Duffy v Baldwin
2018 NY Slip Op 33823(U)
October 25, 2018
Supreme Court, Albany County
Docket Number: 904185-18
Judge: Michael H. Melkonian

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CHRISTINE DUFFY and OWEN DUFFY,

Plaintiffs,

-against-

DECISION AND ORDER

KELLIE BALDWIN and JAMES BALDWIN,

Defendants.

(Supreme Court, Albany County, Motion Term, August 6, 2018)
Index No. 904185-18
(RJI No. 01-18-128905)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Joseph D. Clyne, Esq.
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MELKONIAN, J.:

Plaintiffs Christine Duffy and Owen Duffy ("plaintiffs") and defendants Kellie Baldwin and James Baldwin ("defendants") commenced this action based on causes of action for public and private nuisance and seeking damages and a permanent injunction. Defendants move by this pre-answer motion to dismiss the complaint pursuant to CPLR § 3211(a)(7). Plaintiffs oppose.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the factual allegations in the complaint and supporting

affidavits as true, accord plaintiff all favorable inferences which may be drawn from the facts, and determine whether the facts as alleged fit within any cognizable legal theory (Leon v Martinez, 84 NY2d 83, 87–88 [1994]; Morone v Morone, 50 NY2d 481, 484 [1980]; Rovello v Orofino Realty Co., 40 NY2d 633, 634 [1976]). If the allegations in the complaint are merely conclusory and have no factual support, the complaint fails to state a cause of action (see, M.J. & K. Co., Inc. v Matthew Bender and Co., Inc., 220 AD2d 488, [2nd Dept. 1995]). On this motion to dismiss the facts alleged are taken from the complaint and are assumed to be true and are as follows: Plaintiffs and defendants own adjacent improved real property known as 15 and 11 Fletcher Road in the Town of Guilderland, New York, respectively. Both properties consist of single-family homes on approximately .25 acres of land, located in a residential neighborhood in an R-15 zone. Plaintiffs allege, *inter alia*, that in 2015, defendants paved the frontmost 20 feet of their property to be used as a driveway to accommodate 3 vehicles beyond those that could already be stored in the existing driveway on their property. Plaintiffs allege that defendants regularly park 2 full-sized pickup trucks and a cargo van in this driveway. Plaintiffs allege that these vehicles are "unsightly" and create excessive "noise, exhaust and light." Plaintiffs allege these vehicles also create the impression that the property is being used for commercial purposes, placing it at variance with the residential character of the neighborhood. Plaintiffs further allege that defendants' driveway interferes with their line of vision when entering or exiting their driveway.

The complaint asserts three causes of action. The first and second causes of action

seek damages for private and public nuisance. The third cause of action seeks damages and injunctive relief.

A party may be liable for a private nuisance upon proof of an intentional and unreasonable invasion of the use and enjoyment of another's land (see, Copart Inds. v Consolidated Edison Co. of NY, 41 NY2d 564, 570 [1977]). The elements of a cause of action for a 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 (Copart Inds. v Consolidated Edison Co. of NY, 41 NY2d at 564). The Appellate Division, Third Department has held that a plaintiff must "sufficiently allege facts which would raise an inference that defendant's acts substantially interfered with plaintiff's use or enjoyment of the land" (Dugway Ltd. v Fizzinoglia, 166 AD2d 836, 837 [3rd Dept. 1990]). "[I]n order to establish nuisance the inconvenience and interference complained of must not be 'fanciful, slight, or theoretical, but certain and substantial, and must interfere with the physical comfort of the ordinarily reasonable person.'" Dugway Ltd. v Fizzinoglia, 166 AD2d 836, 837 (3rd Dept. 1990), quoting 81 NYJur2d, Nuisances, § 16, at 332; see, Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d at 570); Langan v Bellinger, 203 AD2d 857, 857–858 (3rd Dept. 1994). Or put another way, the use of the property "must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient." Campbell v Seaman, 63 NY 568,577 (1876).

Applying these principles in this case and viewing the pleadings in the light most

favorable to plaintiffs (see, Zumpano v Quinn, 6 NY3d 666, 681 [2006]; Leon v Martínez, 84 NY2d 83, 87–88 [1994]), the Court concludes that plaintiffs have not sufficiently stated a legally cognizable cause of action sounding in private nuisance since plaintiffs have failed to sufficiently allege facts which would raise an inference that defendants' acts substantially interfered with plaintiffs' use or enjoyment of the land. Moreover, there is no allegation that defendants' intentionally invaded plaintiffs' use of their own property. Nor are plaintiffs' conclusory allegations that such use diminished the market value of their property or that an accident is likely to occur sufficient inasmuch as such allegations are speculative and theoretical, rather than "known or substantially certain to result" (Christenson v Gutman, 249 AD2d 805, 808 [3rd Dept. 1998]; see, Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d at 571). Therefore, the plaintiffs failed to state a cause of action to recover damages for a private nuisance.

The second cause of action for public nuisance does not state a cognizable cause of action. Plaintiffs, as private individuals, seeking to recover damages based on a public nuisance must plead and prove by clear and convincing evidence (1) the existence of a public nuisance; (2) conduct or omissions by a defendants that create, contribute to or maintain that public nuisance; and (3) special or different injury beyond that suffered by the community at large as a result of the public nuisance (532 Madison Avenue Gourmet Foods, Inc. v Finlandia Center, Inc., 96 NY2d 280, 292 [2001], reargument denied, 5th Ave. Chocolatiere, Ltd. v 540 Acquisition Co., LLC., 96 NY2d 938 [2001]; see, also, N.A.A.C.P. v Acusport, Inc., 271 F.Supp.2d 435, 483 [E.D.N.Y.2003]). A public nuisance "consists of

conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" (Copart Industries, Inc. v Consolidated Edison Company of New York, Inc., 41 NY2d 564, 568 [1977]). Plaintiff did not allege an interference with rights belonging to the general public, nor an interest in public land (see, Reid v. Kawasaki Motors Corp., USA, 189 AD2d 954, 957 [3rd Dept. 1993]). The essence of plaintiffs' nuisance claim is that the parked vehicles/driveway may cause an accident involving pedestrians, cyclists or motorists driving past defendants' home. This cause of action for public nuisance is wholly speculative, lacks basis in fact, and must be dismissed.

Accordingly, the branch of the defendants' motion to dismiss the causes of action for private nuisance is denied.

The third cause of action seeks a permanent injunction against the defendants. To state a cause of action for a permanent injunction, the complaint must allege the "violation of a right presently occurring, or threatened and imminent that the plaintiff has no adequate remedy at law ... that serious and irreparable injury will result if the injunction is not granted [and] that the equities are balanced in the [plaintiffs'] favor" (Elow v Svenningsen, 58 AD3d 674 [2nd Dept. 2009]). An irreparable injury constitutes a "continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue pendente lite" (Chrysler Corp. v Fedders Corp., 63 AD2d 567 [1st Dept. 1978]). Here, as this Court has already dismissed the two other causes of action, and as plaintiffs have failed

to sufficiently allege a violation of a right, the third cause of action seeking a permanent injunction against defendants must be dismissed.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to defendants. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
October 25, 2018

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Notice of Motion dated July 17, 2018;
(2) Memorandum of Law dated July 17, 2018, with exhibits annexed;
(3) Affidavit of Christine Duffy dated July 26, 2018, with exhibits annexed;
(4) Memorandum of Law dated July 26, 2018;
(5) Reply Memorandum of Law dated August 2, 2018.