

<b>Falzon v Ford</b>
2021 NY Slip Op 33752(U)
January 12, 2021
Supreme Court, Orange County
Docket Number: Index No. EF002928-2020
Judge: Catherine M. Bartlett
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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

-----x  
JOHN FALZON, CINDY FALZON, JOSEPH  
VOELPEL, and DIANNA VOELPEL

Plaintiffs,

-against-

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

Defendants.

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: December 3, 2020  
Mot. Seq. No. 2

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The following papers numbered 1 to 6 were read on the motion of defendants Brian and  
Stephanie Ford pursuant to CPLR §3211(a) to dismiss the claims against them:

Notice of Motion - Affirmation / Exhibits - Memorandum . . . . .	1-3
Affirmation in Opposition - Memorandum . . . . .	4-5
Reply Memorandum . . . . .	6

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

Plaintiffs John and Cindy Falzon and plaintiffs Joseph and Dianna Voelpel are  
homeowners and next-door neighbors in Minisink, New York. Defendants Brian Ford and  
Stephanie Ford (the "Fords") own eighty-five acres of land directly behind the Falzon and  
Voelpel properties. The Fords 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 Solar Defendants sought approval from the Minisink Planning Board for the solar panel farm project. For their role in this matter, the Plaintiffs asserted causes of action against the Solar Defendants for intentional misrepresentation, common law negligence and private nuisance. By prior Decision and Order dated October 8, 2020, the Court dismissed the causes of action for intentional misrepresentation and negligence. The Solar Defendants thereafter withdrew their application before the Planning Board, and by Decision and Order dated January 6, 2021, the Court awarded the Solar Defendants summary judgment dismissing the remaining cause of action for private nuisance.

The Plaintiffs asserted causes of action against the Fords for aiding and abetting the nuisance allegedly created by the Solar Defendants, and for creating a private nuisance by parking a manure spreader and dump wagon directly behind the Falzon’s house at the edge of the property line. In addition, the Plaintiffs asserted causes of action against Brian Ford, an elected official of the Town of Minisink, for both intentional and negligent infliction of emotional distress, alleging that he abused his position as an elected official in connection with a campaign of harassment directed against Plaintiffs on account of their opposition to the solar panel farm project.

The Fords now move for dismissal of all claims against them.

**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. Aiding and Abetting the Solar Defendants’ Private Nuisance**

The Fourth Cause of Action in the Complaint alleges that the Fords aided and abetted a private nuisance committed by the Solar Defendants. However, Plaintiffs’ claim against the Solar Defendants for private nuisance was dismissed by prior Decision and Order dated January 6, 2021 on the ground that the Solar Defendants did not “substantially” interfere with Plaintiffs’ right to use and enjoy their property. Since the Fords may not be found liable for aiding and abetting actions which as a matter of law do not constitute a private nuisance, the Plaintiffs’ claim that they aided and abetted the Solar Defendants’ purported nuisance must be dismissed.

**C. The Fords’ Alleged Private Nuisance**

The Fifth Cause of Action in the Complaint alleges that the Fords are directly liable for private nuisance in that they “parked, refused to move, and then allowed to remain a manure spreader and dump wagon directly behind the Falzon’s house at the edge of their property line” as “retaliation for their opposition to the solar panel farm...” (Complaint ¶¶ 151-152)

“[A] private nuisance is an intentional interference with a person’s right to use and enjoy his or her property that is ‘substantial in nature’ and ‘unreasonable in character’ (*Copart Indus. v. Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570...[1977]...).” *Balunas v. Town of Oswego*,

56 AD3d 1097, 1098 (3d Dept. 2008). In *Dugway, Ltd. v. Fizzinoglia*, 166 AD2d 836 (3d Dept. 1990), the plaintiff alleged that “defendant deliberately and intentionally placed assorted debris and an uninhabitable trailer on his property in close proximity to the main entrance to plaintiff’s property for no purpose other than to create an eyesore to both plaintiff and its potential customers in order to pressure the plaintiff into selling another parcel of land to defendant at a deflated price.” *See, id.* Dismissing the plaintiff’s claim for private nuisance, the Court held:

