STATE OF MICHIGAN

COURT OF APPEALS

HELGA ROSE,

Plaintiff-Appellant,

v

TERRY BRACISZEWSKI, KATHERINE BRACISZEWSKI, MICHAEL S. SINACOLA and THERESA BRAWDY,

Defendant-Appellees.

UNPUBLISHED
October 13, 2009

No. 285316
Livingston Circuit Court
LC No. 07-022962-CE

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

In this battery and nuisance suit, plaintiff Helga Rose appeals as of right the trial court's order granting defendants Terry and Katherine Braciszewski, and Michael Sinacola and Theresa Brawdy's motions for summary disposition and denying Rose's motion to amend her complaint. Because we conclude that the trial court properly dismissed Rose's claims for battery and nuisance and properly denied her motion to amend, we affirm.

I. Basic Facts and Procedural History

The parties in this case are all neighbors within Hamburg Township. Rose moved into the neighborhood in 2001 and her home sits to the immediate north of a lot owned by defendants Terry and Katherine Braciszewski. Terry and Katherine built a pole barn on this lot, but their home sits on a second lot directly west and across the street from the lot with their pole barn. In September of 2005, defendants Michael Sinacola and Theresa Brawdy moved into their home, which sits on a lot directly south of the lot with the Braciszewskis' pole barn.

Before moving into her home, Rose was unaware that Hamburg Township permitted property owners to burn leaves and other yard waste. The township amended Ordinance No. 40 in 2003 to limit the burning of leaf and yard waste to the months of April and November. Under Ordinance No. 38, the township also prohibited the "keeping, maintaining, accumulating or storage of . . . [r]emnants of wood, . . . accumulations of . . . branches, leaves or yard clippings . . . with the exception of managed compost piles."

In September of 2001, Rose approached Terry Braciszewski and asked him to stop burning leaves and yard waste because the smoke was entering her dining room. Thereafter,

Rose reported several leaf fires started by defendants to the township fire department: three in November 2005, two in April 2006, and one in April 2007. On some of these occasions, Rose reported smoke in her house. Rose indicated that she reported other incidents, but there were apparently no incident reports for these complaints.

Rose also stated that, starting in 2004, the Braciszewskis began running the cars in their pole barn for one to two hours at a time about two to three times per year. Rose claimed that the exhaust emissions from these cars entered her property.

In January 2005 or 2006, Rose attended a township board meeting and complained about the leaf burning. The township supervisor investigated with the fire department and told Rose that burnings were "neighborly burning[s]." Rose understood that to mean that the township would permit the burnings.

Rose sued defendants in June 2007. In her complaint, Rose alleged that defendants' open burnings caused smoke, fumes and debris to envelope her home and damage her property and her health and that Terry Braciszewski's running of his old cars for long periods of time caused emissions of smoke and fumes to drift upon her property damaging her property and her health. Rose alleged that these actions constituted assault and battery, trespass, and nuisance.[1] Rose requested a preliminary injunction prohibiting defendants from conducting open burnings and from running their cars for long periods of time until the case was heard, a permanent injunction to enjoin defendants from conducting open burnings and from running their cars for long periods of time, and damages. After filing her complaint, Rose stipulated to the dismissal of her trespass claim.

The trial court heard oral argument on Rose's motion for a preliminary injunction in August 2007. At the hearing, Rose informed the trial court that the burnings occur in April and November. The trial court noted that Ordinance No. 40D allows such burning. Rose argued that defendants' burnings were not in compliance with the ordinance and that the smoke was permanently damaging her health. Defendants argued that Rose's motion for injunctive relief should be denied because she could not prove the elements of assault and battery nor could she succeed on her nuisance claim. They also noted that there was no proof that their burnings caused Rose's health problems and that they must burn their leaves and debris two times each year in order to comply with Ordinance No. 38. The trial court denied Rose's motion because it was "very skeptical about the likelihood of the success on the merits" and it did not "see the irreparable harm." The trial court also determined that the balancing of factors favored defendants.

In December 2007, the Braciszewskis moved for dismissal of Rose's claims under MCR 2.116(C)(7), (8), and (10). In January 2008, Sinacola and Brawdy also moved for summary disposition under MCR 2.116(C)(8) and (10). On January 28, 2008, Rose moved to amend her complaint to add a claim of intentional infliction of emotional distress.

---

[1] Rose also alleged that the Braciszewskis falsely claimed to own the southern five feet of her property. However, this claim was resolved and is not at issue in this appeal.

