

Behar v Quaker Ridge Golf Club, Inc.

2016 NY Slip Op 32970(U)

October 5, 2016

Supreme Court, Westchester County

Docket Number: 11594/10

Judge: Charles D. Wood

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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LEON BEHAR and GAIL BEHAR,

Plaintiffs,

Sequence Nos. 14-18
Index No. 11594/10

-against-

QUAKER RIDGE GOLF CLUB, INC.,

Defendant.

FILED
OCT - 6 2016
TIMOTHY C. IDONI
COUNTY CLERK
TY OF WESTCHESTER

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WOOD, J.

The following papers were read in connection with plaintiffs' motions for sanctions:

Seq. 14 (Plaintiff's First Motion for Contempt)

Plaintiffs' Order to Show Cause, Counsel's Affirmation, Leon Behar Affidavit, Exhibits.
Defendant's Opposition, Tom Dizena Affidavit, Marc Friedman Affidavit, Exhibits
Plaintiffs' Counsel's Reply Affirmation, Exhibits, Supplemental Affidavit of Leon Behar
Seq. 15-16 (Plaintiff's Second Motion for Contempt and Defendant's Cross Motion for
Costs and Sanctions)

Plaintiffs' Notice of Motion, Leon Behar Affidavit, Exhibits.
Affidavit of Marc Friedman, Exhibits, Memorandum of Law

Seq. 17 (Plaintiffs' Third Motion for Contempt)

Plaintiffs' Notice of Motion, Affidavit of Leon Behar, Exhibits.
Defendant's Memorandum of Law, Affidavit of Mark Friedman, Affidavit of Tom Dizena

Seq. 18 (Plaintiff's Fourth Motion for Contempt)

Plaintiff's Notice of Motion, Affidavit of Leon Behar
Defendant's Memorandum of Law, Affidavit of Marc Friedman, Affidavit of Tom Dizena
Reply Affirmation of Julius W. Cohn, Esq., Exhibits.

In this series of civil contempt motions, the plaintiffs seek to have the defendant held in contempt for violating the permanent injunction of the Appellate Division, Second Department, issued June 18, 2014 and the associated Judgment of Reversal entered by the Westchester County

Clerk on July 17, 2014. Plaintiffs seek rental value damages, a temporary restraining order, attorney fees and other associated relief. Defendant brings a cross motion for costs and attorney fees, and an order enjoining the plaintiffs from commencing any further actions or filing further motions without leave of the court.

This court held a trial on damages over two weeks in March 2016, and issued a decision after trial on October 4, 2016. All evidence from that trial is incorporated and judicial notice thereof is taken, to the extent that it is necessary to provide context and to properly assess the instant submissions of the parties.

Sequence 14

The first order to show cause was brought on May 24, 2016, in anticipation of the Memorial Day weekend. It sought a Temporary Restraining Order preventing Quaker Ridge from allowing play from the traditional tee box location on Hole #2 of its golf course. Oral argument was heard by the court on the return date on June 10, 2016. Plaintiffs initially claimed that seven golf balls fell onto their property in the 22 days between April 30, 2016 and May 21, 2016, then supplemented their submission to reflect five more balls by June 2, 2016, and at the appearance before the court, they amended their total count for 2016 to 15 balls.

Plaintiffs also allege that an agent of Quaker Ridge utilized a ball retriever to remove a ball or balls from their property, which they argue would render the ball counts meaningless. Quaker Ridge denies the accusation. Tom Dizena identified himself as the person with the ball retriever, and swears that he occasionally removes balls that land on Quaker Ridge's property between the net and the Behars' property with a ball retriever, and has not taken balls from the Behars' property. Quaker Ridge also points out that even if the accusation were true, golf balls within a few feet of

the property line would not be interfering with the plaintiffs' enjoyment of their home. It further states that it is in compliance with the Second Department's injunction.

Sequence 15

The plaintiffs' second motion for contempt was filed on June 22, 2016, alleging that five golf balls fell on the Behar property on June 11 and 12, 2016, bringing the total count for the 2016 season to 20. The motion also seeks \$22,294.13 in rental loss damages. Quaker Ridge disputes the timing and number of balls (one ball on June 9, one ball on June 10, two balls on June 12), and states that it is in compliance with the Second Department's injunction.

Sequence 16

On July 7, 2016 Quaker Ridge cross-moved for costs and attorneys fees, claiming that the plaintiffs' successive contempt motions are vexatious and frivolous.

Sequence 17

The plaintiffs' third motion for contempt was filed on July 22, 2016, alleging that four golf balls fell on the Behar property on July 17, 2016, bringing the total balls since April 30, 2016 to 27. The motion also seeks \$479.44 per day in rental loss damages from July 3, 2016, together with attorneys fees and a direction from the court that golf not be played from the rearward tee box location. Plaintiffs also note in this submission that they filed a separate action against the president and general manager of Quaker Ridge, seeking to hold them personally in contempt. Quaker Ridge contends that it is in compliance with the Second Department's injunction.

