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SHORT FORM ORDER

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RETURN DATE: **12-21-10**
MOT. SEQ. # **001**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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SOFIA AMOASHIY, MICHAEL AMOASHIY and DIMITRI AMOASHIY,

Plaintiffs,

-against-

SHINNECOCK SHORES ASSOCIATION, INC., and VICTORIA P. GREENBAUM,

Defendants.

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CALENDAR DATE: June 1, 2011
MNEMONIC: Mot. D

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 17 read on this motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1-10; Notice of Cross-Motion and supporting papers ____; Answering Affidavits and supporting papers 11-13; Replying Affidavits and supporting papers 14-17; Other ____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendants seeking dismissal of the plaintiffs' complaint pursuant to CPLR §3211(a)(1) on documentary evidence, CPLR §3211 (a)(5) on statute of limitations and CPLR §3211(a)(7) for failure to state a cause of action on which relief can be granted is denied in part and granted in part.

The plaintiffs instituted this action against the defendants Shinnecock Shores Association, Inc. (hereinafter SSA) and Victoria P. Greenbaum (hereinafter Greenbaum) as a result of the placement of a wooden park bench supported by concrete in a common area facing Moriches Bay behind the plaintiffs' home located at 42 Tarpon Road in East Quogue, Suffolk County on Long Island, New York. The defendant SSA is a not-for-profit corporation designated as the local homeowners association which consists of 264 lots with 258 single family homes, including the plaintiffs, and Greenbaum is an officer of the SSA. The plaintiffs commenced this action on September 9, 2010 alleging four (4) causes of action of prima facie tort, intentional infliction of emotional distress, private nuisance and declaratory judgment seeking a declaration that the bench is a "structure" resulting in a violation of the SSA rules requiring approval by the members of the SSA.

The substance of the plaintiffs' complaint concerns the placement of the bench in the common area of the SSA behind plaintiffs' home which causes the area in and around the bench to serve as "a place of public congregation and assembly" even though the plaintiffs suggested to the SSA a relocation of the bench to an area a mere fifty (50) feet further away allowing the same view of Moriches Bay. Complicating the present placement of this bench is that one of the plaintiffs, Dimitri Amoashiy, is the son of the other two and is handicapped, suffering from cerebral palsy and severe developmental issues and he has enjoyed the privacy afforded to him to watch the bay from his home's deck. The parties were unable to come to an accommodation resulting in the commencement of this lawsuit.

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The defendants now move for dismissal of the plaintiffs' complaint pursuant to CPLR §3211(a)(1) claiming the documentary evidence adequately establishes the lack of a viable claim by the plaintiffs, CPLR §3211(a)(5) claiming the statute of limitations of one (1) year bars the commencement of the plaintiffs' action as to the causes of action alleging prima facie tort and intentional infliction of emotional distress, and CPLR §3211(a)(7) for failure to state a cause of action on which relief may be granted. In particular, the defendants claim that the bench is not a structure and the "business judgment" rule shields SSA's actions from judicial review. The plaintiffs oppose the defendants' motion at least as to its claims on the 4th cause of action seeking a declaration that the bench is a structure and that the SSA violated its own rules requiring a vote on the placement of these benches in the common areas.

For the following reasons, the defendants' motion to dismiss the plaintiffs' complaint pursuant to CPLR §3211(a)(1), CPLR §3211(a)(5) and CPLR §3211(a)(7) is granted as to the defendant SSA on plaintiffs' causes of action alleging prima facie tort and intentional infliction of emotional distress, and denied as to plaintiffs' causes of action alleging a private nuisance and violation of the SSA restrictions and covenants, and granted as to the defendant Greenbaum in her individual capacity in its entirety.

As Professor David D. Siegel in **New York Practice** §258 noted:

> "CPLR 3211 merely supplies the procedural expedient for bringing to the court's attention a ground that supports an early dismissal of a cause of action or defense. The merits of the particular ground, and whether it supports the dismissal sought, may involve a vast realm of law, substantive or procedural or both."

The Court when considering a pre-answer motion to dismiss the plaintiffs' complaint pursuant to CPLR §3211 must afford the complaint a liberal construction, accept the facts contained therein as true, accord it the benefit of every favorable inference and merely determine whether the facts alleged raise a cognizable legal theory upon which a recovery may occur. ***Goldfarb v. Schwartz***, 26 AD3d 462, 811 NYS2d 414 (2nd Dept. 2006). However, while a pleading's factual allegations are presumed to be true on a motion to dismiss under CPLR §3211, bare legal conclusions and factual claims that are flatly contradicted by the allegations in the case or the evidence are not presumed to be true. ***Lutz v. Caracappa***, 35 AD3d 673, 828 NYS2d 426 (2nd Dept. 2006); ***Syracuse Orthopedic Specialists, PC v Hootnick***, 16 AD3d 1019, 793 NYS2d 305 (4th Dept. 2004). Thus, allegations in support of the complaint which are devoid of a factual basis and are vague and conclusory are properly dismissed. See, ***Stoianoff v. Gahona***, 248 AD2d 525, 670 NYS2d 204 (2nd Dept. 1998).

