DOCKET NUMBER. CV 095013052 :SUPERIOR COURT

MARK TEBBETS ET AL. :JUDICIAL DISTRICT
OF NEW LONDON

V. :AT NEW LONDON

THE OLIVER GROUP :JANUARY 28, 2010

FILED
JAN 28 2010
SUPERIOR COURT - NEW LONDON
JUDICIAL DISTRICT AT NEW

MEMORANDUM OF DECISION
Motion to Strike, No. 102

On September 25, 2009 the Oliver Group filed the present motion to strike counts three, four, seven and eight of the plaintiffs' complaint that allege public nuisance and negligent infliction of emotional distress. In their memorandum in support of their motion to strike, the Oliver Group argues that third and fourth counts of the plaintiffs complaint should be dismissed because their allegations cannot support a claim of public nuisance because they relate only to the Oliver Group's alleged interference with the plaintiffs' private property rights and not a right conferred upon the general public. Further, the plaintiffs' seventh and eights counts should be stricken because Connecticut law does not recognize claims of negligent infliction of emotional distress that arise out of damage to or interference with property.

On October 5, 2009, the plaintiffs filed an objection to the Oliver Group's motion to strike in which they argue that public nuisances and private nuisances are not mutually exclusive and that they have alleged that the Oliver Group's actions have exposed the general public to unreasonable noise and traffic associated with a busy commercial enterprise and

sufficiently pleaded a public nuisance action against the Oliver Group. They also argue that their negligent infliction of emotional distress claims should not be stricken because they have not merely claimed that it is the interference with their property rights that has caused them emotional distress. Rather, they argue that they have claimed that it is the excessive noise and activity at the Oliver Group site that has caused them emotional distress. As such, the plaintiffs argue that they have sufficiently pleaded an action for negligent infliction of emotional distress against the Oliver Group.

On November 3, 2009, the Oliver Group filed a reply to the plaintiffs' objection in which they argue that even accepting the plaintiffs allegations are true, they still cannot constitute a public nuisance because they merely allege that the operations at the Oliver Group site effect the private enjoyment of multiple property owners, and thus constitute several potential private nuisance actions, and not a public nuisance. The Oliver Group also again argues that all of the plaintiffs claims relate to damage to their property rights and that Connecticut has not recognized a claim of emotional distress for damages arising out of damage to real property.

ALLEGED FACTS

The allegations of the complaint may be summarized as follows. This case arises out of a dispute between neighboring property owners regarding the reasonable use of a parcel of land in Pawckatuck, Connecticut. The plaintiffs, Mark and Margaret Tebbets own residential property that is adjacent to 595 Greenhaven Road Pawckatuck, property owned by Connecticut by EOF Realty, LLC (EOF) and leased by The Oliver Group, LLC (Oliver

Group), a marketing and business development company.

Dating back to 1975, the Greenhaven Road property was the subject of a zoning variance granted by the Stonington Zoning Board that allowed the parcel to be used for light manufacturing, despite being zoned for light residential use. As part of this variance, the parcel was subject to several restrictions relating to the creation of a buffer zone that satisfied adjacent property owners and the level of noise permitted by the light manufacturing use. Further, only the light manufacturing of electronic devices was allowed at the site. At the time of the 1975 variance, no parking was available at 595 Greenhaven Road and, instead, the parking lot for the facility was located across the street at 596 Greenhaven Road.

In 1977, the variance was altered to permit the light manufacturing and packaging of surgical sponges and supplies. This use continued of many years until EOF purchased the 595 Greenhaven Road property, but not the 596 Greenhaven Road property, where the parking lot was located. After the purchase of the property by EOF, the Oliver Group commenced operating its business at the 595 Greenhaven Road site.

Since May, 2005, and continuing to the present day, the Oliver Group has parked vehicles at the 595 Greenhaven Road site and used a portion of that site as a parking lot. They have also used the property as an office building rather than a light manufacturing facility. Further, they have maintained a residential apartment at the site without obtaining the proper building and fire code permits. Additionally, the Oliver Group has expanded the building's size without regard to the setbacks or buffer zones required by the 1975 variance. Further, the Oliver Group's use of the site has caused excess noise beyond what is normally consistent with light manufacturing uses that has disturbed the surrounding neighbors' use and

enjoyment of their property.

On February 19, 2009, either EOF or the Oliver Group removed trees and shrubs that had served as a buffer zone between the Oliver Group site and the surrounding properties. After being ordered to restore the buffer, EOF or the Oliver Group planted some new shrubbery that was too small to adequately replace the buffer they had removed. As a result, the Oliver Group is in violation of the town zoning regulations relating to the buffer zones required of commercial properties.

As a result of the Oliver Group's business activities, the plaintiffs claim they are disturbed at all hours of the day and night by vehicle parking, excess noise and excess light coming from 595 Greenhaven Road. As a result of these disturbances, the plaintiffs allefehave suffered emotional distress, anxiety, panic attacks, stress, and physical sicknesses that have required medical care and treatment.

On August 20, 2009, the plaintiffs commenced this action by service of process and filing a forty eight count complaint alleging, among other claims, public nuisance and negligent infliction of emotional distress on the part of the Oliver Group.

DISCUSSION

In ruling on a motion to strike, "[t]he role of the trial court [is] to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [plaintiff has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Dodd* v. *Middlesex Mutual Assurance Co.*, 242 Conn. 375, 378, 698 A.2d 859 (1997). "A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . We take the facts to be those alleged in the complaint . . . and

we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . [I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Thus, we assume the truth of both the specific factual allegations and any facts fairly provable thereunder. In doing so, moreover, we read the allegations broadly, rather than narrowly." (Citation omitted; internal quotation marks omitted.) *Craig* v. *Driscoll*, 262 Conn. 312, 321, 813 A.2d 1003 (2003).

A.

"A public nuisance exists if: (1) the condition complained of has a natural tendency to create danger and inflict injury upon person or property; (2) the danger created is a continuing one; 3) the use of the land is unreasonable or unlawful; and (4) the condition or conduct complained of interferes with a right common to the general public." *Keeney* v. *Old Saybrook*, 267 Conn. 135, 163, 676 A.2d 795 (1996).

"The essential element of the concept of nuisance is a continuing inherent or natural tendency to create danger and inflict injury. . . . [The Connecticut Supreme Court has] defined the concept of public nuisance as follows. 'Nuisances are public where they violate public rights, and produce a common injury, and where they constitute an obstruction to public rights, that is, the rights enjoyed by citizens as part of the public. . . . [I]f the annoyance is one that is common to the public generally, then it is a public nuisance. . . . The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence. . . . Moreover, a private individual may create a nuisance in a public place. . . . Typical examples of public nuisances are: pollution and

obstruction of waterways; air and *noise pollution*; maintenance of a fire or explosion hazard, or other unsafe premises; maintenance of a house of prostitution; obstruction of safe travel on a public highway; and maintenance of a junkyard or dump." (Citations omitted; emphasis added). *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 369, 780 A.2d 98 (2001).

Our Supreme Court has described the scope of public nuisance law as "capacious" and has specifically listed "noise pollution" as a typical example of conduct that can constitute a public nuisance. Id. In the present case, the plaintiffs have alleged that the actions of the Oliver Group constitute a public nuisance in that their operations create excessive noise that can be heard at all hours of the day and night; in other words, the plaintiffs have alleged that the Oliver Group is creating noise pollution. They further allege that the actions of the Oliver Group have a natural tendency to inflict injury by creating excessive vehicle traffic in a residential zone and interfere with the public's right to be free from excessive noise and traffic in residential areas. In light of the court's duty to construe the allegations of a complaint in a manner most favorable to sustaining the action when determining the propriety of a motion to strike, the court finds that the plaintiffs' allegations could support a public nuisance claim because they allege excessive noise and traffic congestion that affect the rights of members of the general public who encounter the Oliver Group site.[1] As such, the Oliver Group's motion

---

[1] Specifically, the actions of the Oliver Group, as alleged in the plaintiffs' complaint, could either have a limited impact on the general public, despite causing distress to the plaintiffs, or, alternatively, constitute a gross deviation from the surrounding land use that would have an impact on the living conditions of the public at large. Proving the general nature of the area surrounding the Greenhaven Road facility and the level of noise created by the Oliver Group's activities will be essential in determining whether the Oliver Group's conduct constitutes a public nuisance. However, in determining the propriety of a motion to strike, the court must take the facts alleged in the complaint as true and

to strike counts three and four of the plaintiffs' complaint is denied.

B.

"[I]n order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm. . . . This . . . test essentially requires that the fear or distress experienced by the plaintiffs be reasonable in light of the conduct of the defendants. If such [distress] were reasonable in light of the defendants' conduct, the defendants should have realized that their conduct created an unreasonable risk of causing distress, and they, therefore, properly would be held liable. Conversely, if the [distress] were unreasonable in light of the defendants' conduct, the defendants would not have recognized that their conduct could cause this distress and, therefore, they would not be liable." *Larobina* v. *McDonald*, 274 Conn. 394, 410, 876 A.2d 522 (2005). The Oliver Group argues that the plaintiffs' claim for negligent infliction of emotional distress is legally insufficient because it relates solely to distress caused by damages to their property interests. However, the plaintiffs claim that they have suffered injuries that are independent of the damage to their property interests. Specifically, in their complaint, the plaintiffs allege that they are personally disturbed at all hours of the day and night by the noise and light caused by vehicle traffic and diesel engines running at the Greenhaven Road facility. While these allegations may sound in a claim for

---

construe them in a manner most favorable to sustaining the action. *Craig* v. *Driscoll*, supra, 262 Conn. 321. As such, the court will assume, for the purposes of this motion to strike, that the actions of the Oliver Group are of such a degree that they impact the quality of life of the public at large, and are not merely offensive to the plaintiffs alone.

damages to the plaintiffs' property interests, they also give rise to claims that the Oliver Group's actions have caused personal harm to the plaintiffs as well. In addition to harming the plaintiffs' property interests, the distress of loud truck noises and the constant coming and going of vehicles at the Oliver Group's facility could cause the plaintiffs additional frustrations and emotional distress independent from their concern over their property rights and interests. Taken as true, and viewed in a light most favorable to the plaintiffs, the allegations set forth in the plaintiffs' complaint could support a claim for negligent infliction of emotional distress in that they have alleged that the Oliver Group should have realized that by operating a parking lot in a residential area without a proper buffer would generate excess noise and light that would cause emotional distress to those living in the surrounding area and that those activities have caused the plaintiffs emotional distress, illness and bodily harm. Accordingly, the Oliver Group's motion to strike counts seven and eight of the plaintiffs' complaint is denied.

The Court