To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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LEON BEHAR and GAIL BEHAR,

Plaintiff,

Index No. 11594/2010

-against-

DECISION & ORDER

QUAKER RIDGE GOLF CLUB, INC.,

Defendant.

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The following papers numbered 1 to 88 were read on defendant's motion for summary judgment dismissing the complaint and summary judgment on its counterclaims and plaintiff's motion for summary judgment on liability, to permanently enjoin defendant from permitting play on the second hole of the golf course and to dismiss defendant's first and second counterclaims.

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits A-DD	1-32
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Factual and Procedural Background

Plaintiffs commenced this action seeking to permanently enjoin defendant from permitting play at the second hole of defendant golf course. The complaint alleges nuisance, trespass and negligence and relates the intrusion of golf balls onto their property which abuts defendant's golf course. Plaintiffs own one of a number of homes which abut defendant's golf course in the Village of Scarsdale. They contend that between November 2007, when they bought their home, and the Spring of 2008, they enjoyed the full use of their backyard, observing only the occasional golf ball on the perimeter of their property. As spring of 2008 turned to summer, plaintiffs constructed a swimming pool and a swing set on their property. They also endured a storm that in June 2008 which brought down a number of tall trees on the periphery of the golf course on or near their property line.

Unfortunately, without the natural screening of the trees, the number of golf balls landing on plaintiffs' property increased as did the number of golfers seeking to reclaim their errant golf balls. Plaintiffs therefore erected a fence on their property as well as a 25-foot safety net to stop the incursion of golf balls landing on their property. Since plaintiffs brought this action, defendant received authorization to erect a 40-foot safety net on defendant's property along the property line. This replaces the 25-foot net which plaintiffs took down in the autumn of 2010. In addition to the new 40-foot safety net now in place, defendant is also in the process of planting 15 30-35 foot trees in front of the new net to provide additional landscape screening.

By order dated January 24, 2011, the Court (Murphy, J.) denied plaintiffs' application for a preliminary injunction finding that plaintiffs did not sustain their burden of establishing irreparable harm. Further, in balancing the equities the Court noted "plaintiffs were not

surprised by the presence of a golf course next to them, and that they have not yet replaced the trees in their backyard which also provided screening from the balls."

By order dated July 14, 2011, the Court (Murphy, J.) denied plaintiffs' motion for leave to renew their motion for a preliminary injunction. In that order the Court noted:

> As the Court observed on the prior application, the plaintiffs were not surprised to find that their property neighbored on a golf course, rather, they sought out and purchased a home which bordered a course that has been in existence for the better part of a hundred years. As defendant points out in opposition, both plaintiffs acknowledge in their examinations before trial that their prior residence also bordered a golf course. Plaintiff Gail Behar testified particularly that in selecting their current residence plaintiffs sought a property which adjoined a golf course because they desired a quiet street to live on. Having deliberately done so, the Court will not presume to re-balance their assessment of the benefits and disadvantages of their choice to that end, but rather must weight the inconvenience and harm inherent in the proximity of plaintiffs' property to the second hole against the inconvenience and harm which would attend provisional relief precluding play at the second hold of defendant's golf course.
>
> In doing so, the Court is not persuaded that the present incursion of golf balls is a reflection of the failure of the parties' ameliorative measure such that it changed the overall balance of equities. The conclusion that these measures have not proven to be functional, protective, equivalent of the former stand of trees, some of which were more than 80 feet tall simply does not tip the balance of equities in plaintiffs' favor when viewed in the light of plaintiffs' own action and inactions in bringing about the circumstances in which they are now faced. Notably, plaintiffs have not alleged that they replanted a tree screening as high and as dense as those which they removed or neglected to maintain. Nor, for that matter, are the replanted trees even in the same areas as those which were in place when they purchased the property, since that area of their yard is now occupied by the swing set they installed.

By Decision and Order dated May 1, 2012, the Appellate Division, Second Department affirmed the motion court's orders.

Defendant now moves for summary judgment dismissing the complaint and summary judgment on its counterclaims. In support of its motion, defendant argues that

plaintiffs created the nuisance by failing to preserve the trees that served as a buffer between the golf course and their property. Defendant notes that when plaintiffs purchased their home they were given notice of a tree preservation plan for their property which was required by the Scarsdale Planning Board as a condition of the development of their property. Further, in March of 2008, three months before the June 2008 storm, defendant's arborist appeared at the meeting of the Zoning Board. which was held to discuss the plaintiffs' application for a special permit to construct their swimming pool, and specifically warned that a substantial Oak tree (#260, as designated by the tree preservation plan) located on plaintiffs' property had a significant stress crack indicating possible disease and weakened condition and was in need of attention and support so that it could continue to act as a barrier. Defendant argues that despite this knowledge plaintiffs did nothing about that tree and, in fact, the June 2008 storm knocked down tree #260 causing other trees, also designated on the preservation plan along the property line, to fall creating a gap in the natural tree barrier.

