Toporoff v Galli
2014 NY Slip Op 32997(U)
February 25, 2014
Supreme Court, Westchester County
Docket Number: 56780/13
Judge: Robert DiBella

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

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Ruth Toporoff and Michael Richman,

Plaintiffs,

-against-

Suzanne and Stefano Galli,

Defendants.

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DECISION AND ORDER
Motion Seq. No. 001-002

INDEX NO. 56780/13

DIBELLA, J.

In this action, the plaintiffs allege that the defendants created and maintain a private nuisance on their property by illegally and improperly storing horse manure, which causes unreasonable and offensive odors and substantially interferes with the plaintiffs' use and enjoyment of their property. The plaintiffs move for a preliminary injunction enjoining the defendants from any continued or further storage of manure on the defendants' property within 50 feet of the southern and western property lines of the defendants' property abutting Alice Road and the church cemetery. The defendants oppose the motion and cross-move for an order enjoining the plaintiffs from trespassing on the defendants' property and awarding them costs, expenses and attorney's fees.

A hearing was conducted on August 23, August 26, August 27 and August 28, 2013. The plaintiffs called three witnesses: George Cronk, Marsha Chambers and plaintiff Michael Richman. The defendants called four witnesses: Nancy Breakstone, Hali Fravola, defendant Suzanne Galli, and Peter Gregory. The Court admitted into evidence and

considered the following exhibits: plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 21, 22, 23, 24 and defendants' Exhibits A, C, E, I, K, L, Q, R, S, V, W, X, Y. In addition to the testimony and exhibits adduced at the hearing, the Court read and considered the following papers:

1) Order to Show Cause dated May 7, 2013 with Affirmation in Support by Eric A. Sauter, Esq. dated May 2, 2013 and Exhibits A, B and A;

2) Notice of Cross-Motion dated May 16, 2013 with Affirmation in Opposition to Plaintiffs' Motion and in Support of Defendants' Cross-Motion with Exhibits A-I;

3) Affirmation in Opposition to the Cross-Motion and in Further Support of the Motion by Eric A. Sauter, Esq. dated May 23, 2013 with Exhibits A-C; and

4) Affidavit in Opposition to the Cross-Motion and in Further Support of the Motion by Ruth Toporoff sworn to May 23, 2013 with Exhibits A-D.

Upon the testimony, evidence and papers submitted on the motion and cross-motion, the Court makes the following findings of fact and conclusions of law.

The plaintiffs and the defendants are neighbors and owners of single family homes on large parcels of land in Bedford, New York. The plaintiffs purchased their property at 12 Alice Road in January 1995. The approximately four-acre lot is improved with a single family home, a barn and a pool. The plaintiffs keep and maintain one horse and one pony on the property. They remove the resulting manure from the property on a daily basis and store it in a dumpster which is emptied approximately once a month. The plaintiffs' dumpster is located approximately 200 feet from Alice Road, 65 feet from their property

line with their closest neighbor and at least 200 feet from their closest neighbor's residence. The plaintiffs feed their animals a "special food" designed to reduce the smell of their waste and take other precautions to mitigate the deleterious effects of keeping such animals.

When the plaintiffs purchased their property in 1995, the property currently owned by the defendants was owned and occupied by the Reynolds family. The address of the Reynolds/Galli property is 341 Succabone Road and the property is located directly across Alice Road from the plaintiffs' property. The Reynolds/Galli property is also approximately four acres and is improved with a single family residence, a separate guest cottage, a pool and a barn. The Reynolds/Galli property also contains substantial wetlands area, a well and septic fields with the requisite expansion area.

In 1982, the Town of Bedford adopted a zoning ordinance which, inter alia, prohibited the storage of manure within 50 feet of any property line or within 150 feet of any existing residence on any neighboring lot. Prior to and subsequent to the enactment of this zoning ordinance, the Reynolds maintained one horse and stored the manure in a pile approximately 18 feet from their property line adjacent to Alice Road and within 150 feet of the plaintiffs' residence at 12 Alice Road. According to the credible testimony at the hearing, the Reynolds' horse passed away in the late 1980's or early 1990's and thereafter they did not keep any horses or other farm animals on the property. Thus, when the plaintiffs purchased their property in 1995, no horses were being kept on the Reynolds/Galli property.

In the summer of 1998, the Reynolds sold the property at 341 Succabone Road to

the Galli defendants. The Gallis immediately acquired two horses and a pony and re-established the manure pile in the same location. Later, they purchased a dumpster, placed it where the manure pile had been, and used the dumpster to store their manure. The dumpster is periodically[1] emptied by a contractor who requires truck access to the location where the dumpster is located. The Gallis also built a four-foot high wall of stone and wood around the perimeter of the manure storage/dumpster area. The Gallis have also initiated a "Whole Farm Plan" pursuant to which manure would be composted and spread around the property as a "soil amendment."

The plaintiff Michael Richman testified as to the offensive nature of the smell emanating from the Galli property on the northerly side of his property. There was also non-party testimony from Ms. Marsha Chambers. Ms. Chambers testified that she was friendly with both parties and had a very good relationship with the Gallis. She also testified that she has twenty years' experience caring for and maintaining horses and that she currently owns six horses. Ms. Chambers testified that she noticed a very prevalent and strong manure smell in the driveway and kitchen area of the plaintiffs' property - this area is the portion of the plaintiffs' property which borders Alice Road and is closest to the Gallis' dumpster. Finally, she testified that she did not smell manure in the pool area behind the plaintiffs' house - this area is furthest from the Gallis' dumpster and closest to the plaintiffs' dumpster.

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[1] Mrs. Galli testified that, prior to 2012, they would have the dumpster emptied every 6 weeks. However, in 2012 they began using pelletized sawdust as bedding and this decreased the volume of waste generated by routine cleaning of the stalls. This resulted in the dumpster being emptied once every three months.

On an application for a preliminary injunction, the plaintiff must demonstrate by clear and convincing evidence: (1) a likelihood of success on the merits, (2) a danger of irreparable injury in the absence of an injunction, and (3) a balance of equities tipping in the plaintiff's favor (Aetna Ins. Co. v. Capasso, 75 NY2d 860, 862 [1990]; In Re Rice, 105 AD3d 962, 963 [2d Dep't 2013]).

The elements of a common-law cause of action for a private nuisance are: (1) an interference with the use or enjoyment of land, which is (2) substantial in nature, (3) intentional in origin, (4) unreasonable in character, and is (5) caused by another's conduct in acting or failing to act (see Massaro v. Jaina Network Sys., Inc., 106 AD3d 701, 703 [2d Dep't 2013]).

As could be expected, the likelihood of success on the merits is a hotly contested issue in this case. The plaintiffs contend that the placement, spreading and storage of manure within 50 feet of the southern and western property lines violates section 125-25 (B)(3)(b) of the Town of Bedford Zoning Code and therefore constitutes a per se nuisance. They refer to the fact that the Town of Bedford has issued violations to the Gallis for improper manure storage[2]. The defendants contend that, although the placement, spreading and storage of manure on their property does occur within the 50-foot "setback" area, "spreading" is not prohibited by the Zoning Code, and their placement and storage constitute a non-conforming use which may be continued pursuant to the Zoning Code.

In the instant case, it is undisputed that, absent non-conforming use status, the

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[2] As of the date of the hearing of this matter, the Town of Bedford has yet to adjudicate the outstanding violations.

storage of manure in their storage dumpster violates the 50-foot "setback" provision of the Town Code. Pursuant to the Bedford Town Code, section 125-11(B) (i)"[a] non conforming use shall not be enlarged or increased nor shall it be extended to occupy a greater area of land than occupied by such use at the time of the adoption of this chapter." And, "(4) [i]f such nonconforming use of land or any portion thereof ceases for any reason whatsoever for a continuous period of more than six months ... any future use of such land shall be in conformity with all provisions of this chapter."

The plaintiffs contend that, in violation of the zoning code, the defendants "enlarged" the use by adding the dumpster and erecting the four foot high retaining wall and "increased" the volume and intensity of the use by adding the manure accumulation of an additional horse and a pony (i.e. estimated to produce 162 lbs. of manure per day). They also contend that within 6 months after the death of the Reynolds' only horse in the late 1980's or early 1990's, the non-conforming use was extinguished and therefore the re-introduction of horse manure in the area of the pre-existing storage pile in 1998 also violated section 125-11 (B)(4) of the Zoning Code.

