

Lax v Ho
2025 NY Slip Op 35609(U)
January 14, 2025
Supreme Court, Nassau County
Docket Number: Index No. 606666/2024
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Supreme Court Justice

DANIEL LAX and REGIANE LAX,

Plaintiffs,

-against-

ALEXANDER HO and NANCY HO,

Defendants.

TRIAL/IAS PART 27
NASSAU COUNTY

Index No.: 606666/2024
Motion Seq. No.: 01
Motion Date: 08/15/2024

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibit	1
Affirmation in Opposition and Exhibit, Memorandum of Law	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiffs' Second Cause of Action (for Intentional Infliction of Emotional Distress), Third Cause of Action (for Intentional Infliction of Emotional Distress), Fourth Cause of Action (for Private Nuisance) and Fifth Cause of Action (for Injunctive Relief). Plaintiffs oppose the motion.

INTRODUCTION

The instant action arises out of a claim alleging, *inter alia*, a violation of New York Civil Rights Law § 52-a(1). Defendants seek dismissal of plaintiffs' second and third causes of action alleging intentional infliction of emotional distress.

Additionally, defendants seek dismissal of plaintiffs' fourth and fifth causes of action for private nuisance and injunctive relief, respectively.

BACKGROUND & PROCEDURAL HISTORY

The facts recited herein, taken from the parties' pleadings, are presumed to be true for the purposes of the motion to dismiss. *See Joseph v. Fensterman*, 204 A.D.3d 766, 167 N.Y.S.3d 106 (2d Dept. 2022). On or about January 26, 2022, plaintiffs acquired a property, which was a vacant lot located at 157 Hegemans Lane, Old Brookville, New York. Following the acquisition, plaintiffs began construction of a single-family residence on the property. Since the time of plaintiffs' acquisition, up until present day, defendants owned the neighboring property located at 158 Hegemans Lane, Old Brookville, New York. The parties' properties are abutting, sharing an approximately 575-foot common boundary. On or about November 2022, defendants installed several cameras along this common boundary for the purposes of monitoring the ongoing construction at plaintiffs' property. Defendants represented to plaintiffs that they would remove the cameras upon completion of construction. After construction was complete, on or about August 31, 2023, plaintiffs, along with their two (2) children, moved into their property. Defendants, however, failed and refused to remove the cameras they installed along the common area of the boundary following completion of construction.

As a result of defendants' refusal to remove their cameras, plaintiffs commenced the instant action on April 17, 2024, seeking damages in excess of \$10,000,000.00. *See Defendants' Affirmation in Support Exhibit 1*. In lieu of answering the Verified Complaint, defendants filed the instant motion to dismiss on May 30, 2024.

MOTION FOR DISMISSAL

Defendants argue that plaintiffs' second and third causes of action for intentional infliction of emotional distress are duplicative and should be dismissed because, even if the allegations in these claims are accepted as true, plaintiffs have not sufficiently alleged facts necessary to satisfy the elements of this claim. Particularly, defendants argue that plaintiffs fail to set forth in their Verified Complaint any allegation of extreme or outrageous conduct, and, as such, plaintiffs cannot meet their burden in establishing the elements of an intentional infliction of emotional distress claim. Defendants further contend that plaintiffs' fourth cause of action alleging private nuisance cannot be maintained since they fail to allege how the cameras interfere with their private enjoyment of the home. Finally, defendants assert that plaintiffs cannot maintain their fifth cause of action for injunctive relief since such relief cannot be sought where money damages are sufficient.

In opposition to the motion, plaintiffs argue that all of their causes of action are properly pled and sustainable. Plaintiffs maintain they have sufficiently alleged extreme and outrageous conduct on the part of defendants with respect to their intentional infliction of emotional distress claims. Plaintiffs attach, as an exhibit, the Complaint of a Westchester County Supreme Court action entitled, *Twinkle Day Care v. Eduardo Suarez*. See Plaintiffs' Affirmation in Opposition Exhibit 1. Plaintiffs contend that the facts as pled in the instant matter are similar to the facts pled in the Complaint in the Westchester case, and, as such, their claim for intentional infliction of emotional distress has been sufficiently pled. See *id.* Plaintiffs further assert that their claim of private nuisance is also sufficiently pled since constant surveillance of them, and their children, interferes with

their use and enjoyment of their own home. Plaintiffs also argue that their cause of action seeking injunctive relief is sustainable because any award of money damages would be insufficient to stop defendants' ongoing, or future, surveillance of them.

ANALYSIS

Dismissal:

Pursuant to CPLR § 3211(a), "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or ... (7) the pleading fails to state a cause of action..." "On a motion to dismiss pursuant to CPLR [§] 3211, the pleading is to be afforded a liberal construction (see, CPLR [§] 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leone v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994) *quoting Morone v. Morone*, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980) *citing Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314 (1976). "... A pleading which, fairly construed, fails to allege any facts which constitute a wrong but only general conclusions, is entirely insufficient and may be dismissed on that ground." *Gerdes v. Reynolds*, 281 N.Y. 180 (1939).

Intentional infliction of Emotional Distress:

"The elements of intentional infliction of emotional distress are:
(1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress." *Eskridge v. Diocese of Brooklyn*, 210 A.D.3d 1056,

180 N.Y.S.3d 179 (2d Dept. 2022). “In order to state a cause of action to recover damages for intentional infliction of emotional distress, the pleading must allege conduct that has been 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.” *Davydov v. Youssefi*, 205 A.D.3d 881, 169 N.Y.S.3d 322 (2d Dept. 2022).