Defendant also argues that plaintiffs ignored the absence of the mandated tree screen and constructed their swimming pool in a location closer to the boundary line than was originally proposed in the site plan, and, to make way for the pool, removed another large tree (#306) specifically designated for preservation. Thereafter, plaintiffs failed to replant trees of sufficient height or canopy size to properly comply with the preservation plan.

Defendant argues that it is entitled to summary judgment on its first counterclaim which seeks an order directing plaintiffs to preserve and replace the trees identified to be preserved as directed by the 1999 Resolution and the Declaration of Easement and

Restriction as referenced in their deed. Likewise, defendant seeks to enjoin plaintiffs from removing any additional trees along the property line and requiring them to replace tree #260. In its second counterclaim, defendant also seeks damages for the costs it incurred due to plaintiffs' failure to comply with the tree preservation plan.

Plaintiffs move for summary judgment on the issue of liability arguing that they have taken actions to alleviate the situation and to avoid this litigation. Plaintiffs note that they erected a fence and netting which did not stop the problem. Plaintiffs note the trees which fell as part of the storm were between 80 and 100 feet tall.

Plaintiffs argue that they are entitled to summary judgment on their nuisance claim by establishing that generally about 3-4 golf balls fell on their property each day between May 2011 and June 2011, thereby, rendering their backyard unuseable. These balls fell in their yard despite the fact that defendant erected a 40 foot safety net. Plaintiffs argue that they have established a continuous invasion of their rights by these golf balls landing on their property and, therefore, have set forth a nuisance claim.

With respect to their negligence claim, plaintiffs argue defendant knew the risks to their home inherent in allowing play to continue at the second hole and did not redesign the second hole. Thus, defendant's failure to warn plaintiffs of the danger of living near the second hole and its failure to redesign the second hole negligently placed plaintiffs and their children in harms way.

With respect to their trespass claim plaintiffs argue that the continuing incursion of golf balls demonstrates trespass.

Plaintiffs also argue that they have established entitlement to a permanent injunction preventing defendant from allowing golfers to use the second hole of the course.

Plaintiffs argue that defendant's first counterclaim must be dismissed because they claim they complied with all of the Town of Scarsdale laws and ordinances when they installed their pool. Further, they argue that the tree preservation plan does not apply to them. They argue that the only restriction on their property is a Declaration of Easements and Restrictions dated June 18, 2004. In the declaration it merely states "As to Lots 3 and 4, there shall be no house constructed within fifty (50) feet of the common property line with [defendant] . . . " Plaintiffs argue that this declaration creates a setback, not a buffer zone. Further, the only restriction regarding vegetation states "(e) As to the common property line with [defendant] there shall be no vegetation removed along the common property line without the submission and approval . . . " Plaintiffs argue that they did not remove any trees along the property line. The only trees affected along the property line were brought down by the June storm. Plaintiffs argue that to impose a duty upon them to "maintain and preserve" trees on and off the common property line in perpetuity was not the intention of the 1999 Scarsdale Planning Board Resolution. Rather, that restriction only applied during the development of their home abutting defendant and is not binding on them as current homeowners.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. *(See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact which require a trial of the action" (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Plaintiff's Motion for Summary Judgment

Entitlement to a permanent injunction requires a showing of irreparable injury in the absence of an adequate legal remedy (*see Battenkill Veterinary Equine v. Cangelosi*, 1 A.D.3d 856, 857–859, 768 N.Y.S.2d 504 [2003]; McDermott v. City of Albany, 309 A.D.2d 1004, 1005, 765 N.Y.S.2d 903 [2003], *lv. denied* 1 N.Y.3d 509, 777 N.Y.S.2d 19, 808 N.E.2d 1278 [2004]). Here, there is no legal basis upon which to grant a permanent injunction. First, much of plaintiffs issues with golf balls falling on their property is the result of their own actions or lack thereof.

At the outset the Court notes, that the facts of this case are undisputed.

Plaintiffs purchased their home in 2007. Notably, plaintiffs could have purchased a home that did not abut a golf course, however they intentionally selected this home because it adjoined a golf course and they wanted a quiet street to live on. As Justice Murphy notes in his July 14, 2011 decision and order, "the plaintiffs were not surprised to find that their property neighbored a golf course . . " Attendant with such a "neighbor" is the likelihood that golf balls may fall on your property.

It is also undisputed that pursuant to the 1999 Planning Board Resolution, a so-called "tree preservation plan" was put in place. Contrary to plaintiffs' contentions, there can be no doubt that the purpose of this tree preservation plan was to maintain the natural barrier between the golf course and the soon to be developed homes lining the fairway. In the 2001 tree preservation plan, 66 trees were identified on plaintiffs' property all located within 50' of the common property line which were to "remain." The clear and unambiguous

purpose of this resolution and the plan was to identify the trees which formed the natural barrier and to permit maintenance of that barrier. Apparently this natural barrier was very effective. Notably, plaintiffs themselves acknowledge this, as noted in the Scarsdale Board of Appeals Resolution dated March 10, 2010, "[Plaintiffs] indicated that 80' high trees formerly provided adequate screen of the property. . . "

Plaintiffs' argument that the Declaration of Easement and Restrictions which provide, in relevant part, that vegetation shall not be removed within 50 feet of the property line is merely a "setback" and was not intended to maintain a natural barrier, simply does not make sense. At all times during the site development planning process it was clear that homes were being built next to a golf course. Common sense dictates that there needs to be a safety barrier between the homes and the golf course.

Plaintiffs' argument that the 1999 Resolution only applies to the initial development of the property and not to the current homeowners is belied by the fact that the 1999 Resolution is expressly referred to in the filed map and the filed map is referred to in the Declaration of Easements and Restrictions. Again, plaintiffs' arguments are at odds with common sense. Upon the completion of the construction of the homes, the golf course continued to abut the newly constructed homes, thus the need for the protective barrier did not, as plaintiffs seem to imply, cease when the site development was complete. Indeed, when the homes became occupied by families the need for the preservation and maintenance of the natural protective barrier became paramount.

Plaintiffs argue that defendant improperly seeks to impose a duty upon them "and the other property owners owning homes adjoining the [defendant's] property [to] preserve and maintain certain trees in perpetuity [emphasis in original]." However, that duty was

imposed upon plaintiffs, not by defendant, but when they purchased their home subject to the 1999 Planning Board Resolution as well as the Declaration of Easements and Restrictions expressly referred to in their deed.

Plaintiffs also argue that while there may have been "sick" trees on their property, namely tree #260, they had no duty to address that problem. The Court rejects this argument. While the Court finds plaintiffs do have a legal duty to comply with the tree preservation plan, assuming *arguendo* they did not, if they do not want golf balls falling onto their property then they can't sit idly by and ignore the known risk of a "sick" tree falling and taking down additional trees. Plaintiffs' cannot create their own problem and then complain about it. It is plaintiffs who have placed "[themselves] and their children in harm's way." not the defendant.

Plaintiffs argue that *Gellman v. Seawane Golf & County Club*, 24 AD3d 415 [2nd 2005]), supports their motion. However, as Judge Murphy stated in his July 14, 2011 decision and order *Gellman* is "entirely distinguishable from [the facts] presented herein. In *Gellman*, defendant golf course made no effort to remedy the incursion of golf balls onto plaintiff's property, and defendant was solely and demonstrably responsible for having created the situation which caused the golf ball intrusion in the first place. *Gellman* is thus unavailing to support plaintiffs' motion in this regard, since plaintiffs do not seek equity with hands that are entirely clean (citations omitted)."

Based upon the foregoing, plaintiffs' application for a permanent injunction is DENIED and plaintiff's motion for summary judgment on liability for its claims sounding in nuisance, negligence and trespass is DENIED.

Defendant's motion for summary judgment dismissing the complaint is GRANTED.

Defendant's Motion for Summary Judgment on their Counterclaims

As discussed above, plaintiffs have an ongoing obligation to preserve and maintain the natural protective barrier along their property line with defendant. Therefore, to the extent defendant seeks to have this Court direct that plaintiffs' comply with the tree preservation plan, its motion is GRANTED. Accordingly, plaintiffs' motion for summary judgment dismissing the first counterclaim is DENIED.

With respect to defendant's second counterclaim seeking damages, its motion for summary judgment is DENIED. While defendant had no legal obligation to erect a safety net in an attempt to resolve the errant golf ball problem, defendant acted in a neighborly manner by working to resolve this matter. While defendant acted admirably, its actions do not entitle it to an award of damages. Accordingly, plaintiffs' motion for summary judgment dismissing defendant's second counterclaim is GRANTED.

Dated: White Plains, New York
July 5, 2012

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