While the parties' proof and legal memoranda focus largely on the issue of whether the Gallis' current manure storage practices constitute a violation of the Town of Bedford Zoning Code, that determination is neither necessary nor dispositive of the dispute at issue in this lawsuit. In fact, whether a municipality or other agency has issued violations for a particular activity has been held "immaterial" to an action sounding in nuisance (see 61 West 62 Owners Corp. v. CGM EMP LLC, 77 AD3d 330 [1st Dep't 2010]). Another court has held that "a showing that [the complained-of activity] is unlawful excuses defendants

only from proving that plaintiff's actions were negligent or intentional; the other elements of a nuisance cause of action must still be shown" (Overocker v. Madigan, 2014 WL 66872 at *2 [3d Dep't 2014]).

In the instant case, the uncontroverted evidence establishes that the Gallis manure storage practices are intentional and the resulting smells are inherent in the activity. In any event, this Court finds that the issue of whether the Gallis' manure storage practices violate the Town of Bedford Zoning Code is better left, in the first instance, to the Town of Bedford.[3]

Notwithstanding the above, the plaintiffs have amply demonstrated that the defendants' storage and spreading of manure in close proximity to the plaintiffs' property interferes with the use and enjoyment of their property. The stench created by the Gallis' storage and spreading of manure in close proximity to the plaintiffs' house constitutes a substantial interference and is intentional in origin. Since the evidence also demonstrates that the manure could be stored in other areas on the Galli property with relative ease, the storage is also unreasonable. The evidence further establishes that the nature and intensity of the smell is not your typical "horse smell" routinely expected by people who have experience keeping and caring for horses on similar size lots and was described as far beyond the acceptable horse smell. Finally, the interference with the plaintiffs' use and enjoyment of their property is clearly caused by the defendants' conduct in storing their

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[3] A local determination is of course reviewable in this court either by appeal of a quasi criminal conviction in the Appellate Term or by review of a purely administrative determination by means of CPLR Article 78.

manure in close proximity to the property line closest to Alice Road. Thus, the plaintiffs have sufficiently established a likelihood of success on the merits.[4]

The plaintiffs also have satisfied the second prong of the test for a preliminary injunction, that of irreparable injury in the absence of an injunction. In the context of this case, irreparable injury is defined as "a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue..." (OSG, LLC v. 119 West 25th LLC, 20 Misc 3d 1110 at *6 [Sup Ct, NY Co 2008], citing Societe Anonyme Belge D'Exploitation De La Navigation Aerienne v. Feller, 112 AD2d 837, 840 [1st Dep't 1995]). The unrefuted testimony establishes that the defendants' spreading and storage of manure in close proximity to plaintiffs' house forces them to keep their kitchen and bedroom windows closed and interferes with the use of their south facing deck. This is an injury to property which can not be resolved by the payment of money damages (cf. Sports Channel Am. Assocs. v. Nat'l Hockey League, 186 AD2d 417 [1st Dep't 1992]; see also DiFabio v. Omnipoint Communications, Inc., 66 AD3d 635 [2d Dep't 2009]).

Finally, the testimony and other evidence clearly establish that the equities weigh in favor of the plaintiffs. The Gallis' storage of manure is placed some 350 feet away from their own house but less than 150 feet from the plaintiffs' house. It is difficult to place a greater burden on the plaintiffs to accept the odor caused by the defendants' storage of manure on their property than the defendants themselves are willing to accept. In addition,

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[4] The factual findings made herein are limited to the evidence adduced at the hearing and otherwise presented on this motion. They are not intended to constitute "law of the case" or otherwise bind either the local authorities or an ultimate trial court.

although the defendants argue that there are no other suitable locations on their four-acre lot to store their manure, the credible testimony reflects that, with a minimal investment, the defendants could relocate their manure storage and spreading facilities to several areas which would be compliant with the setback requirements set forth in the Zoning Code and less intrusive to the plaintiffs' use and enjoyment of their own property.

In accordance with the foregoing, the motion for a preliminary injunction is granted and the defendants are hereby enjoined from the storage or spreading of manure within 50 feet of any property line during the pendency of this action. The cross-motion is denied, as defendants have failed to establish the need for an order enjoining plaintiffs from any alleged trespassing on their property, and their request for costs, expenses and attorney's fees is also denied.

The parties by counsel are directed to appear in the Preliminary Conference Part on March 10, 2014 at 9:30 AM in Courtroom 811 of the Westchester County Courthouse in White Plains, New York.

This is the Decision and Order of the Court.

Dated: February 25 2014
White Plains, New York

Hon. Robert DiBella, JSC

To: Silverberg Zalantis LLP
Via e-file

Robert A. Pierce & Associates
Via e-file