Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-417

MAY TERM, 2008

Frank Huard and Karen Huard	}	APPEALED FROM:
	}	
	}	
v.	}	Lamoille Superior Court
	}	
	}	
Michael Henry, Melinda Henry, Joel Prive and Lisa Prive	}	DOCKET NO. 197-10-05 Lecv
		Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal from a superior court judgment dismissing their claims against defendants for nuisance and breach of contract arising from a dispute over a community wastewater system. Plaintiffs contend the court erred in: (1) finding that any damages arising from the alleged nuisance were insubstantial; (2) failing to afford injunctive relief; and (3) declining to award contract damages on the ground that they were not foreseeable. We affirm in part, reverse in part, and remand for further proceedings.

This appeal arises from a long-running dispute among neighbors in a subdivision in the Town of Morristown. Under restrictive covenants established by the subdivision developer, defendants are responsible for the inspection, maintenance, and repair of a common wastewater system, part of which is located within an easement on plaintiffs' property. Although plaintiffs opted out of the community wastewater system when they purchased their lot in 2000, they subsequently filed suit against defendants for nuisance and breach of contract, alleging that defendants had breached their duty under the covenant to properly maintain and repair the system, resulting in the release of noxious fumes and effluents and a health hazard to plaintiffs and others.

A bench trial was held in August 2007. At the close of plaintiffs' case-in-chief, defendants moved for judgment as a matter of law. The court granted the motion, stating its findings from the bench. In sum, the court found that while the evidence showed some effluent release from the system in the spring of 2005, there was no evidence that it had escaped the easement area or resulted in any odors or significantly interfered with plaintiffs' use and enjoyment of their property. The evidence also showed that defendants had worked to repair the

leak within a reasonable period of time, and there was no evidence the problem had recurred. The court thus concluded that, on balance, plaintiffs had failed to prove an unreasonable interference with their property sufficient to entitle them to relief.

As to the breach-of-covenant claim, the court found "that the evidence presented in the plaintiffs' case does in fact establish that there are some defects and noncompliance" with the septic plan incorporated into the covenants. The court further found, however, that the only damages shown by plaintiffs were the costs they incurred from their decision to build their own septic system in 2002, that these were consequential damages not reasonably foreseeable to the parties, and therefore were not recoverable. Accordingly, the court granted judgment as a matter of law in favor of defendants. Plaintiff subsequently moved to amend the judgment, asserting that the court's finding of defects in the wastewater system entitled them to injunctive relief. The court denied the motion in a brief entry order, explaining that "[a]s the court recalls it, the entry of judgment as a matter of law under V.R.C.P. 52(c) had alternative bases, i.e., failure to establish a prima facie case that there had been any breach or violation of the applicable covenant, and/or that any reasonable loss had been sustained, and that no damage(s) attributable to [defendants] had been established." This appeal followed.

Plaintiffs first challenge the court's dismissal of their nuisance claim, asserting that the court's findings reflect a "casual indifference" to the defects in the wastewater system. In evaluating a nuisance claim, a court must consider both the "extent of the interference" and the reasonableness of the challenged activities in light of the circumstances. Trickett v. Ochs, 2003 VT 91, ¶ 37, 176 Vt. 89. "In order to be considered a nuisance, an individual's interference with the use and enjoyment of another's property must be both unreasonable and substantial." Coty v. Ramsey Assocs., 149 Vt. 451, 457 (1988). Although plaintiffs here stress that the evidence showed several violations with the septic permit incorporated into the covenants, they cite nothing in the record to demonstrate that they suffered a substantial interference with their use and enjoyment of the property. Accordingly, we discern no basis to disturb the ruling.

Plaintiffs also contest the court's refusal to award damages for their costs incurred in constructing a separate septic system. Plaintiffs do not challenge the court's characterization of the damages as special or consequential rather than "direct," i.e., flowing "naturally and usually" from the breach itself. EBWS, LLC v. Britly Corp., 2007 VT 37, ¶ 8, 982 A.2d 497. They contend the court erred, however, in finding that plaintiffs' construction of their own separate septic system "is not something that would have been reasonably foreseeable as damages that would have been incurred because the system was in fact noncompliant with the plans and specifications." See id. (to obtain consequential damages, plaintiff must satisfy tests of "causation, certainty, and foreseeability" and demonstrate that such damages would reasonably have been within the contemplation of the parties when they made the agreement). Plaintiffs' sole argument in this regard is that the construction of a separate system was a foreseeable and reasonable effort to "mitigat[e]" defendants' breach, but they make no showing of any understanding by the parties that replacement rather than repair of the system was contemplated, much less necessary in this case. Accordingly, we find no basis to disturb the court's conclusion that "the foreseeable damage that reasonable people would have objectively been able to foresee is . . . efforts to bring the system into compliance and to meet all the necessary plans and specifications."

Finally, plaintiffs maintain that, having established several violations of the septic plans incorporated within the covenant, they were minimally entitled to have their request for injunctive relief considered by the court. Plaintiffs included a request for injunctive relief in their complaint and, as noted, renewed the request in their motion to amend the judgment. In denying the motion, the court indicated that it had found that plaintiffs failed to establish "any breach or violation of the applicable covenant," but a review of the court's findings shows, to the contrary, that the court specifically found "that the evidence presented in the plaintiffs' case does in fact establish that there are some defects and some noncompliance" with the covenant requirements.

Plaintiffs cite the general principle that restrictive covenants in a deed may be enforced through the equitable relief afforded by an injunction. Sweezey v. Neel, 2006 VT 38, ¶ 11, 179 Vt. 507. The covenants at issue here, however, are not of this type, but rather make the community septic system the affirmative responsibility of each lot owner who derives a benefit from the system. Nevertheless, there is some authority for the granting of injunctive relief to compel the maintenance or repair of common areas as required by residential-association bylaws. See, e.g., Collins v. Hayden on the Hudson Condominium, 602 N.Y.S.2d 867, 868 (App. Div. 1993) (mem.) (granting injunction in favor of condominium owner to compel board to repair common area); Agassiz W. Condo. Ass'n v. Solum, 527 N.W.2d 244, 249 (N.D. 1995); (noting that "courts have sustained injunctive relief to compel compliance with condominium bylaws requiring a board to make repairs to common areas"). Like the unit owners in these cases, plaintiffs here seek, in effect, to specifically enforce the maintenance and repair obligation under the covenants, and as we have generally held, such equitable relief may be available if the party seeking relief can demonstrate that the normal remedies at law are inadequate. Campell Inns, Inc. v. Banholzer, Turnure & Co., 148 Vt. 1, 4 (1987). Accordingly, we conclude that the case must be remanded to the trial court to consider plaintiffs' request for injunctive relief solely in light of the evidence presented at trial.

The judgment is affirmed, but the order denying plaintiffs' motion to amend is reversed and case remanded to the trial court to consider plaintiffs' request for injunctive relief.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice