NO. KNL-CV- 17-6030465-S

JEAN WALDEN | SUPERIOR COURT

V. | J. D. OF NEW LONDON AT NEW LONDON

NATIONSTAR MORTGAGE, LLC AND NRZ REO INVENTORY CORP. | NOVEMBER 24, 2017

MEMORANDUM OF DECISION IN
RE: MOTION TO DISMISS (#110)

FACTS

This action arises out of an alleged infestation of a colony of running bamboo on the property owned and controlled by the defendant, NRZ Reo Inventory Corp. (hereinafter "NRZ"). The Plaintiff, Jean Walden, owns property in Waterford, Connecticut adjacent to the property of NRZ. On June 14, 2017, the plaintiff filed an eight count complaint alleging the following facts: The defendant, Nationstar Mortgage, LLC (Nationstar), was the owner of real property at 249 Rope Ferry Road, Waterford Connecticut (Nationstar Property) and transferred an unrecorded interest and control of the Nationstar Property to the defendant, NRZ. The plaintiff is the owner of real property located at 243 Rope Ferry Road, Waterford, Connecticut (Walden Property), which property abuts the Nationstar Property. A colony of running bamboo exists on the Nationstar Property and has grown beyond the property line into the Walden Property. The plaintiff has, on a number of occasions, warned Nationstar and NRZ to control the bamboo colony so that it does not invade 243 Rope Ferry Road. The uncontrolled colony of bamboo on the Nationstar Property threatens to and has in fact crossed onto the Walden Property.

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In counts one and five of the complaint, the plaintiff further alleges that the defendants were negligent because they had a duty not to allow the bamboo to encroach upon the plaintiff's land. The plaintiff also asserts that the defendants breached their duty of care by failing to remove the bamboo proximate to the Walden Property.

In counts two and six of the complaint, the plaintiff further alleges that the bamboo colony physically invades her property without her permission and that she has asked Nationstar and NRZ, orally and in writing, to control the bamboo, and the defendants' failure to control the bamboo is intentional.

In counts three and seven of the complaint, the plaintiff also claims that the defendants failed to control the bamboo colony in violation of the Connecticut Environmental Protection Act (CEPA), specifically General Statutes § 22a-16 and § 22a-381e, which failure constitutes an unreasonable harm and future threat of harm to the public trust in the natural resources of the state.

In counts four and eight of the complaint, the plaintiff further alleges the migration of the bamboo colony unreasonably interferes with the peaceable use and enjoyment by the plaintiff of the Walden Property. The plaintiff further claims that the bamboo colony damages her landscaping, plants, and trees on her property, causes her concern and worries regarding the continual invasion, and causes her to spend money to remove the bamboo from her property.

On August 11, 2017, NRZ filed a complaint for apportionment as to the parties responsible for negligence under General Statutes § 52-572h. On August 14, 2017, the plaintiff filed a revised complaint and a motion to dismiss the apportionment complaint. In the revised complaint, the plaintiff also has removed the negligence counts and has left the claims regarding trespass, nuisance and violation of General Statutes § 22a-16 and § 22a-

381e. The revised complaint has a total of six counts.[1] On September 13, 2017, NRZ filed a memorandum in opposition to the plaintiff's motion to dismiss the apportionment complaint. On September 13, 2017, the plaintiff filed a reply.

ANALYSIS

"[A] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 350, 63 A.3d 940 (2013). "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 626, 79 A.3d 60 (2013). "A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide." (Internal quotation marks omitted.) *Hinde* v. *Specialized Education of Connecticut, Inc.*, 147 Conn. App. 730, 740-41, 84 A.3d 895 (2014).

A. Counts Two and Five: Connecticut Environmental Protection Act

The plaintiff argues that General Statutes § 52-572h—the apportionment statute-- is not applicable to the alleged violations of CEPA because the violation is not a cause of action based on negligence and the apportionment complaint cannot rest on any basis other than negligence. The plaintiff further argues the statutory cause of action of the running bamboo is based on nuisance and not negligence. NRZ argues in response that a defendant found liable under CEPA will be deemed to have been negligent by virtue of violating the statute because it is negligence per se. NRZ further argues because the plaintiff's allegations against it are rooted in alleged unreasonable conduct causing the plaintiff harm, apportionment of liability and damages must be available and the court has jurisdiction.

[1] In counts one and four, the plaintiff alleges trespass. In counts two and five, the plaintiff alleges violations of CEPA, specifically General Statutes § 22a-16 and § 22a-381e. In counts three and six, the plaintiff alleges nuisance. The only counts NRZ contests are the nuisance and violations of CEPA claims and, thus, the only counts discussed herein are those counts.

General Statutes § 22a-16 provides in relevant part: "[A]ny person . . . may maintain an action in the superior court . . . for declaratory and equitable relief against . . . any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . . ."

General Statutes § 22a-381e (b) provides in relevant part: "No person who . . . allows running bamboo to be planted on his or her property shall permit such bamboo to grow beyond the boundaries of his or her property." General Statutes § 22a-381e (c) provides in relevant part: "No person shall . . . allow running bamboo to be planted on his or her property at a location that is forty feet or less from any abutting property . . . ."

"Negligence per se . . . serves to superimpose a legislatively prescribed standard of care on the general standard of care. . . . A violation of the statute or regulation thus establishes a breach of duty when (1) the plaintiff is within the class of persons intended to be protected by the statute, and (2) the injury is the type of harm that the statute was intended to prevent." (Citation omitted; internal quotation marks omitted.) *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 24, 60 A.3d 222 (2013). "[I]n determining whether a duty of care is owed to a specific individual under a statute, the threshold inquiry . . . is whether the individual is in the class of persons protected by the statute. . . . In determining the class of persons protected by a statute, we do not rely solely on the statute's broad policy statement. Rather, we review the statutory scheme in its entirety, including the design of the scheme as enacted." (Citation omitted; internal quotation marks omitted.) *Vermont Mutual Ins. Co.* v. *Fern*, 165 Conn. App. 665, 673, 140 A.3d 278 (2016). "[O]ur courts have treated a statutory violation as negligence per se in situations in which the statutes . . . at issue have been enacted for the purpose of ensuring the health and safety of members of the general

public." (Internal quotation marks omitted.) *Shukis* v. *Board of Education*, 122 Conn. App. 555, 580, 1 A.3d 137 (2010).

"CEPA was enacted by the legislature to enable persons to seek redress in the court when someone is [polluting] our environment. . . . [O]ur Supreme Court has determined that when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes [unreasonable pollution] under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme." (Citations omitted; internal quotation marks omitted.) Id., 581. Additionally, the Appellate Court has held that "§ 22a-16 imposes on the defendants a standard of care, the violation of which constitutes negligence per se." Id., 582.

"[T]he two-pronged test applied to establish negligence per se is: (1) that the plaintiff was within the class of persons protected by the statute; and (2) that the injury suffered is of the type that the statute was intended to prevent." Id., 580.

In the present case, under the two-pronged statutory test, the plaintiff, who alleges damage to her property caused by bamboo, is within the class of persons protected by the statute. Furthermore, on the basis of the Appellate Court's interpretation of unreasonable pollution, the alleged injury suffered by the plaintiff is of the type that CEPA intended to prevent—in this case, the continued violations of the running bamboo going beyond the defendants' property and onto the plaintiff's abutting property.

B. Counts Three and Six: Nuisance

The plaintiff also argues that NRZ's apportionment complaint is based upon General Statutes § 52-572h, which applies exclusively in causes of actions based on negligence, and the claim of nuisance is not a cause of action based on negligence because the complaint alleges common-law nuisance and statutory nuisance under General Statues § 22a-318e (f).

NRZ argues that a cause of action for nuisance may be based upon a defendant's negligent misconduct.

The plaintiff argues in her brief that her complaint alleges statutory nuisance under General Statutes § 22a-318e and common-law nuisance. The complaint, however, does not allege statutory nuisance under General Statutes § 22a-318e (f), which provides: "Allowing running bamboo to grow beyond the boundaries of a parcel of property that a person owns shall be deemed to be a nuisance." The complaint merely alleges that the defendants' bamboo colony unreasonably interferes with the peaceable use and enjoyment by the plaintiff of the Walden Property. Therefore, the complaint is alleging a common-law nuisance.

"A common-law nuisance claim consists of four core elements: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the [plaintiff's] injuries and damages." (Internal quotation marks omitted.) *Elliott* v. *Waterbury*, 245 Conn. 385, 420, 715 A.2d 27 (1998). "[T]his four factor analysis has since been applied without distinction to both public and private nuisance causes of action." *Pestey* v. *Cushman*, 259 Conn. 345, 356, 788 A.2d 496 (2002).

"Although there are some similarities between a public and a private nuisance, the two causes of action are distinct. . . . Public nuisance law is concerned with the interference with a public right and cases in this realm typically involve conduct that allegedly interferes with the public health and safety. . . . Private nuisance law, on the other hand, is concerned with conduct that interferes with an individual's private right to the use and enjoyment of his or her land. (Citations omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 357, 788 A.2d 496 (2002).

In the present case, the plaintiff alleges that the bamboo colony on NRZ's property unreasonably interferes with the peaceable use and enjoyment of the Walden Property, but

conduct that interferes with an individual's private right to the use and enjoyment of his or her land. (Citations omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 357, 788 A.2d 496 (2002).

In the present case, the plaintiff alleges that the bamboo colony on NRZ's property unreasonably interferes with the peaceable use and enjoyment of the Walden Property, but does not allege any interference with a public right. "[A] defendant's use of his property, while reasonable, nonetheless constitutes a common-law private nuisance because it unreasonably interferes with the use of property by another person." *Pestey* v. *Cushman*, 259 Conn. 345, 359-360, 788 A.2d 496 (2002). Therefore, the nuisance alleged is a common-law private nuisance.

"[I]n a common-law private nuisance cause of action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . *or the result of the defendant's negligence*." (Emphasis added; internal quotation marks omitted.) *Shukis* v. *Board of Education*, supra, 586. Therefore, a common-law private nuisance cause of action can be based on negligence.

CONCLUSION

Accordingly, the court denies the plaintiff's motion to dismiss the defendants' apportionment complaint.

T. Bates

Bates, J.