Sequence 18

The plaintiffs' fourth motion for contempt was filed on August 17, 2016, alleging that one golf ball fell on the Behar property on August 7, 2016, three golf balls fell on August 13, 2016, bringing the total balls since April 30, 2016 (3 ½ months of peak golf season) to 31. The motion

also seeks \$479.44 per day in rental loss damages from July 3, 2016, together with attorneys fees and a direction from the court that golf not be played from the rearward tee box location. Quaker Ridge contends that it is in compliance with the Second Department's injunction.

Discussion

For a party to prevail on a motion to punish a party for civil contempt, the movant must “demonstrate by clear and convincing evidence that the party charged has violated a clear and unequivocal court order, thereby prejudicing a right of another party to the litigation” (Katz v Katz, 73 AD3d 1134 [2d Dept 2010]). Moreover, the moving party must demonstrate that the alleged contemnors actions were calculated to, or actually defeated, impaired, impeded or prejudiced its rights or remedies (see Laland v Edmond, 13 AD3d 451 [2d Dept 2004]). In this case—in all four contempt motions—the plaintiffs have failed to meet this burden.

As noted in the court's decision after trial, the plaintiffs have essentially adopted a “one ball is too many” stance, which is wholly inconsistent with the level of balls that a neighbor adjacent to a golf course must accept (“On this record, given what has gone on before, there can be simply no excuse for either *one ball* landing in our pool area on July 3, 2016 or 4 balls landing *all over our property* on Sunday July 17, 2016” [emphasis in original])¹. Plaintiff's counsel claimed during oral argument on June 10, 2016 that “it is not a numbers game,”² but employs mathematical gymnastics and contortions to eliminate rainy days and holidays from the ball count to embellish plaintiff's numbers (“The 118 day period between July 1 and October 26, 2015, when separated into three day weekends consisting of Fridays, Saturdays and Sundays, yields a ball count of 22 balls out of the total of 40 balls falling in the 118 day period, reflecting that 55% of

¹ Affidavit of Leon Behar, sworn to July 21, 2016

² And also in his Reply affirmation, sworn to June 9, 2016.

the balls entering onto the Plaintiffs' property were from play on weekends")³. In the same way that Quaker Ridge was not given credit for not playing golf during nighttime hours in the court's decision after trial, neither will the Behars be able to artificially inflate their numbers in this analysis. The court notes that even employing these improper techniques, the Behars' "count only golf days" calculation is 4.5 balls per seven day week, which is significantly less than "3-4 golf balls each day" as previously claimed by plaintiff in this case, as well as Quaker Ridge's admitted count of 103 balls in 88 days between April 2, 2011 and June 28, 2011, upon which the Second Department based its injunction.

The Behars also claim that the current condition for them is "Russian Roulette."⁴ In his affidavits, plaintiff Leon Behar describes "high-velocity golf balls" hitting his fifty-foot trees, causing the balls to stop and fall to the ground. This once again demonstrates the folly of the Behars' written opposition to the 60-foot net application by Quaker Ridge, as noted in the decision after trial. If the "high velocity" golf ball was effectively transformed by the Behars' fifty-foot trees into a golf ball falling according to the Earth's gravitational pull, that golf ball would more than likely have been stopped by a sixty-foot net, remained on Quaker Ridge's property, and would not be landing on the Behars' property. The Behars hold out their hands for relief, but those hands are unclean.

Quaker Ridge argues that all ball counts, including the Behars' reflect acceptable intrusions for a property adjacent to a golf course, consistent with the Court of Appeals' decision in Nussbaum v Lacopo, 27 NY2d 311 (1970). Further, these numbers—compared to the numbers

³ Affirmation of Jules W. Cohn, sworn to May 24, 2016.

⁴ Affidavit of Leon Behar, sworn to July 21, 2016 and June 10, 2016 transcript at page 6, line 5, page 10, line 24, page 14, line 10

cited by the Second Department—constitute a vast improvement, and are thus in compliance with the Second Department’s injunction. The court agrees.

The court has considered Quaker Ridge’s motion for costs and fees, and does not find it to be warranted at this time. There is no reason at this juncture to believe that plaintiffs or their counsel are engaging in anything other than good faith litigation.⁵

Based upon the foregoing, it is hereby

ORDERED, that all four of plaintiffs’ motions for contempt (seq. 14, 15, 17, and 18) are denied; and it is further

ORDERED, that defendant’s cross-motion for costs and fees (seq. 16) is denied; and it is further


ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendant within ten (10) days of entry, and file proof of service within five (5) days of service; and it is further

The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this decision.

This constitutes the decision and order of the court.

Dated: October 5, 2016

White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

⁵ However, the court notes that in Exhibit “L” to Leon Behar’s affidavit, Mr. Behar emailed to his own counsel a less than good faith and vexatious instruction about opposing counsel’s name and mother.