Here, even when affording plaintiffs the benefit of every possible favorable inference, the Court cannot find that defendants’ actions as alleged amounted to conduct so extreme and outrageous sufficient to sustain a claim for intentional infliction of emotional distress. Contrary to plaintiffs’ contention, the facts pled in the Verified Complaint in the instant matter are not at all similar to the facts alleged in *Twinkle Day Care*. See Plaintiffs’ Affirmation in Opposition Exhibit 1. In the Westchester case, the defendant, in addition to surveilling the plaintiffs, was alleged to have made many false allegations of child abuse and endangerment, in addition to filing such reports to both the local police and prospective clientele of plaintiff’s daycare. See *id.* By contrast, in the instant matter, the conduct defendants are alleged to have engaged in is the improper surveillance of plaintiffs’ backyard.

While it is premature for this Court to opine at this juncture whether defendants violated Section 52-a of New York Civil Rights law, defendants’ conduct in simply installing cameras along the boundary of their property cannot be said to be 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 civilized society.

Private Nuisance:

The elements of a private nuisance cause of action 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 the land; (5) caused by another's conduct in acting or failure to act. *See Aristides v. Foster*, 73 A.D.3d 1105, 901 N.Y.S.2d 688 (2d Dept. 2010). "An essential feature of a private nuisance is an interference with the use and enjoyment of property, and it is actionable by the person or persons whose rights have been disturbed." *Broxmeyer v. United Capital Corp.*, 79 A.D.3d 780, 914 N.Y.S.2d 181 (2d Dept. 2010). Further, "the interference not be fanciful, slight or theoretical, but certain and substantial, and must interfere with the physical comfort of the ordinarily reasonable person." *Cangemi v. Yeager*, 185 A.D.3d 1397, 128 N.Y.S.3d 708 (4th Dept. 2020).

Private right of action for unwarranted video imaging of residential premises:

New York Civil Rights Law § 52-a(1) provides in pertinent part:

Any owner or tenant of residential real property shall have a private right of action for damages against any person who installs or affixes a video imaging device on property adjoining such residential real property for the purpose of [videotaping] or taking moving digital images of the recreational activities which occur in the backyard of the residential real property without the written consent thereto of such owner and/or tenant with intent to harass, annoy or alarm another person, or with intent to threaten the person or property of another person ...

Here, defendants have failed to meet their burden in establishing their entitlement to dismissal of plaintiffs' remaining causes of action. Plaintiffs have pled a cause of action alleging a violation of New York Civil Rights Law § 52-a(1). While defendants do not seek dismissal of this branch of plaintiffs' Verified Complaint, *Cangemi v. Yeager*, *supra*, however, suggests that unlawful surveillance may establish a claim for private nuisance. *See Cangemi v.*

Yeager, supra at 1400. Particularly, the Fourth Department found that the defendant's surveillance of the plaintiff's backyard, coupled with his continued intrusions thereof, interfered with the plaintiff's use and enjoyment. *See id.* Moreover, plaintiffs' cause of action for private nuisance is further supported by their claim that defendants installed a fence along the boundary of their property which plaintiffs allege partially encroaches on their premises. *See Nead v. Di Leva*, 295 N.Y. 768 (1946).

Injunctive Relief:

To properly plead a claim for permanent injunctive relief a plaintiff must allege, "a 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 plaintiff's favor." *Elow v. Svenningsen*, 58 A.D.3d 674, 873 N.Y.S.2d 319 (2d Dept. 2009).

With respect to plaintiffs' claim for injunctive relief, plaintiffs are correct in their assertion that an award of monetary damages would not restrain defendants from any ongoing and continued surveillance. *See Cangemi v. Yeager, supra* at 1400. Thus, contrary to defendants' contentions, plaintiffs cannot be fully recompensed by a monetary award. *See Dana Distribs , Inc. v. Crown Imports, LLC*, 48 A.D.3d 613, 853 N.Y.S.2d 111 (2d Dept. 2008). In sum, plaintiffs' Verified Complaint sufficiently pleads their fourth and fifth causes of action, respectively alleging private nuisance and seeking injunctive relief against defendants.

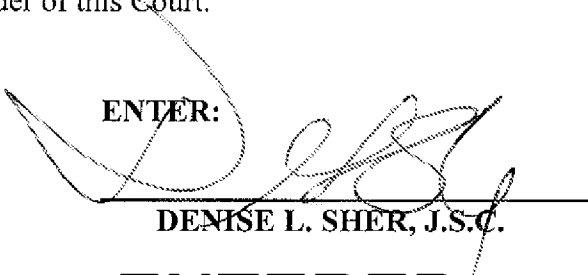
Accordingly, based upon the above, the branches of defendants' motion, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiffs' Second Cause of Action (for Intentional Infliction of Emotional Distress) and Third Cause of Action (for Intentional Infliction of Emotional Distress), are hereby **GRANTED**.

The branches of defendants' motion, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiffs' Fourth Cause of Action (for Private Nuisance) and Fifth Cause of Action (for Injunctive Relief), are hereby **DENIED**. And it is further

ORDERED that the parties shall appear for a Preliminary Conference on **March 3, 2025, at 9:30 a.m.**, at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, J.S.C.

ENTERED

Jan 21 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
January 14, 2025