After a hearing on defendants' motions for summary disposition, the trial court dismissed Rose's assault and battery claim because Rose failed to prove the requisite intent. The trial court also dismissed the nuisance claim because the invasion is "sporadic, it's evanescent, it disappears and dissipates" and because Rose failed to prove "the type of significant impact or harm envisioned by the law." The trial court also denied Rose's motion to amend the complaint as futile.

Rose moved for reconsideration, but the trial court denied the motion. This appeal followed.

II. Preliminary Injunction

Rose first argues that the trial court erred when it refused to issue a preliminary injunction prohibiting defendants from burning leaves on their property. We review a trial court's decision concerning injunctive relief for an abuse of discretion. *Mich Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001).

Under MCR 3.310(A)(1), unless otherwise provided by statute or court rule, an injunction may not be granted without a hearing. At this hearing, "the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued . . . ." MCR 3.310(A)(4).

> In determining whether to issue a preliminary injunction, a court must consider four factors: (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. . . . The trial court's decision must not be arbitrary and must be based on the facts of the particular case. [*Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998) (citations omitted).]

At the hearing on Rose's motion for an injunction, the trial court found that there was no danger of irreparable injury from the activities about which Rose was complaining, that the balancing of the equities favored defendants, and that Rose's claims did not appear likely to prevail on the merits. The record available at the time of the hearing supported these findings. Rose's physician averred that further exposure to smoke "may" cause her irreparable injury. This averment was insufficient to establish a "real and imminent danger of irreparable injury," because the mere apprehension of future injury or damage cannot be the basis for injunctive relief. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 11; 753 NW2d 595 (2008). Because there was no evidence that Rose would suffer irreparable harm, we cannot conclude that the trial court erred when it concluded that a balancing of the harms favored denying the motion for a preliminary injunction. Defendants noted that they burned their leaves as permitted by local ordinance in order to comply with the ordinance that prohibited the accumulation of yard waste. Likewise, given the nature of the claims, the trial court also had reason to believe that Rose would likely not be able to establish the elements of either a battery or nuisance. Consequently, the trial court did not abuse its discretion when it declined to issue a preliminary injunction.

III. Summary Disposition

Rose also argues that the trial court erred in granting defendants' motions for summary disposition. We review de novo a trial court's ruling on a motion for summary disposition. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). Summary disposition may be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing all the evidence in the light most favorable to the nonmovant. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008).[2]

A. Nuisance Claim

A traditional action for nuisance is grounded in the rights that accompany the ownership of real property; it seeks to vindicate a property owner's right to use and enjoy his or her property without interference by others. *Adams v Cleveland Cliffs Iron Co*, 237 Mich App 51, 57-59; 602 NW2d 215 (1999). However, not every interference with a property owner's use and enjoyment will be actionable:

> No one is entitled, in every location and circumstance, to absolute quiet, or to air utterly uncontaminated by any odor whatsoever in the use and enjoyment of his property; but when noises are unreasonable in degree, considering the neighborhood in which they occur and all attending circumstances, or when stenches contaminate the atmosphere to such an extent as to substantially impair the comfort or enjoyment of adjacent premises, then an actionable nuisance may be said to exist. [*De Longpre v Carroll*, 331 Mich 474, 476; 50 NW2d 132 (1951).]

Accordingly, in order to warrant judicial intervention, the property owner must demonstrate that the activities substantially and unreasonably interfere with his use and enjoyment of his property. *Adams*, 237 Mich App at 67; see also *Smith v Ann Arbor*, 303 Mich 476, 484-485; 6 NW2d 752 (1942) (noting that, although the smoke and odors from burning leaves will not normally constitute a nuisance, if excessive they may be actionable).

In this case, Rose failed to establish that defendants' burning of yard waste and running of automobiles substantially and unreasonably interfered with her right to use her property. The evidence submitted to the trial court shows that defendants only burn yard waste a few times each year. Further, although the smoke and fumes from the burning yard waste will sometimes cross onto Rose's property, Rose also admitted that sometimes the smoke will not enter her

---

[2] Because the trial court considered evidentiary submissions by the parties in deciding the motions for summary disposition, we shall evaluate the motion under MCR 2.116(C)(10). Further, we did not consider the affidavit submitted with Rose's motion for reconsideration because it was not properly before the trial court on the motions for summary disposition. *Quinto*, 451 Mich at 366-367 n 5.

property because the wind will be blowing in a different direction. Rose also indicated that the effects of the smoke—even when it does affect her property—are sporadic and dissipates with time. Similarly, the evidence demonstrated that the Braciszewskis running of their automobiles occurs for a couple of hours during two or three days per year. Thus, the undisputed evidence shows that the activities about which Rose complains are infrequent and, even when the activities actually affect Rose, the effects are intermittent and varying.

Moreover, the fact that Rose might be particularly susceptible to the smoke and fumes does not transform an activity that would otherwise be permissible under a totality of the circumstances into a nuisance. As our Supreme Court has explained, the test for a nuisance is objective: an activity will not rise to the level of a nuisance unless it would cause actual physical discomfort to persons of ordinary sensibilities. *Smith v Western Wayne Co Conservation Association*, 380 Mich 526, 536; 158 NW2d 463 (1968); see also Restatement (Second) of Torts, § 821F (1979) (stating that the harm must be significant and "of a kind that would be suffered by a normal person."). In this case, Rose did not present evidence from which the trial court could conclude that a person of ordinary sensibilities would suffer adverse health effects from the limited activities at issue; she only presented evidence that she herself might have suffered adverse health effects from the activities.[3]

Given these facts, the trial court properly dismissed Rose's nuisance claim. MCR 2.116(C)(10).

B. Assault and Battery

Rose also argues that summary disposition should not have been granted on her assault and battery claim.

In order to establish claims of assault or battery, a plaintiff must demonstrate that the defendant had the requisite intent. *Mitchell v Daly*, 133 Mich App 414, 426-427; 350 NW2d 772 (1984); *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). The intent necessary to make out a battery is the intent to cause a harmful or offensive contact with another person, or knowing, with substantial certainty, that such contact would result. *Boumelhem v BIC Corp*, 211 Mich App 175, 184; 535 NW2d 574 (1995). "[T]he intent necessary to make out a tortious assault is either an intent to commit a battery or an intent to create in the victim a reasonable fear or apprehension of an immediate battery." *Mitchell*, 133 Mich App at 427.

Viewing the evidence in the light most favorable to Rose, there was insufficient evidence to show that defendants acted with the requisite intent. Although it is clear that defendants intended to set the fires and start the automobiles allegedly giving rise to Rose's health complaints, there is no evidence that the defendants took those actions with the intent to cause the smoke or fumes to come into contact with Rose or with the knowledge that their actions were substantially certain to cause such contact. *Boumelhem*, 211 Mich App at 184. Specifically,

---

[3] She did, however, attach a publication by the EPA to her brief on appeal, which stated that generally healthy persons were not at major risk from smoke.

there was no evidence that defendants took steps to increase the likelihood that the smoke and fumes would come into contact with Rose or that the conditions prevalent on the properties was such that defendants had to know that the smoke and fumes were substantially certain to come into contact with her. Further, given the vagaries of wind and weather, defendants' actions in starting the fires and automobiles alone cannot be said to be proof of the requisite intent. Even when the prevailing winds might have given notice that the smoke and fumes would travel in the general direction of Rose's property, there is no evidence that defendants were substantially certain that the smoke and fumes would not pass over Rose—assuming defendants knew of her presence—or that Rose would not otherwise be safe from the smoke and fumes. Likewise, for the same reason, any apprehension that Rose might have had concerning the potential for contact as a result of these activities cannot be said to be reasonable. *Mitchell*, 133 Mich App at 427.

Rose failed to present evidence from which the trier-of-fact could find the requisite intent to support either an assault or a battery claim. The trial court did not err in dismissing Rose's assault and battery claim on this basis.[4]

IV. Leave to Amend

Rose also argues that the trial court erred in denying her motion for leave to amend her complaint to add a claim of intentional infliction of emotional distress. We review a trial court's decision to grant or deny a request for leave to file an amended complaint for an abuse of discretion. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658-659; 213 NW2d 134 (1973). Under MCR 2.118(A)(2), leave to amend pleadings should be freely given but may be denied where the amendment would be futile. *Miller v Chapman Contr*, 477 Mich 102, 105; 730 NW2d 462 (2007). Because there was no evidence tending to show that defendants lit the fires or started the automobiles in order to cause Rose emotional distress or acted with such recklessness that any reasonable person would know that emotional distress would result, Rose would not have been able to establish a claim for intentional infliction of emotional distress. *Lewis v LeGrow*, 258 Mich App 175, 197; 670 NW2d 675 (2003). Therefore, the trial court properly denied Rose's motion to amend her complaint to add this claim as futile

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly

[4] Given our conclusion that the trial court properly granted summary disposition in favor of defendants on all Rose's claims, we decline to address defendants' alternate basis for affirming the trial court's grant of summary disposition and Rose's request to assign the case to a different judge. For the same reason, we conclude that the trial court did not err when it denied Rose's motion for reconsideration.