The plaintiffs' 1st cause of action alleges a prima facie tort which was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort would provide a remedy. There is no recovery in prima facie tort unless malevolence is the sole motive for the defendants otherwise lawful conduct. See, ***Morrison v. Woolley***, 45 AD3d 953, 845 NYS2d 508 (3rd Dept. 2007). The requisite elements of prima facie tort include (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification and (4) by an act or series of acts which would otherwise be lawful. See, ***Del Vecchio v. Nelson***, 300 AD2d 424, 729 NYS2d 902 (2nd Dept. 2002); ***Levy v. Coates***, 286 AD2d 424, 729 NYS2d 903 (2nd Dept. 2001). Further, special damages must be pleaded with some specificity. ***Levy v. Coates***, *supra*.

In claims of prima facie tort and intentional infliction of emotional distress the statute of limitations bars actions commenced after one (1) year. (CPLR §215); ***Kwarren v. American Airlines***, 303 AD2d 722, 757 NYS2d 105 (2nd Dept 2003); ***Havell v. Islam***, 292 Ad2d 210, 739 NYS2d 371 (1st Dept. 2002); ***Drury v. Tucker***, 210 AD2d 891, 621 NYS2d 822 (4th Dept. 1994). The plaintiffs in opposition to the defendants' motion do not address or contest the one (1) year statute of limitations claim and upon review of the complaint the benches are alleged to have been placed within the common areas of the SSA in and around July of 2009 and this action was instituted on September 9, 2010. The plaintiffs do not address the untimeliness of their claim or their failure to state a cause of action in prima facie tort and intentional infliction of emotional distress.

Accordingly, the 1st cause of action and the 2nd cause of action are dismissed pursuant to CPLR §3211(a)(5) and CPLR §3211 (a)(7) because of the statute of limitations and the failure to state a cause of action.

However, as to the plaintiffs' 3rd cause of action alleging a private nuisance and the 4th cause of action alleging a violation of the restrictions and covenants of the SSA, the SSA's motion is denied. The elements of a claim for private nuisance are (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's right to use and enjoy land and (5) caused by another's conduct in acting or failing to act. ***JP Morgan Chase Bank v. Whitmore***, 41 AD3d 433, 838 NYS2d 142 (2nd Dept. 2007); ***Rashford v. Randazzo***, 38 AD3d 1261, 834 NYS2d 899 (4th Dept. 2007). In this regard, the Court in ***Weinberg v. Lombardi***, 217 AD2d 579, 629 NYS2d 280 (2nd Dept. 1995) stated that, except for the issue of whether the plaintiff had the requisite property interest, the proof of all these elements is a question to be determined by a trier of fact. In ***State of New York et al. v. Fermenta ASC Corporation***, 166 Misc2d 524, 630 NYS2d 884 (1995) aff'd 283 AD2d 400, 656 NYS2d 342 (2nd Dept.1997), my distinguished colleague, the late Justice Alan D. Oshin in discussing private nuisance noted that

> " a private nuisance embraces not a mere physical injury to the realty, but any injury to the rights of the owner or possessor as to his dealing with possessing, or enjoying such realty." (citations omitted).

The Court finds that the plaintiffs as members of SSA have the requisite property interest, especially as they have articulated claims that the park bench placement has resulted in "a place of public congregation and assembly" disturbing to the plaintiffs and, as members of SSA, they have a property interest in the placement of the benches within the common areas of SSA. The Court finds that the plaintiffs' claims of noise, public hangout of young adults and interference with their deck activities by the placement of this bench in the vicinity of their back yard may constitute a substantial and unreasonable interference with the plaintiffs' use of their home and back yard in particular, as well as constitute an annoyance to their handicapped son, also a plaintiff. Cf. ***Kaniklidis v. 235 Lincoln Place Housing Corp.***, 305 AD2d 546, 759 NYS2d 389 (2nd Dept. 2003). See also, ***Baum v. Ragozzino***, 23 Misc3d 1104(A), 2009 WL 884663. As discussed in ***Kahona Beach LLC v. Santa Ana Restaurant Corp.***, 29 Misc3d 1210(A), 2010 WL 4054473 the Court found, in discussing the 3rd element in nuisance of unreasonable in character, that:

> " '[E]xcept for the issue of whether the plaintiff has the requisite property

> interest, each of the other elements is a question for the jury, unless the evidence is undisputed' (***Weinberg***, 217 AD2d at 579; but see ***McCarty v. Natural Carbonic Gas Co.***, 189 NY 40, 47 [1907]) ['What is reasonable is sometimes a question of law and at others a question of fact. When it depends upon an inference from peculiar, numerous or complicated circumstances it is usually a question of fact']). Residents are not required to... move in order to demonstrate injury"

The plaintiffs' allegation in their complaint that SSA officer(s) told them to move if they were unhappy with the placement of the park bench is a factor to be considered by the trier of fact in determining reasonableness, even more so because the plaintiffs' suggestion to the SSA to move the park bench fifty (50) feet further away provided the same views toward Moriches Bay and because it was at the end of the block would result in less disruption to their use of their deck and the emotional upset to Dimitri Amoashiy, the plaintiff handicapped son.

Finally, when considering a motion pursuant to CPLR §3211 (a)(1) on documentary evidence, a dismissal is warranted only if the documentary evidence submitted in support of the motion by the defendants conclusively establishes a defense to the asserted claims as a matter of law. As with any other CPLR §3211 motion, the complaint is to be liberally construed and the plaintiff is to be afforded the benefit of every possible favorable inference. ***511 W. 232nd Owners Corp. v. Junnifer Realty Co.***, 98 NY2d 144, 746 NYS2d 131 (2002). The documentary evidence must be so compelling and conclusive that it resolves all factual issues as a matter of law and definitively disposes of the plaintiffs' claim. ***Mazur Bros. Realty LLC v. State of New York***, 59 AD3d 401, 873 NYS2d 326 (2nd Dept. 2009); ***Weston v. Cornell University***, 56 AD3d 1074, 868 NYS2d 364 (3rd Dept. 2008); ***Berger v. Temple Beth-EL of Great Neck***, 303 AD2d 346, 756 NYS2d 94 (2nd Dept. 2003).

Here, in the case at bar, and giving the plaintiffs' complaint the benefit of every favorable inference possible, the defendant SSA has not established with conclusive proof that the restrictions and declarations within the SSA rules in regard to a vote on the park benches was either approved or voted upon by the membership. The SSA rules are very specific in Article 14 stating "No structure shall be constructed on SSA property by anyone without a vote of approval from the members." SSA's contention that a bench is not a structure or not subject to the SSA's Article 14 requiring a membership vote is belied by the facts [See, **Southampton Town Code §330-5**; ***Miller v. Price***, 267 AD2d 363, 700 NYS2d 209 (2nd Dept. 1999)] and SSA's alternate contention that a vote of the membership was taken is not established. The documentary evidence is not conclusive that notice was provided to the homeowners or that a vote was taken with regard to the installation and placement of these benches as required by Article 14. Finally, the defendants' argument that the "business judgment" rule insulates the SSA's actions from judicial scrutiny and oversight is unavailing.

In ***Cababe v. Estates at Brookview Homeowner's Ass'n, Inc.***, 52 AD3d 557, 859 NYS2d 742 (2nd Dept. 2008) the Court stated:

> " 'The business judgment rule protects the board's business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the

> [development], deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority ' ***Matter of Levandusky v. One Fifth Ave. Apt. Corp.***, 75 NY2d 530, 554 NYS2d 807, 553 NE2d 1317; see ***Quinones v. Board of Mgrs. of Regalwalk Condominium I***, 242 AD2d 52, 54, 673 NYS2d 450)."

The plaintiffs' claim that the SSA made an improper decision without a proper vote of approval by the SSA membership. Were the Court to accept SSA's argument, then all actions of the SSA would be insulated from judicial scrutiny and review on the mere representation that the action was properly conducted and is a "business judgment." The plaintiffs have established sufficient claims of improper conduct, a violation of Article 14 of the SSA's rules and possible misconduct, bad intent or ill motive directed at the plaintiffs as to the SSA's officers, in particular, Greenbaum, to withstand a "business rule" claim. This warrants denial of the SSA's motion to dismiss the 4th cause of action.

Accordingly, the defendants' motion to dismiss the plaintiffs' complaint pursuant to CPLR §3211(a)(1) on documentary evidence, CPLR §3211(a)(5) on statute of limitations grounds and CPLR §3211(a)(7) for failure to state a cause of action is granted as to the defendant SSA on the plaintiffs' 1st cause of action alleging prima facie tort and 2nd cause of action alleging intentional infliction of emotional distress, and denied as to the 3rd cause of action alleging a private nuisance and 4th cause of action alleging violation of the SSA restrictions and covenants, and is granted as to the defendant Greenbaum in her individual capacity in its entirety. The action is severed and continued against the SSA, the remaining defendant, as to the 3rd cause of action alleging private nuisance and the 4th cause of action alleging violation of Article 14 of the SSA's rules. The SSA is directed to file an answer to plaintiffs' remaining complaint within twenty (20) days of service of a copy of this order with notice of entry thereon.

The foregoing constitutes the decision of the Court.

Dated: October 27, 2011

Peter Kohlman

J.S.C.