STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

SAM FARELLA, DAVID G. POHLE, and
ASSHA SANGAVI,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 09-843
RJI NO. 19-09-4275

WELDON HOUSE INC., and
DIAMONDBACK MOTORCROSS, INC.,

Defendants.

Supreme Court Greene County All Purpose Term, April 12, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Bunting, Goner & Associates
Gerald Bunting, Esq.
Attorneys for Plaintiffs
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New York, New York 10018

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Attorney for Defendant Weldon House, Inc.
424 Warren Street
Hudson, New York 12534

Michael P. Delaney, Esq.
Attorney for Defendant Diamondback Motocross, Inc.
465 New Karner Road
Albany, New York 12205

TERESI, J.:

Plaintiffs commenced this nuisance/declaratory judgment/injunction action against Defendants[1] seeking to prevent them from using a parcel of real property in East Durham, New

[1] As Diamondback Motocross, Inc., by its attorney's letter, simply joined Weldon House, Inc.'s positions on these motions they are being collectively referred to as Defendants herein.

York for motocross racing. Issue was joined by Defendants, discovery is complete and a trial date certain has been set for July 18, 2011.

Defendants now move to vacate the Hon. Daniel Lalor's August 13, 2009 preliminary injunction, as modified by this Court on March 26, 2010. Plaintiffs oppose the motion and cross move for summary judgment, as limited by their notice of motion, granting the permanent injunction they seek. Defendants oppose the cross motion. Because neither party demonstrated their entitlement to the relief they seek, their motions are denied.

As previously noted by this Court, "[a] motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court and may be granted upon compelling or changed circumstances that render continuation of the injunction inequitable." (Thompson v. 76 Corp., 54 AD3d 844 [2d Dept. 2008], quoting Wellbilt Equip. Corp. v Red Eye Grill, 308 AD2d 411 [1st Dept. 2003][internal quotation marks omitted]; Cade v. New York Community Bank, 18 AD3d 489 [2d Dept. 2005]).

Here, as the trial of this matter is set to commence in two months, Defendants failed to demonstrate that continuation of this injunction until the trial is inequitable. Defendants' attorney's conclusory statement that Defendants will loose a "year of revenue" unless the injunction is lifted is wholly unsupported with any evidentiary facts and is otherwise of no probative value. (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]). Specifically, such proof demonstrates neither the construction activities necessary to create the proposed motocross track, the motocross events that could be scheduled to generate revenue, nor the amount of potential revenue lost. The affidavits supporting Defendants' motion similarly fail to proffer any non-

conclusory proof on these basic issues of construction and revenue necessary to demonstrate the inequity of continuing the injunction for only two more months. As such, Defendants' motion is denied.

Turning next to Plaintiffs' motion for summary judgment in their favor, Plaintiffs "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, and the evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference." (Andrew R. Mancini Associates, Inc. v. Mary Imogene Bassett Hosp., 80 AD3d 933, 935 [3d Dept. 2011], quoting Rought v. Price Chopper Operating Co., Inc., 73 AD3d 1414 [3d Dept. 2010]). Moreover, Plaintiffs' "burden may not be met by pointing to gaps in [Defendants'] proof." (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326, 1327 [3d Dept. 2010]).

Although Plaintiffs' failed to articulate their nuisance theory, because it is based upon Defendants' proposed racetrack, this cause of action may state a public or private nuisance. (Wheeler v. Lebanon Valley Auto Racing Corp., 303 AD2d 791 [3d Dept. 2003]). On this record, however, Plaintiffs failed to demonstrate their entitlement to an injunction, as a matter of law, on either theory.

"[A] public nuisance is actionable by private persons only if it is shown that the person suffered special injury beyond that suffered by the community at large." (Wheeler v. Lebanon Valley Auto Racing Corp., supra at 793, quoting 532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 NY2d 280 [2001]; Agoglia v. Benepe, 77 AD3d 927 [2d Dept. 2010]). On this record, Plaintiffs neither demonstrated, with admissible proof, the applicable "community at large" nor

their "special injury." While Plaintiffs' extensive proof that the Defendants' proposed motocross racetrack, when operational, will adversely affect their properties; such proof is insufficient to demonstrate the necessary public nuisance elements.

Similarly unavailing is Plaintiffs' request for a permanent injunction based upon a private nuisance theory. On this record, Plaintiffs proffer no proof that the loss they would suffer from Defendants' operation of a racetrack outweighs the economic effects of a permanent injunction prohibiting Defendants' proposed racetrack. Absent such proof, a permanent injunction cannot be granted on a private nuisance theory. (Little Joseph Realty v. Town of Babylon, 41 NY2d 738 [1977]; Boomer v. Atlantic Cement Co., 26 NY2d 219 [1970]; Wheeler v. Lebanon Valley Auto Racing Corp., supra; Hohenberg v. 77 West 55th St. Assoc., 90 AD2d 750 [1st Dept. 1982]).

Nor have Plaintiffs demonstrated their entitlement to a permanent injunction on their cause of action alleging Defendants' unspecified violations of local, state and federal law. Plaintiffs' experts affidavits established that the Defendants noise mitigation plan, proffered during this litigation, has not been approved by the Department of Environmental Conservation (hereinafter "DEC"). The expert affidavits further established the necessity for DEC approval on certain portions of such plan. Plaintiffs failed to demonstrate, however, any steps that Defendants have taken to implement their noise mitigation plan. As such, Plaintiffs have established no violation. Similarly unavailing are Plaintiffs' expert's speculations about wetlands on Defendants' property. Such expert neither establishes the existence of a wetland on Defendants' property nor the motocross project's disruption of such potential wetland. At this point, the violations Plaintiffs assert are theoretical and speculative. They do not provide the basis for a permanent injunction.

The parties' remaining contentions have been examined and found to be lacking in merit. Accordingly, both Plaintiffs' and Defendants' motions are denied.

This Decision and Order is being returned to the attorneys for Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: May 19, 2011
Albany, New York

Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated January 28, 2011, Affidavit of Robert Gagen, dated January 27, 2011, with attached Exhibits I-III; with copy of Memorandum and attached Schedules A-S and Exhibits A-C.
2. Notice of Cross-Motion, dated February 27, 2011; Affirmation of Gerald Bunting, dated February 27, 2011; with attached Exhibits 1-23; Affidavit of Asha Sangavi, dated February 28, 2011; Affidavit of David Pohle, dated February 27, 2011; Affidavit of Russell Darnell, dated February 27, 2011, with attached Exhibit A; Affidavit of Robert Andres, dated March 2, 2011, with attached Exhibit A; Affidavit of Daniel Koehler, dated February 25, 2011, with attached Exhibits A-C; Affidavit of Steven George, dated February 10, 2011, with attached Exhibits A-F; .
3. Letter of Michael Delaney, dated March 21, 2011.
4. Affirmation of James Byrne / Robert Gagen, dated March 21, 2011, with attached Exhibit A.
5. Affirmation of Gerald Bunting, dated March 29, 2011.