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SHORT FORM ORDER

INDEX No. 09-20067
CAL No. 11-02448 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 5-2-12
ADJ. DATE 5-2-12
Mot. Seq. # 004 - MotD

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JASON FIGARSKY and MELANIE FIGARSKY,

Plaintiffs,

- against -

MARION TREUDLER, as sole heir at law of DAVID TREUDLER, STATEWIDE EQUITIES, INC., ALBO AGENCY REAL ESTATE, TERRACES ON THE SOUND PROPERTY OWNERS ASSOCIATION, and MATT REVEGNO, a/k/a MATTHEW REVEGNO, as President of TERRACES ON THE SOUND PROPERTY OWNERS ASSOCIATION,

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 14 - 24; Replying Affidavits and supporting papers 25 - 26; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Terraces on the Sound Property Owners Association for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint against it is decided as follows.

This action arises out of a claim for monetary damages allegedly sustained by plaintiffs when the interior and exterior of plaintiffs' property, located at 29 Soundway Drive in Rocky Point, New York, were damaged due to excessive flooding in 2008. By their bill of particulars, plaintiffs allege that defendant Terraces on the Sound Property Owners Association ("Owners Association") installed a drywell and two berms on Ferndale Road near the back of their house, causing an "artificial diversion of the natural flow of water" and the subsequent flooding of their property.

The first cause of action for a permanent injunction alleges that defendants' alterations to the streets above the plaintiffs' property caused the natural drainage of rain water to carry debris, soil and rocks from the upper streets onto their property. Thus, plaintiffs seek a judgment mandating that defendants make "appropriate repairs ... to ensure that the surface run-off water ceases to drain" onto their property. The second cause of action, sounding in negligence, alleges that defendants' alterations to the streets caused the flow of water to be redirected from the surrounding land to the plaintiffs' property, resulting in flood damage on September 26, 2008 and December 10, 2008. The third cause of action, sounding in private nuisance, alleges that defendants' alterations to the streets substantially interfered with the plaintiffs' use and enjoyment of their property. The fourth cause of action seeks "declaratory relief to maintain the status quo of the value of the property," and the fifth cause of action alleges that defendants fraudulently induced plaintiffs to purchase the property.

The Owners Association now moves for summary judgment dismissing the complaint against it on the grounds that, although it had a dry well installed on Ferndale Road to catch excess water run-off, there is no evidence that the drywell installation was made in bad faith or did not serve a rational purpose, or that it diverted the water run-off from Ferndale Road onto plaintiffs' property. In support, the Owners Association submits, *inter alia*, copies of the pleadings and transcripts of plaintiff Melanie Figarsky's deposition testimony dated March 23, 2011, of plaintiff Jason Figarsky's deposition testimony dated March 23, 2011, and of the deposition testimony dated March 23, 2011 of Matthew Rovegno, a representative of the Owners Association.

At her deposition on March 23, 2011, Melanie Figarsky testified to the effect that she and her family purchased and moved into the subject house in September 2006, and that the first flooding incident occurred on September 26, 2008. She stated that plaintiffs had never experienced flooding at the subject premises prior to September 26, 2008. She further testified that a second flooding incident occurred on December 10, 2008, and they have not experienced any subsequent flooding at the premises.

At his deposition on March 23, 2011, Jason Figarsky testified to the effect that approximately four months after purchasing his home, he observed water flowing down the sluiceway from the end of Ferndale Road to his driveway, and then out to the street in front of his house. He testified that when he moved into the house, the backyard was flat for 30 feet and there was an incline of about 30 feet, leading up to the fence. He testified that in April 2007 he removed the sloped portion within the 100 foot length of the backyard, but did not touch the fence, and that he did not make any other changes to the backyard before the September 2008 flooding incident. Jason Figarsky further testified that prior to April 2007 he had observed runoff water down the sluiceway, and that when he walked against the flow of water in the sluiceway, he discovered the water was "continuing or stemming" from the top of Ferndale Road and draining towards his property. He testified that in April 2007, he complained to the Owners Association that there was "a lot of their runoff crossing [his] property," and that he did not make any complaints to the Owners Association prior to April 2007. According to Jason Figarsky's deposition testimony, the Owners Association installed a drywell at the end of Ferndale Road and re-pitched the road towards the drywell sometime between April 2007 and September 2008. Jason Figarsky testified he contacted the Owners Association by e-mail to complain that the drywell installation and road re-pitching increased the volume and the flow of water coming down the sluiceway. He further testified that, although he believed that the Owners Association had "good intentions" when it installed the drywell, "it just didn't

work out." Moreover, he testified that when he moved into his house, there was no berm on Ferndale Road, and that on September 26, 2008 after the first flooding, he observed a berm at the end of Ferndale Road made from dirt. When he returned to Ferndale Road on December 11, 2008, after the December 10, 2008 flooding, he observed that the berm consisted of asphalt and dirt, and was much wider and higher than before.

At his deposition on March 23, 2011, Matthew Rovegno testified to the effect that the issue relating to the flooding of plaintiffs' home was discussed at a Board meeting conducted on August 3, 2007, and that the Board decided to install a drywell on Ferndale Road and to pave Ferndale Road and Crestwood Road for general maintenance purposes. Mr. Rovegno testified that the minutes of the Board meeting on May 2, 2008 reflected that the drywell was completed on Ferndale Road and Greenleaf Road in September 2007. He testified that after the drywell was installed, Ferndale Road was paved in September 2007. He also testified that although there were discussions about installing another drywell further up the pitch on Ferndale Road, a second drywell was never installed. Regarding a berm located at the northern side of the western edge of Ferndale Road, Mr. Rovegno testified that, upon Jason Figarsky's request, the Owners Association hired a contractor to install the berm to prevent water from flowing down to plaintiffs' sluiceway. He also testified that the berm, about 1½ feet high and 9 feet long, was made of compacted dirt, and that later, it was reinforced with crushed concrete and extended in length by a contractor.

The First Cause of Action: Injunctive Relief

A permanent injunction is an "extraordinary remedy to be granted or withheld by a court of equity in the exercise of its discretion ... Not every apprehension of injury will move a court of equity to the exercise of its discretionary powers" (***Kane v Walsh***, 295 NY 198, 66 NE2d 53 [1946]; *see* ***DiMarzo v Fast Trak Structures***, 298 AD2d 909, 747 NYS2d 637 [4th 2002]). Indeed, equity interferes in the transactions of persons by preventive measures only when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong (*see* ***Kane v Walsh***, *supra*; ***Di Marzo v Fast Trak Structures***, *supra*). Therefore, a permanent injunction may be granted only where the plaintiff demonstrates he or she will suffer irreparable harm absent such relief (*see* ***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]). Moreover, although equitable relief may be a proper remedy to prevent repeated or continuing trespass even if the injury or damages are minimal, the court may refuse to grant such relief if warranted by the circumstances (*see* ***Di Marzo v Fast Trak Structures***, *supra*; ***Danchak v Tuzzolino***, 195 AD2d 936, 600 NYS2d 816 [3d Dept 1993]).

Here, the Owners Association established its entitlement to judgment in its favor as matter of law by demonstrating that plaintiffs would not suffer irreparable injury absent the grant of the permanent injunction (*see* ***Di Marzo v Fast Trak Structures***, *supra*). Rather, the adduced evidence shows that the backyard of plaintiffs' property was a natural drainage point for areas west of Ferndale Road. Jason Figarsky conceded that, prior to the September 2008 and December 2008 flooding, he observed water coming down the sluiceway from the end of Ferndale Road, flowing down to his driveway and then out to the street in front of his house. Thus, although water was carried off the west end of Ferndale Road by artificial means, i.e., the berm, it would have flowed onto plaintiffs' property even without the berm, based on the natural topography of the land. In addition, Melanie Figarsky testified to only two incidents

of flooding, which occurred over four and a half years between the time when plaintiffs moved into the house and the time of her deposition on March 23, 2011. The Court notes that despite the cause of action for injunctive relief, the "wherefore" clause of the complaint seeks only monetary damage from the defendants. Accordingly, given the absence of any material issue of fact as to whether plaintiffs are threatened with irreparable injury, the branch of the instant motion for summary judgment on the cause of action for injunctive relief is granted.

The Second Cause of Action: Negligence

It is well settled that a landowner will not be liable for damages to an abutting property caused by the flow of surface water due to improvements to his or her land, provided that the improvements were made in good faith to fit the property for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes and ditches (*see* ***Papadopoulos v Town of N. Hempstead***, 84 AD3d 768, 922 NYS2d 481 [2d Dept 2011]; ***Moretti v Croniser Const. Corp.***, 76 AD3d 1055, 908 NYS2d 132 [2d Dept 2010]; ***Moone v Walsh***, 72 AD3d 764, 898 NYS2d 472 [2d Dept 2010]). In other words, a landowner will be liable if he or she diverts water onto an abutting premises by artificial means (*see* ***Vanderstow v Acker***, 55 AD3d 1374, 864 NYS2d 813 [4th Dept 2008]; ***Long v Sage Estate Homeowners Assn.***, 16 AD3d 963, 792 NYS2d 219 [3d Dept 2005]).

Here, defendant Owners Association failed to establish its entitlement to judgment as a matter of law on the claim for negligence. The adduced evidence indicates that, after the Owners Association installed a drywell and a berm at the end of Ferndale Road between April 2007 and September 2008, two floodings incidents occurred at plaintiffs' property on September 26, 2008 and December 10, 2008. There are questions of fact as to whether the Owners Association's conduct – namely the installation of a drywell and two berms – caused the surface water to be diverted onto the plaintiffs' property (*see* ***Vanderstow v Acker***, *supra*; ***Long v Sage Estate Homeowners Assn.***, *supra*) and as to whether plaintiffs were comparatively negligent by their act of removing the 30-foot sloped portion of their backyard in April 2007. In view of the foregoing, the branch of the motion which seeks summary judgment in its favor on the second cause of action is denied.

The Third Cause of Action: Private Nuisance

A private nuisance constitutes a threat to one person or a relatively few, an essential feature being an interference with the use or enjoyment of land, and it is actionable by the individual person or persons whose rights have been disturbed (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]; ***Broxmeyer v United Capital Corp.***, 79 AD3d 780, 914 NYS2d 181 [2d Dept 2010]). The elements of a cause of action for private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, and (5) caused by another's conduct in acting or failure to act" (***Copart Indus. v Consolidated Edison Co. of N.Y.***, *supra*; ***Gedney Commons Homeowners Assn. v Davis***, 85 AD3d 854, 925 NYS2d 181 [2d Dept 2011]). To prevail on a private nuisance claim, a plaintiff must show that the "defendant's interference was intentional. An interference is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his

conduct" (***Copart Indus. v Consolidated Edison Co. of N.Y.***, *supra*; *see* ***Berenger v 261 W. LLC***, 93 AD3d 175, 940 NYS2d 4 [1st Dept 2012]).

Here, Jason Figarsky testified that he believed that the Owners Association had "good intentions" by installing the drywell, but "it just didn't work out." The Owners Association has established its prima facie entitlement to judgment as a matter of law by demonstrating that its alleged interference was not intentional, and that the Owners Association did not know that its conduct would result in flooding on plaintiffs' property. In opposition, plaintiffs failed to demonstrate an issue of fact exists as to whether the Owners Association engaged in intentional and unreasonable conduct (*see* ***Caldwell v Two Columbus Ave. Condominium***, 92 AD3d 441, 940 NYS2d 15 [1st Dept 2012]). Accordingly, the branch of the motion which seeks summary judgment on the third cause of action for a private nuisance is granted.

The Fourth Cause of Action: Declaratory Relief

The fourth cause of action for declaratory relief alleges that defendants' alterations to the streets adjacent to the plaintiffs' property caused the value of their property to decrease, and that "the acts of defendants which constitute objectionable and damaging behavior must cease and be prevented from occurring in the future." Thus, plaintiffs seek "declaratory relief to maintain the status quo of the value of the property."

Declaratory judgment does not entail coercive relief, but only provides a declaration of rights between parties that, it is hoped, will forestall later litigation (*see* ***Matter of Morgenthau v Erlbaum***, 59 NY2d 143, 464 NYS2d 392 [1983]; ***New York Public Interest Group v Carey***, 42 NY2d 527, 399 NYS2d 621 [1977]). Accordingly, the declaration in the judgment itself cannot be executed upon so as to compel a party to perform an act or to surrender property (*see* ***Matter of Morgenthau v Erlbaum***, *supra*; ***Kraham v Mathews***, 305 AD2d 746, 761 NYS2d 102 [3d Dept 2003]).

Here, the fourth cause of action for declaratory relief is inappropriate since plaintiffs seek the "coercive relief" – compelling defendants to perform an act – and the similar injunctive relief is sought in the first cause of action. Accordingly, the branch of the motion which seeks summary judgment on the fourth cause of action for declaratory relief is granted.

The Fifth Cause of Action: Fraud

To recover damages for fraud, a plaintiff must establish a misrepresentation or a material omission of fact that was false and known to be false by the defendant, made for the purpose of inducing the plaintiff to rely upon it, the plaintiff's justifiable reliance on the misrepresentation or material omission, and a resulting injury (*see* ***Lama Holding Co. v Smith Barney Inc.***, 88 NY2d 413, 646 NYS2d 76 [1996]; ***Sobel v Ansanelli***, 93 AD3d 1020, 951 NYS2d 533 [2d Dept 2012]).

Here, the fifth cause of action alleges that defendants' deceptive act induced plaintiffs to purchase the property. However, it is undisputed that plaintiffs had no contact with the Owners Association until April 2007, when Jason Figarsky made a complaint about run-off water crossing his

property. The Owners Association established its prima facie entitlement to judgment as a matter of law by demonstrating that it had no contact with plaintiffs prior to April 2007, and that it did not make any representations to induce the plaintiffs to purchase the property. In opposition, plaintiffs failed to raise a triable issue as to whether the Owners Association made representations to them concerning the property prior to the purchase. Accordingly, the branch of the motion seeking summary judgment in favor of the Owners Association on the fifth cause of action is granted.

Dated: DEC 03 2012

J.S.C.
JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION