli v. Encompass Ins. Co.*, 40 AD3d 696, 697-698). The Court has considered defendant's remaining contentions and concludes that they do not warrant an award of relief beyond that granted above.

Accordingly, the first, second, third and fifth causes of action of plaintiffs' complaint are hereby dismissed.

This decision constitutes the order of the court.

Dated: 12-15-09

HON THOMAS P. PHELAN

J.S.C.

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