Falzon v Ford
2020 NY Slip Op 34434(U)
October 8, 2020
Supreme Court, Orange County
Docket Number: EF002928-2020
Judge: Catherine M. Bartlett

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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JOHN FALZONE, CINDY FALZONE, JOSEPH VOELPEL, and DIANNA VOELPEL

Plaintiffs,

-against-

BRIAN FORD, STEPHANIE FORD, SUNSTARTER SOLAR XXXIV LLC, and SOLAR PROVIDER GROUP LLC,

Defendants.

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

Index No. EF002928-2020

Motion Date: August 28, 2020

The following papers numbered 1 to 5 were read on the motion of defendants Sunstarter Solar XXXIV LLC and Solar Provider Group LLC pursuant to CPLR §3211(a) to dismiss the claims against them:

Notice of Motion - Affirmation / Exhibits 1-2

Affirmation in Opposition / Exhibits - Memorandum 3-4

Reply Affirmation 5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiffs John and Cindy Falzone and plaintiffs Joseph and Dianna Voelpel are homeowners and next-door neighbors in Minisink, New York. Defendants Brian Ford and Stephanie Ford own eighty-five acres of land directly behind the Falzone and Voelpel properties.

The Fords have leased seven of their 85 acres to defendants Sunstarter Solar XXXIV LLC and Solar Provider Group LLC (collectively, the "Solar Defendants") for the construction and long term operation of a "solar panel farm" behind Plaintiffs' homes, approximately fifty (50) feet from their rear property lines.

The planned solar panel project is presently before the Minisink Planning Board for review. The Solar Defendants commissioned a visual impact study as part of their application for Planning Board approval to address Plaintiffs' opposition to the project. Plaintiffs allege that (1) the study methodology called for the use of both 24 mm and 50 mm lens photographs; (2) the Solar Defendants took both 24 mm and 50 mm lens photographs, but submitted only the 24 mm photographs without properly notifying Plaintiffs or Minisink officials of the change in methodology; (3) they did so to skew the true visual impact of the project, as the 24 mm lens photograph is a wide-angle image that makes objects seem farther away and less invasive; and (4) the Planning Board members were "visibly surprised and were displeased with [the Solar Defendants'] omission and withholding of the 50 mm lens photographs."

The Plaintiffs' Complaint asserts three causes of action against the Solar Defendants: (1) intentional misrepresentation; (2) negligence; and (3) private nuisance. The Plaintiffs seek compensatory damages and a permanent injunction against the solar panel project. The Solar Defendants move pursuant to CPLR §3211(a)(7) to dismiss the Complaint for failure to state a valid cause of action.

A. CPLR §3211

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as

alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Agai v. Liberty Mutual Agency Corporation,* 118 AD3d 830, 831-832 (2d Dept. 2014) (citing *Leon v. Martinez,* 84 NY2d 83, 87 [1994]). *See, ABN AMRO Bank, N.V. v. MBIA INC.,* 17 NY3d 208 (2011); *Gad v. Sherman,* 160 AD3d 622 (2d Dept. 2018); *83-17 Broadway Corp. v. Debcon Financial Services, Inc.,* 39 AD3d 583, 585 (2d Dept. 2007).

B. Intentional Misrepresentation

"[A] cause of action for fraud or intentional misrepresentation requires proof 'that the defendant knowingly misrepresented a material fact upon which the plaintiff justifiably relied, causing the plaintiff's damages." *Kazmark v. Wasyln,* 167 AD3d 1386, 1387 (3d Dept. 2018). In *Berenger v. 261 West LLC,* 93 AD3d 175 (1st Dept. 2012), the plaintiffs alleged claims for fraud and misrepresentation predicated on alleged omissions in a condominium offering plan as to the location and operation of a cooling tower. The Court dismissed those claims, writing:

> Here, it is undisputed that the plaintiffs purchased the unit having previously seen the cooling tower. Thus, the plaintiffs cannot claim to have relied on any failure to depict the cooling tower in the offering plan or architectural plans when they decided to purchase the unit.