As for the theory of private nuisance, plaintiff has failed to sufficiently allege facts which would raise an inference that defendant’s acts *substantially* interfered with plaintiff’s use or enjoyment of the land [cit.om.]. Although plaintiff vaguely indicates that the “unsightly condition” of defendant’s property interferes “with the rights of the plaintiff in the development of its property”, in 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” (81 N.Y. Jur.2d, Nuisances, §16, at 332). In other words, “things merely disagreeable, which simply displease the eye \*\*\* no matter how irritating or unpleasant, are not nuisances” (81 N.Y. Jur.2d, Nuisances, §17, at 333).

*Dugway, supra*, 166 AD2d at 837.

Quoting *Dugway*, the Second Department in *Ruscito v. Swaine, Inc.*, 17 AD3d 560 (2d Dept. 2005) held that “the mere presence, on the adjoining property, of unsightly dumpsters, an abandoned icebox, ‘automobile hulks,’ or a ‘hideous rampart of dirt,’ without more” does not give rise to a valid cause of action for private nuisance. *Id.*, at 561. *See also, Balunas v. Town of Oswego, supra* (allegation of defendant’s construction of an unsightly 30 foot tall water tank on land abutting plaintiff’s property was insufficient to raise an inference of substantial interference with plaintiffs’ use and enjoyment of their property [quoting *Dugway*]).

Here, the Fords are alleged to have parked farm vehicles – a manure spreader and dump wagon – on their own farm property near the boundary line with the Falzon Plaintiffs’ property.

While those vehicles might well be deemed unsightly, *Dugway* and its progeny unambiguously teach that “things merely disagreeable, which simply displease the eye...no matter how irritating or unpleasant, are not nuisances.” *See, id.* Plaintiffs’ further allegation that the Fords acted intentionally in retaliation for Plaintiffs’ opposition to the solar panel farm project is unavailing, for as *Dugway* itself holds, a condition that does not *substantially* interfere with the plaintiff’s use and enjoyment of his property – i.e., does not “interfere with the physical comfort of the ordinarily reasonable person” – is not transformed into a nuisance simply by virtue of the fact that the defendant has acted intentionally and for an ulterior motive. *See, Dugway, Ltd. v. Fizzinoglia, supra*, 166 AD2d at 836-837.

In short, as the Plaintiffs’ allegations are insufficient to raise an inference of substantial interference, the Fifth Cause of Action in their Complaint fails to assert a valid cause of action for private nuisance. Consequently, it must be dismissed.

**D. Intentional Infliction of Emotional Distress**

The Sixth Cause of Action asserts a claim for intentional infliction of emotional distress against defendant Brian Ford only. The Complaint alleges:

158. Brian Ford’s conduct as alleged herein was extreme and outrageous. As an elected official, he weaponized his influence to have others verbally harass Plaintiffs at town board meetings simply for Plaintiffs having opposed the location of Brian Ford’s solar panel farm project.
159. In addition, Brian Ford parked (and then refused to move for several months) a large manure spreader and a dump wagon right behind the Falzons’ house just feet from the property line specifically to harass and to retaliate against Plaintiffs.
160. Brian Ford had the specific intent to cause Plaintiffs the severe emotional distress that he caused through his campaign of retaliation as an elected official (in a small town like Minisink where Brian Ford’s family is influential and heavily involved in the town’s government).

161. Brian Ford's specific purpose was to cause Plaintiffs as much distress as possible simply because they objected to his allowing a solar panel farm to be built on his property close to Plaintiffs' own property lines.
162. He kept the large manure spreader and dump wagon parked directly behind the Falzons' house during the December holidays, which caused Plaintiffs and their families to experience significant anxiety.
163. Brian Ford's despicable and outrageous actions have caused each of [Plaintiffs] to suffer severe emotional distress.

The elements of a cause of action for the intentional infliction of emotional distress are:

“(I) extreme and outrageous conduct; (ii) an intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress.” *Chanko v. American Broadcasting Cos., Inc.*, 27 NY3d 46, 56 (2016). To survive a motion to dismiss, the plaintiff must allege conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *See, Murphy v. American Home Products Corp.*, 58 NY2d 293, 303 (1983); *Chanko v. American Broadcasting Cos., Inc., supra*.

While the requirement of “extreme and outrageous conduct” is very rigorous and difficult to satisfy, it may be met in cases where, as here, it is alleged that severe emotional distress resulted from a deliberate and malicious campaign of harassment by a person abusing a position of power. *See, e.g., Paulino v. Paulino*, 170 AD3d 629, 629-630 (1<sup>st</sup> Dept. 2019); *Scollar v. City of New York*, 160 AD3d 140, 146 (1<sup>st</sup> Dept. 2018).

Moreover, contrary to Mr. Ford's assertion, the Plaintiffs are not collaterally estopped from proceeding here by reason of the prior dismissal of their federal district court complaint

alleging a claim under 42 U.S.C. §1983 and pendent state law claims, including the instant claim for intentional infliction of emotional distress. It is hornbook law that where a party has previously litigated an issue and that issue has been determined on the merits, he is collaterally estopped from raising the same issue again in a subsequent action. The essential prerequisites for application of the doctrine are (1) identity of issue, and (2) prior determination on the merits. The district court's dismissal of Plaintiffs' Section 1983 claim may have been on the merits, but the issues determined were plainly not the same as those underlying their state law claim for intentional infliction of emotional distress. Having dismissed the Plaintiffs' only federal claim, the district court declined to retain jurisdiction of the pendent state law claims, but their dismissal on that ground did not constitute an adjudication on the merits. *See, Stevens v. Kirk*, 171 AD2d 587 (1<sup>st</sup> Dept. 1991). Consequently, the doctrine of collateral estoppel does not apply.

In view of the foregoing, the motion for dismissal of the Sixth Cause of Action in the Complaint, for intentional infliction of emotional distress, is denied.

**E. Negligent Infliction of Emotional Distress**

The Seventh Cause of Action in the Complaint is against defendant Brian Ford only for Negligent Infliction of Emotional Distress. The Complaint alleges:

167. Brian Ford owed Plaintiffs a duty of care both as Plaintiffs' abutting neighbor and as an elected official on the town board not to use or to marshal his property in a matter designed to harass and to distress Plaintiffs.
168. Brian Ford breached his duty of care to each Plaintiff by using his influence to have others verbally harass Plaintiffs at town board meetings simply for Plaintiffs having opposed Brian Ford's solar panel farm project.
169. In addition, Brian Ford breached his duty of care by parking (and then refusing to move for several months) a manure spreader and a dump wagon right behind the Falzon's house just feet from the property line specifically to harass and to retaliate against Plaintiffs.

“A cause of action to recover damages for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, ‘generally must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff’s physical safety, or causes the plaintiff to fear for his or her own safety.’” *Santana v. Leith*, 117 AD3d 711, 712 (2d Dept. 2014). *See also, Daluise v. Sottile*, 40 AD3d 801, 803 (2d Dept. 2007). There is no allegation in the Complaint of any threat to the Plaintiffs’ physical safety. Moreover, a claim for negligent infliction of emotional distress must fail where “no allegations of negligence appear in the pleadings.” *See, id.* Where, as here, the plaintiff’s claim is premised on intentional conduct and not negligence, a cause of action for negligent infliction of emotional distress is subject to dismissal. *See, Santana v. Leith, supra; James v. Flynn*, 132 AD3d 1214, 1216 (3d Dept. 2015).

Therefore, the Seventh Cause of Action in the Complaint, for negligent infliction of emotional distress, is dismissed.

It is therefore

ORDERED, that the motion of defendants Brian and Stephanie Ford for dismissal of Plaintiffs’ Complaint is granted with respect to the Fourth, Fifth and Seventh Causes of Action alleged therein, and the said Causes of Action are hereby dismissed, and Defendants’ motion is otherwise denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 12, 2021  
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT