

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

WILLIAM GOULECHI, JOANNE GOULECHI,
MICHAEL VUKICH, ISABEL VUKICH,
ROBERT PACHLA, LAURIE PACHLA,
DAVID STAPELS, MICHAEL MEGACNK,
PETER FUCIARELLI, MARY FUCIARELLI,
MICHAEL MAZZARA, ELIZABETH MAZZARA,
NICK SOURIS, MARY SOURIS,
MICHAEL KOUSTICK and TINA KOUSTICK,

Plaintiffs,

vs.

Case No. 2012-5578-CZ

PHILLIP SERRA AND CANDY SERRA,

Defendants.

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OPINION AND ORDER

Defendants have moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiffs have filed a response requesting that the Court deny Defendants' motion.

Factual and Procedural History

The parties are residents of the Buckingham Forest Subdivision (the "Subdivision"). All owners of lots within the Subdivision are bound by restrictive covenants and restrictions which run with the land (the "Restrictions"). On February 28, 2000, Donald and Carolyn Todd purchased Lot 7 of the Subdivision (the "Subdivision Lot"). Subsequently, Mr. and Mrs. Todd purchased the lot directly behind and west of Lot 7 (the "Adjoining Lot"). In 2002, the Todds placed the Subdivision Lot and Adjoining Lot under the same parcel identification number. In 2002, the Todds allegedly erected a shed on the Adjoining Lot. On February 9, 2011,

Defendants purchased and received a warranty deed to the Subdivision Lot and the Adjoining Lot.

Plaintiffs allege that Defendants have breached several of the Restrictions by, *inter alia*, maintaining two trailers, a detached garage and a shed, and operating a tractor on the properties. On December 19, 2012, Plaintiffs filed their complaint in this matter asserting claims for violation of covenants and restrictions (Count I), nuisance (Count I), gross negligence (Count III) and injunctive relief (Count IV). On May 22, 2013, Defendants filed their instant motion for summary disposition. Plaintiffs have filed a response requesting that the motion be denied. The Court has since held a hearing in connection with the motion.

Standards of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

In support of their motion, Defendants contend that the Adjoining Lot is not covered by the Restrictions, that the complained about activities have taken place on the Adjoining Lot, and that as a result they are entitled to summary disposition of Count I. In response, Plaintiffs contend that the Adjoining Lot is covered by the Restrictions under the doctrine of Reciprocal Negative Easement. That doctrine has been explained as follows:

If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land subject to its affirmation or negative mandates.... It must start with a common owner. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. *Sanborn v McLean*, 233 Mich 227, 229-230; 206 NW 496 (1925).

As summarized by one commentator,

The doctrine appears to apply only to lots in a development retained by the common grantor when he or she has conveyed others with some affirmative or negative restriction or otherwise evidenced a common scheme of development. But once established, it applies against both the common grantor who retains lots and those who subsequently acquire an interest in them. [2 Cameron, Michigan Real Property Law (3d ed), § 22.13, p 1253.]

In this case, the Court is satisfied that the Restrictions do not extend to the Adjoining Lot under the doctrine of reciprocal negative easement. In this case, the doctrine would only apply if the original grantor of the lots within the Subdivision had retained the Adjoining Lot and later conveyed that lot to Defendants' predecessors in interest. However, the grantors of the Adjoining Lot were completely different parties than the grantor of the lots within the

Subdivision, including the Subdivision Lot. Consequently, the doctrine does not apply in this case.

Plaintiffs also appear to contend that the Adjoining Lot and Subdivision Lot have merged, which by extension extends the Restrictions to both lots. However, Plaintiffs have failed to support their contention in any way. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Because Plaintiffs have failed to support their position the Court is satisfied that it is without merit. Moreover, the deed by which the properties were conveyed to Defendants evidences that the properties remain separate. While the warranty deed in question deeds both properties to Defendants, it contains a separate description for each property and states that it is conveying the [Subdivision Lot] and the [Adjoining Lot]. (See Defendants' exhibit 7.) Based on the fact that the properties were conveyed separately, and the fact that the properties were acquired by the Todds from different grantors, the Court is satisfied that the Adjoining Lot is not encumbered by the Restrictions. Accordingly, Defendants are entitled to summary disposition of Count I to the extent that Plaintiffs' claims are based on Defendants' activities on the Adjoining Lot.

Next, Defendants contend that they are entitled to summary disposition of Plaintiffs' nuisance claims. Specifically, Defendants contend that their activities are permitted by the Township's and County's requirements and because they have not caused a substantial and significant injury to Plaintiffs. In response, Plaintiffs contend that Defendants' activities constitute a nuisance because they have disturbed a quiet and peaceful neighborhood with their noise and aesthetically displeasing shed, tractor and construction equipment.

Michigan recognizes two types of nuisances: public nuisances and private nuisances. A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land. To be classified as a public nuisance, a nuisance must affect "an interest common to the general public, rather than peculiar to one individual... It is not necessary, however, that the entire community be affected, so long as the nuisance will interfere with those who come into contact with it in the exercise of public right." *Garfield v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957).

In this case, the Plaintiffs allege that the nuisance(s) created by the Defendants only affect the residences of the Subdivision. Accordingly, Plaintiffs' nuisance claims are private in nature. A person is subject to liability for private nuisance for a non-trespassory invasion of another's interest in the private use and enjoyment of land if (1) the other has property rights and privileges in respect to the use or enjoyment interfered with, (2) the invasion results in significant harm, (3) the actor's conduct is the legal cause of the invasion, and (4) the invasion is either intentional and unreasonable, or unintentional but actionable under the rules governing liability for negligent, reckless, or ultra-hazardous conduct. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995).

Defendants contend that their above-referenced conduct, even if true, cannot form the basis for a nuisance claim because such actions in no way substantially and/or unreasonably interfere with the Plaintiffs' right to use their properties. To warrant judicial intervention, a plaintiff must demonstrate that the activities substantially and unreasonably interfere with his or her use or enjoyment of his property. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). Nuisances are dangerous, offensive, or hazardous conditions. *Buckeye*

Union Fire Ins Co v Michigan, 383 Mich 630, 178 NW2d 476 (1970); *Radloff v State*, 116 Mich App 745, 323 NW2d 541 (1982), *remanded*, 417 Mich 894, 330 NW2d 692 (1983).

In this case, this Court is convinced that the Plaintiffs' claims cannot form the basis of a nuisance action. Sheds and the presence of recreational vehicles and/or trailers are commonly found in local neighborhoods and Plaintiffs have failed to establish that Defendants' items/activities have caused a disturbance more severe than any other shed or trailer. Further, the presence of construction equipment, and the noise made by such equipment, is to be expected at the time a construction project is taking place. Moreover, Plaintiffs have failed to provide any evidence establishing the extent to which Defendants' actions have interfered with their ability to use and enjoy their properties. While each of the Plaintiffs has filed an affidavit, their testimony only establishes that Defendant's activities have created eyesores in the form of a shed, trailers, a tractor and a trench. While potentially unpleasant to look at, the Court is convinced that such circumstances do not state a viable nuisance claim. Consequently, Defendants are entitled to summary disposition of Plaintiffs' nuisance claims.

Finally, Defendants contend that they are entitled to summary disposition of Plaintiffs' gross negligence claims. Plaintiffs' gross negligence claims are premised on their contention that Defendants' actions have breached the Restrictions. However, for the reasons discussed above, the Restrictions do not apply to the Adjoining Property. Accordingly, Defendants are entitled to summary disposition of Plaintiff's gross negligence claims to the extent that said claims are based on Defendants' activities on the Adjoining Lot. However, the Court is convinced that further discovery is needed to determine whether Defendants have engaged in any activities/actions on the Subdivision Lot that have breached the restrictions.

Conclusion

For the reasons set forth above, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) is GRANTED IN PART AND DENIED IN PART. Defendants' motion is granted with respect to Plaintiffs' nuisance claims. Further, Defendants' motion is granted to the extent that Plaintiffs' Count I and III are based on Defendants' activities on the Adjoining Lot. The remainder of Defendants' motion is denied. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: October 28, 2013

JCF/sr

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