Berenger, supra, 93 AD3d at 184. Here, similarly, inasmuch as both the Plaintiffs and the members of the Minisink Planning Board were fully aware of the Solar Defendants' omission of the 50 mm lens photographs from the visual impact study, Plaintiffs cannot plead justifiable reliance upon any misrepresentation by the Solar Defendants in this regard. Moreover, there is no allegation that the Minisink Planning Board has granted approval for the solar panel project based on the allegedly flawed visual impact study. For each of these reasons, the Complaint

fails to state a valid cause of action for intentional misrepresentation. Consequently, the First Cause of Action in the Complaint is dismissed.

C. Common Law Negligence

It is hornbook law that the elements of a cause of action for common law negligence are (1) the existence of a duty of care on the part of the defendant running to the plaintiff, (2) a negligent breach of that duty, and (3) damages flowing from the breach. The Complaint against the Solar Defendants pleads none of the elements of common law negligence.

"The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" *Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d 222, 232 (2001). "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Id.* (quoting *Lauer v. City of New York*, 95 NY2d 95, 100). Whether any duty exists is, in the first instance, a legal question for the courts to determine. *See, Powers ex rel. Powers v. 31 E. 31 LLC*, 24 NY3d 84, 94 (2014); *Darby v. Compagnie National Air France*, 96 NY2d 343, 347 (2001); *Waters v. New York City Housing Authority*, 69 NY2d 225, 229 (1987).

Under New York law, the approval *vel non* of site plan applications is within the purview of municipal planning boards, subject to administrative appeal and ultimately to judicial review under Article 78 of the Civil Practice Law and Rules. Property owners who by reason of their proximity to proposed land use projects would thereby suffer actual harm differing from that suffered by the public at large – including harm resulting from the visual impact of the project – have standing to challenge the planning board's determinations by means of an Article 78 proceeding. *See, Schlemme v. Planning Board of City of Poughkeepsie*, 118 AD3d 893, 894-895

(2d Dept. 2014); *Cady v. Town of Germantown Planning Board,* 184 AD3d 983, 985-986 (3d Dept. 2020); *Cady v. Stapf,* 91 AD3d 1229, 1230-31 (3d Dept. 2012). So far as this Court can determine, however, New York law does not countenance a parallel scheme whereby aggrieved property owners may also hale site plan applicants into court on common law claims that they breached some amorphous duty of care in presenting their applications to the municipal planning board. Property owners' rights and remedies in this area are governed instead by well established Article 78 jurisprudence.

Thus, Plaintiffs have not demonstrated the existence of any duty of care owed by the Solar Defendants to the Plaintiff homeowners in connection with the said Defendants' application to the Minisink Planning Board. In any event, Plaintiffs do not allege any negligence on the Solar Defendants' part, but rather an intentional misrepresentation in connection with the visual impact study; and as the Minisink Planning Board has not granted approval for the solar panel project based on the allegedly flawed visual impact study, the Complaint alleges no damage flowing from the putative breach. For each of these reasons, the Complaint fails to state a valid cause of action for common law negligence. Consequently, the Second Cause of Action in the Complaint is dismissed.

D. Private Nuisance

The elements of a cause of action for private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.,* 41 NY2d 564, 570 (1977); *Taggart v. Costabile,* 131 AD3d 243, 247 (2d Dept. 2015).

The Solar Defendants claim that Plaintiffs' complaint fails to state a cause of action for private nuisance because (1) there is no present interference with Plaintiffs' property right to use and enjoy land, but only a planned future project still awaiting Planning Board approval; and (2) the proposed project is authorized by the Town code and hence not unreasonable in character. New York law, however, is to the contrary.

1. A Court In Equity May Enjoin A Threatened Prospective Nuisance

In *Sweet v. Campbell,* 282 NY 146 (1940), plaintiffs brought an action in equity to restrain the use by defendants of certain premises for a funeral church and undertaking establishment. The complaint was dismissed without prejudice to the institution of a new action after the completion of the structure and the commencement of its use for undertaking / funeral purposes. The Court of Appeals reversed, holding:

> We need not now consider the subject of nuisance by way of definition and determine whether the proposed use would constitute a private nuisance [cit.om.], or whether the occupation and use of the property would amount to a nuisance under any circumstances regardless of location and surroundings. [cit.om.] It is sufficient, at least, at this time to point out that the facts set up in the complaint, if established by competent and adequate proof upon a trial of the action, would furnish the foundation upon which a finding, if made, might be sustained, to the effect that the proposed occupation and use of the premises by defendants are unwarranted and unreasonable and constitute an actionable injury to the plaintiffs and a detriment to their properties. The complaint, on its face, states facts sufficient to constitute a cause of action.

Sweet v. Campbell, supra, 282 NY at 148.

In other words, a complaint in equity for private nuisance is not rendered insufficient as a matter of law simply by virtue of the fact that the alleged nuisance is only *in prospect* and not actually existing. As the Court of Appeals recognized in *People ex rel. Leonard v. Elmore,* 256 NY 489 (1931), although "courts of law can only reach existing nuisances," "[c]ourts of equity

can not only prevent nuisances that are threatened and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public against them in future." *Id.,* 256 NY at 495. As one Court explained:

> [I]t seems to defy common sense to defer trial of the issues presented [i.e., regarding an alleged nuisance in prospect] to a future date, for possible future abatement, after completion of construction of the magnitude proposed. It is quite possible that plaintiffs may well be able, on the basis of known factors, to show at this time what human experience would irresistibly indicate to be the necessary result of operation of the facilities intended to be built. And, should plaintiffs not be able so to demonstrate at a trial, that worry about the future would be lifted from defendants. See, Sweet v. Campbell, 282 NY 146....

Hillside Property Owners Ass'n, Inc. v. Salanter Akiba Riverdale Academy, 40 AD2d 964 (1st Dept. 1940).

Contrary to the Solar Defendants' assertion, then, the Plaintiffs' cause of action in equity for private nuisance is not rendered legally insufficient simply by reason of the fact that there is no present interference with Plaintiffs' property right to use and enjoy their land, but only a planned future project still awaiting Planning Board approval.

2. That The Proposed Project Is Lawful Under The Minisink Code Does Not Obviate A Finding Of Private Nuisance

In *Sweet v. Campbell, supra,* the defendants in answer to the plaintiff's complaint for private nuisance contended that the proposed use of their premises for a funeral and undertaking establishment was not forbidden by zoning regulations, and that they had secured a permit from the proper authorities for such location and use. Accepting the defendants' contentions as true, the Court of Appeals held that "even so, the right of plaintiffs to challenge, in an action in equity, the location of the funeral establishment and proposed use of the property on the ground that it constitutes a nuisance still remains." *Id.,* 282 NY at 149. *See also, Murray v. Young,* 97 AD2d

958 (4th Dept. 1983); *Jones v. Chapel Hill,* 273 AD 510 (1st Dept. 1948). As the Court of Appeals explained in *Little Joseph Realty, Inc. v. Town of Babylon,* 41 NY2d 738 (1977):

> The law of nuisance and that of zoning both relate to the use of property, but they each protect a different interest. So a use which fully complies with a zoning ordinance may still be enjoined as a nuisance (Sweet v. Campbell, 282 NY 146...)...
>
> Nuisance is based upon the maxim that "a man shall not use his property so as to harm another [cit.om.]. It traditionally required that, after a balancing of risk-utility considerations, the gravity of the harm to a plaintiff be found to outweigh the social usefulness of a defendant's activity. [cit.om.]....
>
> Zoning is far more comprehensive. Its design is, on a planned basis, to serve as "a vital tool for maintaining a civilized form of existence" for the benefit and welfare of an entire community [cit.om.]....

Little Joseph Realty, Inc. v. Town of Babylon, supra, 41 NY2d at 744-745.

Contrary to the Solar Defendants' assertion, then, the Plaintiffs' cause of action in equity for private nuisance is not rendered legally insufficient simply by reason of the fact that the Defendants' proposed solar panel project is lawful under the Minisink Code.

3. Conclusion

Therefore, the Solar Defendants' motion to dismiss Plaintiffs' cause of action for private nuisance and request for a permanent injunction is denied.

It is therefore

ORDERED, that the motion of defendants Sunstarter Solar XXXIV LLC and Solar Provider Group LLC pursuant to CPLR §3211(a) to dismiss the claims against them is granted in part and denied in part, and it is further

ORDERED, that the First and Second Causes of Action in Plaintiff's Complaint are hereby dismissed, and it is further

ORDERED, that the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: October 8, 2020 ENTER
Goshen, New York

Cate M. Bartlett

HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE