**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE**
**IN AND FOR SUSSEX COUNTY**

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| SILVER VIEW FARM, INC., | ) | |
| | ) | |
| Defendant Below/Appellant, | ) | C.A. No. 2005-09-168 |
| | ) | |
| v. | ) | |
| | ) | |
| TIMOTHY L. LAUSHEY and | ) | |
| SUSAN B. HEHMAN, | ) | |
| | ) | |
| Plaintiffs Below/Appellees. | ) | |

Decided October 31, 2008

*John W. Paradee, Esquire of Prickett, Jones, & Elliott, P.A., Dover, Delaware; counsel for Defendant Below/Appellant.*
*Christopher W. White, Esquire and James G. McGiffin, Jr., Esquire of Community Legal Aid Society, Inc., Wilmington, Delaware; counsel for Plaintiffs Below/Appellees.*

## DECISION AFTER TRIAL

This appeal *de novo* is an action for breach of a manufactured home community rental agreement (Count II), and for statutory damages for alleged "retaliatory acts" in violation of 25 *Del.C.* § 7023 (Count I). After considering the testimony and evidence submitted by the parties during the course of a two day trial, the Court finds for the Plaintiff on Count I, and for the Defendant on Count II.

## FACTS

Plaintiffs Timothy L. Laushey and Susan B. Hehman (now Laushey) are husband and wife residents of the Silver View Farm manufactured housing community (hereinafter "the Community") located in Rehoboth Beach, Delaware. Defendant Silver View Farm, Inc. is the corporate owner of the Community. In 1999, Plaintiffs purchased a manufactured home situated on Lot B-20 of the Community from Carl and Gladys DiRocco, and on February 23, 1999 entered into a new rental agreement with Defendant for Lot B-20. Plaintiffs executed a

rental agreement on January 1, 2001, and continue to rent the lot and use the manufactured home today as a vacation home.

Plaintiffs' lot is one of about twelve lots in the Community that adjoin a heavily wooded buffer zone area that naturally slopes toward a creek. Rainfall naturally drains downhill on Plaintiffs' and other similarly situated lots toward the creek. The back yard area of Plaintiffs' lot slopes down to the creek. Leaves from the trees of the buffer zone fall upon or blow onto the affected lots. The Community rules and regulations in effect during the time at issue in this matter required the affected lots, including Plaintiffs', to "completely" rake the leaves from the lot on specified dates each year. The evidence clearly established that all of these physical conditions of Plaintiffs' lot were in existence at the time Plaintiffs first rented the lot, and that Plaintiffs were aware of these conditions prior to entering into the rental agreement.

In or about June, 2000, Plaintiffs first complained to Defendant in writing that the back of their lot was experiencing erosion. Defendant initially responded by hiring "erosion professionals" to investigate the matter. In a June 29, 2000 letter to Plaintiffs, Defendant informed them that, according to his professionals, the problem they were experiencing was caused primarily by Plaintiffs' lack of rain guttering on their home and outbuilding, which should be installed. He also gave them permission to allow leaves to accumulate on the back of the lot to further alleviate the situation. Plaintiffs never installed rain guttering. Plaintiffs also complained that same year that the erosion was causing an above-ground oil tank installed a year earlier to tilt precipitously to the point they were concerned it would fall. Photographic and testimonial evidence show that the oil tank continues to sit in the same location at the same apparent tilt.

This 2000 complaint and exchange was the apparent beginning of a contentious, litigious, acrimonious and decidedly *bad* relationship between Plaintiffs and Defendant's

principals, James Truitt, Jr. and James Truitt III, which continues to this day. Plaintiffs have received scores of written violation notices from Defendant over the years. The vast majority of the notices cite Plaintiffs for having leaves on their heavily wooded lot, in violation of a markedly draconian community regulation "D4," which provides that lots must be "completely raked by the weekend nearest to November 15th, December 1st, January 1st, and May 1st each year. Some lots will require continuous raking throughout the year." The Court finds credible Plaintiffs' evidence that they made good faith efforts to conform to the regulations, to rake their lot every weekend they were in residence at their vacation home, and that leaf raking is a never-ending battle for them and most of their neighbors. The Court finds less than credible Defendants' evidence that Plaintiffs were the only tenants repeatedly in violation of the raking provision. The Court concludes that Plaintiffs were the only tenants of those with similar leaf conditions that Defendant found fit to repeatedly cite.

Another of Defendant's regulations requires garbage cans to be set out for pickup no earlier that 4:00 pm on Sunday. On April 15, 2002, Defendant wrote to Plaintiffs complaining that he noticed their cans out at 3:00 pm on Sunday, April 14th, an entire hour early.

The Community Regulations also require tenants to request and receive prior written approval from Defendant for all home improvements and repairs. In 2002, Plaintiffs wrote to Defendant requesting permission to have a siding installer install new siding and skirting on their mobile home, specifying the installer, the style and color of the proposed siding and skirting. In response, Defendant required the following: A meeting with the installer, reaching "agreement" with the installer on the "specifics" of the job, two copies of scaled drawings of the proposal, and a list of all building materials for the project. As a result, the installer wrote to Plaintiffs, declining to take the job. The installer stated that he had done other siding jobs in the Community, and Defendant had never before asked to interview him first or demand scaled drawings.

In short, the nature of Defendant's petty, trivial and nit-picking responses to Plaintiffs' petty and trivial violations and requests, albeit all of which were technically within the scope of the incredibly detailed and rigorous community regulations Plaintiffs agreed to in writing, was made abundantly clear to the Court by the evidence.

Section 7006(a) of the Delaware Manufacture Home Owners and Community Owners Act[1] (the "Act") mandates the inclusion of certain provisions in all manufactured home lot leases. As required by subsection 7006(a)(13)(a), Paragraph 11 of the parties' rental agreement states, "[t]he Landlord shall at all times during the tenancy: a) Maintain the premises and regrade them when necessary to prevent the accumulation of stagnant water thereon, and to prevent the detrimental effects of moving water." Plaintiffs claim that Defendant violated this section of the rental agreement by failing to remedy an erosion problem on the back of their lot. It is Plaintiffs contention that from the moment they moved into their home on Lot B-20, 25% of the lot was unusable because of a steep slope towards the rear of the lot they claim is caused by erosion.

Defendant claims that there is no erosion on Lot B-20, and to the extent that there is any erosion, it is caused solely from the lack of gutters and downspouts on Plaintiffs' home.

Plaintiffs also claim that Defendant has violated Section 7023(b) of Title 25 by engaging in retaliatory acts. Plaintiffs allege that since they first complained to Defendant about the condition of their lot, Defendant has attempted to terminate their rental agreement numerous times and has engaged in a course of harassing conduct intended to cause Plaintiffs to move involuntarily from the Community. Over the course of their tenancy, Plaintiffs have complained to Defendant about their lot, they have complained to the Attorney General's office about the management of the Community, the Attorney General has initiated

[1] 25 *Del.C.* §§ 7001 *et seq.*

an action in the Court of Chancery based in part on their complaints,[2] Plaintiff Hehman has been active in the Silver View Farm Tenants' Association, and Plaintiffs have filed the present lawsuit against Defendant. Under the Act, Defendant cannot respond to any of the above-mentioned actions by attempting to terminate Plaintiffs' rental agreement or attempting to cause them to move involuntarily.[3]

In support of their retaliatory acts claim, Plaintiffs offered their own testimony and that of their neighbor, Theresa Dolan. They portrayed both the elder and younger Truitts as vengeful landlords, quick to cite Plaintiffs for even the slightest violation and equally quick to become verbally abusive. Plaintiffs and Dolan recalled numerous occasions when one or the other Truitt would drive slowly past Plaintiffs' home brandishing a tape recorder and threaten to use everything that any tenant said in a court of law. Plaintiffs also introduced a video tape of a 2001 Tenant Association picnic that was interrupted by Truitt. The tape showed Truitt rudely and provocatively confronting various tenants, including Plaintiff Hehman, and threatening to raise their rent.

In response, the Truitts assert that Plaintiffs are the most difficult tenants that they have had in the Community in thirty-four years, but they always give Plaintiffs the benefit of the doubt and treat them fairly. James Truitt, III testified that every notice sent to Plaintiffs for violating the Rules was justified. Defendant introduced photographs of leaves in Plaintiffs' yard that corresponded with several instances when Defendant sent Plaintiffs notices of violation for failing to rake in accordance with the Rules. Defendant asserts that the Rules are administered fairly and other tenants in the Community are cited for violations as well. Both of the Truitts testified that they drove slowly past Plaintiffs' home because of a

[2] *See State of Delaware,* ex rel., *Brady v. Silver View Farm, Inc.,* Civ.A. 701-S (Del.Ch.2004) (The Chancery action was settled by the parties).
[3] *See* 25 *Del.C.* § 7023(b).

speed bump in the road in front of Plaintiffs' lot, and any time they used a tape recorder it was to make note of conditions or rule violations as they drove through the community.

## DISCUSSION

### *Breach of Contract*

Plaintiffs claim that Defendant breached the rental agreement by failing to re-grade an eroded portion of their lot in accordance with a provision of the agreement. To prevail on a breach of contract claim, three elements must be proven by a preponderance of the evidence: (1) the existence of a contract, whether express or implied; (2) the breach of an obligation imposed by the contract; and (3) resultant damage to the plaintiff.[4] The existence and terms of the rental agreement are not in dispute here; the only factual issue presented is whether Defendant breached the agreement with resultant damages.

In order to establish that Defendant violated Paragraph 11 of the rental agreement, Plaintiffs must first establish that there was either stagnant water accumulating on their lot or that their lot suffered from the detrimental effects of moving water.

#### *Admissibility of Plaintiffs' Expert Testimony*

To establish that their lot suffered erosion from moving water, Plaintiffs offered the testimony of Thomas A. Mierzwa, a civil structural engineer, as expert observational and opinion testimony on soil erosion and its causes. On the eve of trial, Defendant filed a lengthy Motion in Limine objecting to Mierzwa's qualifications as an expert. The Court permitted Mierzwa to testify, but reserved decision on whether the testimony would be accepted as admissible expert opinion testimony.

The admissibility of expert testimony is governed by Rule 702 of the Delaware Rules of Evidence:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

[4] *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del.2003).

> by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[5]

In interpreting D.R.E. 702, the Delaware Supreme Court has expressly adopted the holdings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[6] the U.S. Supreme Court's decision interpreting Federal Rule of Evidence 702, and *Kumho Tire Co., Ltd.v. Carmichael*,[7] the U.S. Supreme Court's decision expanding the scope of *Daubert* to all expert testimony concerning scientific, technical, or other specialized matters.[8]

Under *Daubert* and *Kumho Tire*, the trial judge acts as a "gatekeeper" in ensuring that all expert testimony admitted at trial "has a reliable basis in the knowledge and experience of [the relevant] discipline."[9] To determine the admissibility of scientific or technical expert testimony, the Court must apply a five-step test. Specifically, the Court must determine:

> (1) the witness is qualified as an expert by knowledge, skill, experience, training or education;
> (2) the evidence is relevant;
> (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field;
> (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and
> (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.[10]

The party seeking to introduce the expert testimony bears the burden of establishing admissibility by a preponderance of the evidence.[11]

In analyzing Mierzwa's qualifications under the first step of the above test, the Court finds that Plaintiffs have failed to meet their burden of adequately qualifying their witness as an expert on soil erosion. Mierzwa graduated from the University of Massachusetts in 1998 with a bachelor's degree in Civil Engineering. He took a broad range of engineering courses

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[5] D.R.E. 702.
[6] 509 U.S. 579 (1993).
[7] 526 U.S. 137 (1999).
[8] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del.1999).
[9] *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 794 (Del.2006) (quoting *M.G. Bancocorporation*, 737 A.2d at 521) (internal quotations omitted).
[10] *Bowen*, 906 A.2d at 795.
[11] *Id.*

at college that included the study of geotechnology (involving the way soils move and behave), but did not include any study of hydrology (the study of how water behaves) or any course specifically focusing on soil erosion. In 1999, Mierzwa passed the Fundamentals of Engineering exam, also known as the Engineer in Training exam, (hereinafter "FE/EIT exam") in Massachusetts. The FE/EIT exam is the first of two professional exams that must be passed in order to become licensed as a Professional Engineer, the Principles and Practice of Engineering exam (hereinafter "PE exam") being the second exam. As of the date of trial, Mierzwa had taken the PE exam once and failed.

The Court has reviewed the evidence offered on Mierzwa's professional and occupational experience. From 1999 to present, Mierzwa has been employed by various engineering firms across the country as a civil engineer and a forensic engineer. Although he has extensive experience as a structural engineer inspecting and assessing the cause of damages to buildings and bridges, he has little if any experience in land or soils erosion investigation and analysis.

Mierzwa does not possess any other training or membership in professional organizations that would further qualify him as an expert on soil erosion. Nor has he taken any continuing education courses directly related to soil erosion since obtaining his degree.

In *Spencer v. Wal-Mart Stores East, LP*,[12] the Delaware Supreme Court affirmed the Superior Court's decision to exclude the "expert testimony" of an architect who was testifying as to snow and ice removal. The situation in *Spencer* is very similar to the case at bar. In *Spencer* the proposed expert was trained as an architect whose experience in snow and ice removal was limited to a two-day course and, as a teenager, helping his father, who operated a snow plowing business.[13] The proposed expert in *Spencer* worked for an architectural consulting firm where he provided opinions for clients on topics including construction

[12] 930 A.2d 881 (Del.2007).
[13] *Id.* at 888-89.

quality, playground equipment, mold, water infiltration, maintenance procedures, and snow removal.[14]

The Superior Court in *Spencer* noted that the "[t]rial Court must ensure that the expert's experience can produce an opinion that is sufficiently informed, testable, and verifiable on an issue to be determined at trial."[15] The court continued, "[t]hus, an expert must possess not only specialized knowledge, but also be able analytically to apply that experience in giving a reliable opinion in the case at bar."[16] Furthermore, in analyzing the Superior Court's decision, the Supreme Court looked at the proposed expert's formal education and training, any continuing education on the subject, current and previous employment, membership in professional organizations related to the subject matter of the testimony, and any other life experience that could give the witness expertise in the relevant field.[17]

Although he is a civil "Engineer in Training" by virtue of passing the FE/EIT exam, Mierzwa failed the PE exam and thus is not a licensed Professional Engineer in Delaware. Prior to this case, Mierzwa had no practical experience analyzing the causes of soil erosion, nor any opportunity to study erosion and its effects outside of his general undergraduate studies nearly ten years ago. He's had no continuing education courses on the subject matter of his testimony, nor does he have any personal experience with erosion. In short, Mierzwa's knowledge, skills, experience, training, and education do not adequately qualify him as an expert in soil erosion or soil mechanics. The Court finds that Plaintiffs have failed to satisfy the first step of the five-step test used to determine the admissibility of expert testimony.[18] The Court will not consider any expert opinion testimony offered by Mierzwa at trial relating

[14] *Spencer v. Wal-Mart Stores East, LP*, 2006 WL 1520203, at *2 (Del.Super. June 5, 2006).
[15] *Id.* at *1 (citing *Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del.2004)).
[16] *Id.*
[17] *See Spencer*, 930 A.2d at 888-89.
[18] *See Bowen*, 906 A.2d at 795.

to the erosion of Plaintiffs' lot. The Court will, however, consider Mierzwa's lay testimony concerning his personal observations of Plaintiffs' lot.

At trial, the Court heard testimony as to the condition of the lot from both of the Plaintiffs, their proffered expert, Mierzwa, both Truitts, and from Defendant's expert David Diefenthaler. Several topographical maps and surveys as well as numerous photographs of the yard taken over the course of Plaintiffs' tenancy were introduced into evidence. Although both Plaintiffs claimed there was a serious erosion problem on the rear of their lot, the only qualified expert that testified, Diefenthaler[19], disagreed.

Diefenthaler concluded that there was no apparent erosion occurring on Lot B-20, based upon his on-site observation and analysis of multiple topographical surveys. During his on-site investigation, Diefenthaler observed that there was some bare soil towards the rear of Plaintiffs' lot, but there were no erosion gullies or other visual evidence that is typically present in areas where erosion is occurring. Because the erosion of which Plaintiffs complained was not evident upon inspecting the lot, Diefenthaler then analyzed topographical surveys.

Diefenthaler compared his personal observations as well as photographs of the lot that he took during his investigation with a topographical survey of the lot from 1994. He concluded that the 1994 survey was consistent with what he saw when he investigated the lot in 2006. At Diefenthaler's suggestion, Defendants had a new topographical survey performed by a professional land surveyor in 2006. Diefenthaler then compared the new topographical survey with the 1994 topographical survey by using a computer to overlay one "topo" over the other. He found that the 1994 elevation lines and the 2006 elevation lines showed that the slope of the lot was substantially unchanged between those years. Diefenthaler thus

[19] The parties stipulated to Diefenthaler's qualifications as an expert on erosion and sediment control as a discipline of civil engineering.

concluded that, in his professional opinion, Lot B-20 has not suffered from standing water or from the detrimental effects of moving water.

In addition to the parties' stipulation to same, the Court is satisfied that Diefenthaler's testimony is admissible as qualified expert testimony under the five-step *Bowen* test outlined above.[20] Although both Plaintiffs testified that their lot was eroding rapidly and that they could not use the rear of their lot as a result, Plaintiffs' evidence alone fails to sufficiently satisfy their burden of proof without additional evidence. While photographs introduced at trial do show that Plaintiffs' lot slopes slightly towards the rear, that slope is a result of a natural slope downward towards a creek in the wooded area behind Plaintiffs' lot, that the Court finds existed when Plaintiffs entered into the rental agreement, and of which Plaintiffs were aware. The Court finds Diefenthaler's expert testimony and exhibits showing that the degree of the slope of the lot has not substantially changed in over ten years to be conclusive that the lot has not suffered any demonstrable erosion.

Additionally, a large amount of testimony and photographic evidence focused on the position of an oil tank installed on top of a piece of carpet placed over bare earth, and apparent drop-off in the soil around it. Plaintiffs testified that the tank has tilted since its installation due to erosion of soil underneath it. Plaintiffs argued that the angle of the tank was proof of the erosion of their lot. However, other than the Plaintiffs' lay opinion, no evidence was presented at trial that indicated that erosion was the cause of the tank's angle. Although the tank does appear to have tilted, it is not convincing evidence that Plaintiffs' lot suffered from the effects of erosion.

Several other photographs showed the "undermining" of a corner of the concrete slab of Plaintiffs' shed. Although Plaintiffs assert that these photographs are proof of the erosion occurring on their lot, the only qualified expert witness who testified at trial, Diefenthaler,

[20] *See* 906 A.2d at 795.

found the photographs to be inconclusive. Because Diefenthaler's examination of Plaintiffs' property focused more on the rear of the lot than on the area around the structures on the property, he did not personally observe the drop-off around the carpet or the "undermining" of the shed corner. However, Diefenthaler did carefully examine the photographs at trial, and in his opinion, what was shown in the photographs was unlikely to have been caused by erosion. When questioned about the drop-off around the carpet, Diefenthaler indicated that it could have been caused by moving water, however, given the degree of the drop-off, if that were the cause, he would expect to see some evidence of the water moving down the rest of the lot. He did not observe any such evidence. As to the photograph depicting the "undermining" of the shed, although Diefenthaler indicated that undermining could be a sign of erosion, in such cases he said he would not expect to see vegetation and debris around the area, as was the case here. In light of the testimony regarding the photographs of the drop-off and the "undermining," these photographs do not persuade the Court to find that the lot has an erosion problem.

Plaintiffs essentially are unhappy with the slope and condition of the back of their lot. However, prior to purchasing the home and renting the lot, Plaintiffs had an opportunity to inspect the lot for potential problems. Documents signed by Plaintiffs, such as the Seller's Disclosure of Real Property Condition Report and the Release of Home Inspection Contingency, indicate that they carefully inspected the property and found its condition to be acceptable. In fact, the Release of Home Inspection Contingency specifically mentions the grading, slope and drainage on all sides of the lot, and Plaintiffs indicated that it was satisfactory. The evidence shows that the lot has not undergone any material change since Plaintiffs accepted it as satisfactory.

In sum, the Plaintiffs have not established by a preponderance of the evidence that their lot has suffered from the detrimental effects of moving water. Defendant's duty to re-

grade the lot only arises if and when the lot suffers such effects; therefore Plaintiffs have not proved a breach of the rental agreement.

### ***Retaliatory Acts Under 25* Del.C. *§ 7023***

Plaintiffs claim that Defendant's conduct amounts to retaliatory acts as defined in 25 *Del.C.* § 7023 of the Manufactured Home Owners and Community Owners Act (hereinafter "the Act"). The Act defines a retaliatory act as follows:

> [A]n attempted or completed act on the part of the landlord to pursue an action against a tenant for summary possession, to terminate a tenant's rental agreement, to cause a tenant to move involuntarily from a rented lot in the manufactured home community, or to decrease services to which a tenant is entitled under a rental agreement, after:
>
> (1) The tenant has complained in good faith to either the landlord or to an enforcement authority about a condition affecting the premises of the manufactured home community which constitutes a violation of this subchapter or a violation of a housing, health, building, sanitation or other applicable statute or regulation;
>
> (2) An enforcement authority has instituted an enforcement action based on a complaint by the tenant for a violation of this subchapter or a violation of a housing, health, building, sanitation or other applicable statute or regulation with respect to the premises;
>
> (3) The tenant has formed or participated in a manufactured home tenants' organization or association; or
>
> (4) The tenant has filed a legal action against the landlord or the landlord's agent for any reason.[21]

The Act further provides that if a landlord commits an act outlined above within 90 days of a tenant engaging in one of the protected acts under 25 *Del.C.* § 7023(b)(1)-(4), then the landlord's act is presumed to be retaliatory.[22] Section 7023 also establishes four affirmative defenses, only one of which is relevant here.[23] Specifically, it is an affirmative defense if the landlord had "due cause for termination" and gave the required notice.[24] These provisions of the Act became effective August 25, 2003. Therefore, any of Defendant's actions prior to that date cannot, individually, be deemed "retaliatory" in violation of the Act.

During their tenancy, Plaintiffs have engaged in all four of the acts protected under 25 *Del.C.* § 7023(b)(1)-(4). First, Plaintiffs complained in good faith to the landlord, and later to

[21] 25 *Del.C.* § 7023(b).
[22] 25 *Del.C.* § 7023(c).
[23] *See* 25 *Del.C.* § 7023(d).
[24] 25 *Del.C.* § 7023(d)(1).

the Consumer Protection Unit of the Office of the Attorney General, about the erosion of Lot B-20. Second, the Consumer Protection Unit subsequently filed a complaint against Defendant, in part because of Plaintiffs' complaints.[25] Third, Plaintiff Hehman not only participated in the Silver View Farm Tenants Association, but was its president at one point. And lastly, Plaintiffs filed this action against Defendant.

Plaintiffs allege that Defendant retaliated against them by driving slowly past or stopping in front of Plaintiffs' home on a regular basis; tape recording or threatening to tape record conversations for later use in court proceedings; making verbal threats to increase rent or evict Plaintiffs; and repeatedly sending Plaintiffs numerous notices of violation or termination for breaking the community's rules, most frequently for not raking their leaves.

When analyzing the numerous notices of violations and termination under 25 *Del. C.* § 7023, it is first worth noting that only one of the notices was given to Plaintiffs within the 90 day period that creates a presumption that the action was retaliatory.[26]

The Attorney General filed an enforcement action in the Court of Chancery at least partially based upon Plaintiffs' complaints. Although the civil investigative demand in that action was delivered to Defendant in February of 2003, before section 7023's effective date, the enforcement action was not filed until September 14, 2004. Eighty five days later, on December 8, 2004, Defendant delivered to Plaintiffs yet another rule violation letter for failure to properly rake their leaves. That notice included language to the effect that if the rules were not complied with within twelve days, Plaintiffs' rental agreement would be terminated. If the Court views this notice as an attempt to terminate the rental agreement or as conduct intended to force the tenant to move involuntarily, then this letter would be presumed to be a retaliatory act and the burden would shift to Defendant to prove that it was not.[27]

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[25] *See State ex rel. Brady v. Silverview Farm, Inc.*, Civ.A. 701-S (Del.Ch.2004).
[26] *See* 25 *Del.C.* § 7023(c).
[27] *See id.*

To determine if Defendant's December 8, 2004 notice of violation was presumptively retaliatory, and to determine if any of the notices of violation or termination were retaliatory absent the presumption, the Court must first determine if those notices constitute either an attempt to terminate Plaintiffs' rental agreement or an attempt to cause Plaintiffs to move involuntarily, under 25 *Del. C. §* 7023 (b) (2) or (3).

Although sending these notice letters could be construed as attempts to terminate the rental agreement, the evidence proved otherwise. The Merriam-Webster Dictionary defines "attempt" as a verb meaning "to make an effort toward."[28] Black's Law Dictionary defines "attempt" as a noun meaning "[t]he act or an instance of making an effort to accomplish something, especially without success."[29] Over the course of Plaintiffs' tenancy, they received numerous notices of violation or termination from Defendant giving them twelve days to remedy their noncompliance or else have their rental agreement terminated. Plaintiffs did not always come into compliance with the rules and regulations within the twelve day period; however, Defendant never actually took steps to terminate the rental agreement.

When asked why Defendant didn't terminate the rental agreement even when it had a right to do so under the Act, James Truitt, III responded that the Defendant likes to give its tenants the benefit of the doubt, and that Defendant has terminated only one rental agreement in thirty-four years. Whatever the reason may have been, it appears to the Court that Defendant could have lawfully initiated termination proceedings against Plaintiffs several times but did not. The Court therefore cannot find that Defendant sent the violation notices with the specific intent to commence termination proceedings or otherwise declare the rental agreement terminated. There can be no "attempt" without intent, so the evidence fails to establish that the violation notices were an attempt to terminate the rental agreement.

[28] MERRIAM-WEBSTER DICTIONARY 33 (Home and Office ed. 1998).
[29] BLACK'S LAW DICTIONARY 51 (2nd Pocket ed. 2001).

In addition, the Act mandates that a landlord send violation notices when he believes a tenant is in violation, or he loses the right to subsequently act upon the uncured violation.[30] The General Assembly could not have intended than an action mandated by one part of the Act to protect tenants (written notice of violation) elsewhere in the Act be deemed an unlawful prohibited practice on the part of the landlord. Indeed, the Act provides landlords an "affirmative defense" to a claim of retaliatory termination *only* if the landlord first gave "the required notice to the tenant.[31]"

Nonetheless, were the numerous violation notices sent to Plaintiffs, and Defendant's other actions toward them, intended to cause Plaintiffs to move involuntarily without formal termination of the rental agreement? Plaintiffs claim Defendant engaged in a course of harassing conduct specifically for that purpose; and that Defendant has been stricter in its enforcement of the rules with Plaintiffs than it was with the rest of the tenants. Defendant's leaf-raking rule was imposed upon all of the lots similarly situated near the wooded buffer zone. Although, in the Court's view, the rule was at best draconian and at worst ridiculous, Plaintiffs did agree to it in writing. However, the rule was so onerous that a tenant acting in good faith could nonetheless find himself technically in violation of it.

Defendant's community manager repeatedly testified that Defendant had "due cause" for sending each violation notice, apparently seeking to invoke one of the affirmative defenses set forth in section 7023 (d) (1) of the Act. That subsection provides an affirmative defense to a retaliatory act claim if "[t]he landlord had due cause ***for termination*** of the rental agreement . . . and gave the required notice to the tenant." (Emphasis added.) This specific defense, however, on its face is not a defense to a claim of retaliatory action to cause an involuntary move. It is a defense only to a retaliatory termination or attempted termination. If it were otherwise, then as long as a landlord had due cause to terminate a rental agreement

[30] 25 *Del. C.* §7010A
[31] 25 Del.C. § 7023 (d)(1).

and sent proper notice, he would be immune from liability under the Act for any action, however harassing and heinous, taken to force the tenant to quit the premises without due process of summary possession.

The Court cannot consider any specific violation notices or other acts that occurred prior to August 25, 2003 as discrete retaliatory acts separately violative of 25 *Del. C.* § 7023(b), since the "retaliatory acts" prohibition was not enacted until that date. However, based on the totality of the circumstances shown by the evidence, the Court finds that the repeated, numerous violation notices Defendant sent to Plaintiffs were part of a harassing course of conduct intended by Defendant to cause Plaintiffs to move involuntarily from the Community. The Court does consider the earlier retaliatory acts as circumstantial evidence of Defendant's intent in sending the post-August 23, 2003 notices, which the Court finds were sent specifically to provoke Plaintiffs to involuntarily move. Finally, one specific leaf-raking notice mailed to Plaintiffs on December 8, 2004, was sent less than ninety days after the Attorney General instituted the Court of Chancery enforcement action upon Plaintiffs' complaint. That notice is presumed to be retaliatory under 25 *Del.C.* § 7023(c). Even without the presumption, however, the Court finds that Defendant acted to cause Plaintiffs to involuntarily move from their lot. Defendant has not established an affirmative defense for its actions.

The entire course of Defendant's dealings with Plaintiffs demonstrates its intent to force Plaintiffs off the premises. In the year prior to Plaintiffs complaining to Defendant about the condition of their lot in 2000, Defendant had given Plaintiffs no notices of violation. In the months following their initial complaint regarding the condition of their lot, Plaintiffs and Defendant exchanged numerous letters the content of which ranged from "friendly" requests to juvenile nit-picking over the other's typographical errors. The overall tone of the letters paints a truly hostile picture of the parties' relationship, betraying the Defendant's

representation that it is a benevolent landlord that always gives the tenants the benefit of the doubt.

In addition to written exchanges, both Plaintiffs and their witness, Dolan, testified that both Truitts frequently would harass Plaintiffs verbally. Plaintiffs introduced a videotape from 2001 showing James Truitt, Jr. interrupting a community picnic hosted by the tenants' association. Although the Court is not considering Truitt's actions in the tape as instances of conduct that could be considered retaliatory under 25 *Del.C.* § 7023(b), Truitt's rudely antagonistic behavior and statements captured on the videotape certainly corroborate Plaintiffs' evidence regarding his hostile and harassing behavior toward them after August, 2003.

Plaintiffs and Dolan testified that Truitt, Jr. or Truitt, III frequently slowed down or stopped in front of Plaintiffs' home and stared, gestured, or said things to taunt them. Both of the Truitts explained their stops as necessary to document rule violations. However, based on the credibility of the witnesses and the evidence presented, it is more likely than not that the Truitts were stopping in order to scrutinize Plaintiffs' lot and home in order to find violations when they were otherwise not readily apparent. Such fault finding revealed violations ranging from having a bike stored outside to failing to rake leaves from the flowerbeds.

The numerous violations issued to Plaintiffs also evidence harassment intended to cause them to move involuntarily. Defendant gave Plaintiffs violation notices for even the most minor of infractions. Defendant contends that Plaintiffs are the worst tenants that have lived in the Community since it was founded thirty four years ago. However, even when Defendant could terminate Plaintiffs' rental agreement, it did not do so. It is clear that Defendant has attempted to drive the Plaintiffs from the Community without resorting to termination proceedings.

The Court finds that the notices of violation and termination were part of a harassing course of conduct intended to cause Plaintiffs to move involuntarily. The December 8, 2004 notice of violation was less than ninety days after the Attorney General instituted the Court of Chancery enforcement action, and therefore is presumed to be retaliatory under 25 *Del.C.* § 7023(c). The burden shifts to Defendant to prove that that notice was not retaliatory. Defendant has failed to overcome the presumption that the December 8, 2004 notice was retaliatory.[32] Plaintiffs met their burden of proving Defendant's acts were retaliatory even without the presumption, however.

Under § 7023 (e) of the Act, a tenant "subjected to a retaliatory act set forth in subsection (b) of this section is entitled to recover the greater of 3 months' rent, or 3 times the damages sustained by the resident, in addition to the court costs of the legal action." Plaintiffs submitted no separate evidence of damages sustained from the retaliation. Their monthly lot rent at the time of suit was $442.00.

**CONCLUSION**

Plaintiffs have not proved that their manufactured home rental lot suffers from erosion due to Defendant's failure to maintain and regrade the premises as required by the rental agreement. However, Plaintiffs' complaints about the perceived erosion were the origin of the ensuing years of caustic relations between Plaintiffs and Defendant and its principals. During the course of this ongoing siege, Plaintiffs engaged in tenant acts specifically protected from retaliation by Delaware law. And Defendant engaged in acts in retaliation, intended to cause Plaintiffs to move from the lot, in violation of that law.

Accordingly, on Count I, judgment is entered in favor of Plaintiffs and against Defendant Silver View Farm, Inc. in the amount of $1,326.00. On Count II, judgment is

[32] Even if the "due cause to terminate" defense were applicable to "involuntary move" claims of retaliation, Defendant did not prove that it had due cause to send Plaintiffs the December 8, 2004 notice for failing to rake their leaves, even though it introduced photos of unraked leaves on other occasions.

entered against Plaintiffs and in favor of Defendant. Inasmuch as each party prevailed on one Count, each shall bear its own costs of suit.

**IT IS SO ORDERED.**

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**Kenneth S. Clark, Jr.**
**Judge**