VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-03339

Stonybrook Condominium Homeowners Association v. Thomas West

ENTRY REGARDING MOTION

Title: Motion for Preliminary Injunction; Motion to Dismiss ; (Motion: 2; 5)
Filer: William F Grigas; Jennifer E. McDonald
Filed Date: September 21, 2022; November 16, 2022

The motion is GRANTED IN PART and DENIED IN PART.

The present matter concerns a roiling dispute over how far an individual homeowner within a common interest ownership association can go in expressing his displeasure and dissent over the association's activities. At the same time, this action tests the limits of how far the Association can go to silence or relieve themselves of an implacable, and at times hostile, critic.

The basic facts are as follow. Plaintiff is a common interest ownership association that manages the common area and infrastructure for a series of condominium units located on a property in Stowe, Vermont. Defendant Thomas West is an individual unit owner within a building located within this common interest ownership association as those terms are defined under 27A V.S.A. § 1-103. The relationship of the parties is governed by Vermont law and by Title 27A, known as the Vermont Common Interest Ownership Act. The parties are also subject to a declaration and set of bylaws duly adopted and approved by the original developers and declarants of the Stonybrook Condominium Homeowners Association (the "Association" or "Plaintiff"), which have been modified by the Association over the subsequent years.

The specific facts giving rise to the complaint concern various statements, communications, and actions taken by Defendant in opposition to and in protest of the decisions and consensus of the Board over the past year, specifically concerning infrastructure issues associated with the building in which Defendant's unit is located. As explained through his testimony at the October 5, 2022 preliminary injunction hearing, Defendant reports that his unit

and building have had significant problems, including septic back-up and moisture issues. Defendant has sought a resolution to these and other issues from the current governing board of the Association and from prior boards—as well as from current and prior managers and employees. Defendant has not been satisfied with the results, and he has expressed his on-going dissatisfaction with the lack of solutions or approached taken by the Association. These actions have included numerous e-mails, texts, and phone calls, attendance at various Association Board and Committee meetings, and through his efforts to report to the Association about his own research into possible solutions. Defendant's efforts to communicate have been primarily directed to the Association's Board and other unit members as well as the Association's managers. More recently, Defendant has sought to continue these efforts by reaching out to third-party contractors hired by the Association to do work.[1]

To reduce the dispute down to its essential elements, the Association, through its evidence and testimony has demonstrated its efforts to manage the common area, infrastructure, and the various components of these systems through various engineering, maintenance, and construction projects. Defendant, concerned with the value, cost, and use of his condominium, has objected to several parts of the Association's work and decision-making process, and he has sought through communications—including text, email, phone calls, and in-person conversations—to make his objections known and to push for rejection of other plans in favor of what he believes should be done. These communications have strayed into realm of personal attacks, repeated communications, and efforts that might be characterized as dogged, but could also be characterized as unrelenting and aggressive.

As detailed below, the Court finds a narrow area for both the preliminary injunction and Plaintiff's complaint to continue, but it dismisses several components of Plaintiff's complaint.

Preliminary Injunction

The Court issues the initial, ex parte injunction in this matter based on the actions of Defendant that interfered with the site work planned by Plaintiff. This interference took two

[1] Defendant has, at various times, served on a committee created by the Association to deal with wastewater issues. Notwithstanding this membership, the Court does not find any evidence that his actions were taken as part of this committee. Rather Defendant's action, as evinced through testimony and exhibits, appear to be in furtherance of his own, personal position and his interests regarding his own unit.

primary forms. The first was Defendant's actions toward an engineer, Barbara Evans of Knight Engineering. Defendant's questions and inquiries became so intensive and persistent that Ms. Evans terminated her contract with Plaintiff because the questions had pushed the project beyond what she and the Association has agreed would be the scope of the work. The second was Defendant's cease and desist letter, which he sent to Walker Construction, who had been retained by Plaintiff to perform excavation and septic work in the common area outside Defendant's building. The Court concluded that these instances, along with Defendant's substantial communications with the Association disputing their actions, their legitimacy, and even their motivations for the repairs, constituted sufficient evidence of tortious interference with third parties that under V.R.C.P. 65 justified the issuance of an ex parte temporary restraining order. Importantly, the Court found that the on-going work and the on-going threat of interruption and interference justified the limited restraint.[2]

At the October 5, 2022, Plaintiff sought to expand the scope of the preliminary injunction to prevent Defendant from communicating with Plaintiff and Plaintiff's property manager. Defendant sought to dismiss the claims as lacking in a legal basis, which the Court will take up in greater detail below.

As to the issue of tortious interference, the evidence continues to support a conclusion that Defendant acted to interfere with Plaintiff's efforts to hire and retain third-party contractors. *Gifford v. Sun Data, Inc.*, 165 Vt. 611, 613 (1996) (laying out the elements of a tortious interference claim). The evidence shows that Defendant likely acted in a manner intended to frustrate Plaintiff's plan to retain an engineer and perform repairs. The evidence shows that these actions were intentional and were a function of Defendant's disagreement with the actions and decisions of Plaintiff. While Defendant was free to object or express his displeasure about these decisions, he was not free to cause delay or termination in the work of these third-party contractors. As stated in the Association by-laws and under 27A V.S.A. § 3-102, it is the Board of the Association that has the sole authority to contract and direct work on the common areas

[2] While not an example of tortious interference, the evidence of Defendant's correspondence with Plaintiff's counsel and the allegations by Plaintiff's former manager supported the finding that Defendant was acting in a conscious and intentional manner and that any restraint, short of a court order was unlikely to cause him to refrain from interfering with third-party contractors.

and infrastructure. While Defendant is a unit owner, he is not the Board, and by acting in his individual capacity to thwart the actions of the Board, he interfered with the Board's contracts on behalf of the Association. These actions resulted in the loss of one engineer and a delay in construction. When coupled with the fact that work on common areas will continue during the pendency of this litigation, the fact that Defendant has not demonstrated any right or privilege to interfere with these construction and repair projects, and the fact that he has not indicated whether he intends to stop any efforts to interfere, a preliminary injunction is the necessary consequence to preserve Plaintiff's right to seek and complete repairs as it is authorized and empowered to do under Vermont law and the bylaws of the Association and to avoid this tortious interference. The Court concludes that the TRO shall be extended into a preliminary injunction. This injunction will continue until the litigation is resolved, or until further motion and evidence from a party as to whether it should be abrogated or modified.

For the remaining issues and for the purposes of the preliminary injunction, the Court denies Plaintiff's effort to expand the scope of the current temporary restraining order. These issues fail because Plaintiff is unable to demonstrate a likelihood of success on the merits at this point in the litigation. V.R.C.P. 65.

Beginning with Plaintiff's first claim, Plaintiff's efforts to stop, or at least channel Defendant, within the Association do not appear to be premised upon a solid legal footing either in the Stonybrook Declaration and Bylaws, the Vermont Common Interest Ownership Act, or under the common law. By way of example, 27A V.S.A. § 3-102(a)(18) contains restrictions on a common interest association's ability to limit a unit owner's ability to participate in the Association, even if that unit owner has not paid his or her assessment. Under this subsection, an association cannot lock the unit owner out of their unit, suspend the unit owner's right to vote, prevent the owner from running for the board of the association, or withhold services. While there is no allegation that Defendant has not paid his assessment or that the Association is violation section 3-120(a)(18), the reasoning applies by analogy. As 27A V.S.A. § 3-102(b) notes, Section 3-102(a)(18) is a limitation on the Association's power, a ceiling on its authority to limit owners from participating. The Court finds no expansion or modification of these rights or powers in either the Stonybrook declaration or bylaws.

Given this guiding principle, the Court finds no inherent authority for Plaintiff to cut off a unit owner in good standing from the communication and participating in the deliberative and governing process.[3] Put more plainly, the right to contract and do business that Plaintiff points to in its bylaws and within the Vermont Common Interest Ownership Act as authority for its claim of breach do not come with the additional authority to squelch or prevent a unit owner from expressing dissent or objections to the Board. In fact, as 27A V.S.A. § 3-102(a)(18) indicates, the right to interfere with a member's ability to interact with an Association's governance lies outside of the inherent authority of the Board.

This is not to say that Defendant's actions are laudable, effective, or warranted. It is simply that Plaintiff and its governing board lacks separate authority under either Title 27A or the governing bylaws—either express or implied—to stop a unit owner from either expressing their dissent and disagreement or from participating in the process laid out for unit owners to participate in the business of the Association.[4]

The Court's analysis follows a similar direction for Plaintiff's arguments under the claim of harassment and intentional infliction of emotional distress. Plaintiff's use of the harassment statute under 13 V.S.A. § 1027 lacks any support for a private right of action that would give

[3] In recognizing this limitation, the Court does not accept Defendant's argument that an action to silence or limit the participation of a unit owner by a common interest ownership association would invoke the State's anti-SLAPP statute. 12 V.S.A. § 1041. Neither party is a public entity, and the forum on which the dispute is based is not a public forum. *Felis v. Downs Rachlin Martin*, 2015 VT 129, ¶¶ 38–53 (rejecting a broad interpretation of Vermont's anti-SLAPP law to protect testimony given by a consultant in a family court proceeding). Under *Felis*, the Vermont Supreme Court distanced itself from the broader application of anti-SLAPP laws, that have occurred under the California version. Id. The Court states, "Indeed, we join the Rhode Island Supreme Court in concluding that the anti-SLAPP statute should be construed as limited in scope and that great caution should be exercised in its interpretation." Id. at ¶ 41. The *Felis* Court also cites to a Texas case concerning a similar anti-SLAPP application outside of the public forum as an example of an anti-SLAPP law applied too far. Id. at ¶ 50 (citing *Serafine v. Blunt*, No. 03–12–00726–CV, 2015 WL 3941219 (Tex.Ct.App. June 26, 2015)). Defendant's proposed application of 12 V.S.A. § 1041 goes against the plain language as well as strengthened "in connection with a public issue requirement" that *Felis* adopts as a limiting principle, and which is not met in this case. Felis, 2015 VT 129, at ¶ 52.

[4] The Association, like many similarly situated bodies is not without recourse. Under Section 2.08 of the Association's bylaws, the Association has adopted Robert's Rules of Order. Under Section 61, a Board has the authority to control the conduct of its own meetings and to remove or discipline any member deemed to be out of order. RONR § 61, at 626 (10th ed. 2000). Similarly, individuals that are impacted more directly or more personally can seek individual relief under the civil stalking statute. 12 V.S.A. §§ 5131, et sec.; see also *Hinkson v. Stevens*, 2020 VT 69, ¶¶ 31, 41, 44, 52 (discussing application of the civil stalking statute and course of conduct necessary for a protection under the statute).

Plaintiff the right to seek relief under a criminal statute. *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶¶ 22–23 (citing RESTATEMENT (SECOND) OF TORTS § 874A (1979)). Under a Section 874A analysis, the Court cannot conclude that the legislature intended to create a private right of damages or injunctive relief under Section 1027 when there is a civil stalking statute available for such relief and when there is no indication that the legislature intended to create another private right in this statute or to give individuals the ability to address and remediate the harm encountered outside the criminal prosecution arena. *Dalmer v. State*, 174 Vt. 157, 167–68 (2002). In this respect, Section 1027 is a misdemeanor that does not offer injunctive relief or any remediation but only imposes a penalty of either a fine or imprisonment or both. Based on this, the Court finds no private right of action to sustain a likelihood of success on the merits for this claim.

Plaintiff's claim of intentional infliction of emotional distress does not allege outrageous conduct sufficient to create a likelihood of success under V.R.C.P. 65. "A plaintiff's burden on a claim of IIED is a 'heavy one.'" *Dulude v. Fletcher Allen Health Care, Inc.*, 175 Vt. 74, 83 (2002)(quoting *Gallipo v. City of Rutland*, 163 Vt. 83, 94 (1994)). "The conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable." *Dulude*, 175 Vt. at 83 (citing *Denton v. Chittenden Bank*, 163 Vt. 62, 66 (1994)). Taking even just the facts alleged in the verified complaint, they do not support an initial finding that Defendant's action crossed the line of outrageousness. In this respect, the Court is cautious not to substitute how it thinks an individual should behave in a particular situation or even what an objective observer might deem reasonable or logical behavior, with the high threshold required to establish a claim of IIED. Human interactions are often a quilt-work of contrasting patterns which do not mesh or form orderly lines. But IIED cannot regulate choices. Instead, it is there for the most extreme and outrageous choices where some injury—either physical or psychological—ensues. It is difficult to see how Plaintiff would prevail as a matter of law under the standards of *Dulude* or *Denton* with the facts as alleged, and by extension, there is insufficient support for a finding of likelihood of success on the merits necessary for a preliminary injunction. V.R.C.P. 65.

Finally, there is the issue of nuisance. Plaintiff advances a theory that Defendant's actions, which to date have been exclusively communications—emails, texts, and phone calls—constitute a "substantial and unreasonable interference with the use and enjoyment of land." *Jones v. Hart*, 2021 VT 61, ¶ 30. As *Jones* notes, nuisance law concerns either physical interference with the use of land or a category of invasions that constitute "pollution." Id. at ¶ 31. While *Jones* does state that nuisance law can be extended to an interest in "the pleasure, comfort, and enjoyment in land," it is careful to couch this right in a series of caveats, such as distinguishing this right from the freedom from emotional distress (a different harm vested in the individual, rather than the property). Id. at ¶33. Most importantly for the present analysis, *Jones* distinguishes from the "petty annoyances of everyday life in a civilized community." Id. at ¶ 34. The Court notes that it is extremely difficult to prove nuisance under this theory without physical damage, and there must be evidence of substantial interference. Id. at ¶¶ 36–38.

Here the evidence is that the behavior at issue was an on-going communication campaign that was entirely a war of words. While this may have discouraged individuals from serving on Plaintiff's board or caused them individual grief, it does not fully link these behaviors, for the purposes of a preliminary injunction, to evidence that Plaintiff or its members were affected from using or enjoying or taking pleasure in their land to the extent that the Court can conclude that Plaintiff is likely to establish a judgment in nuisance. The problem is that Plaintiff is advancing a novel theory outside the usual indicia of nuisance. Unlike a situation where an owner imports and then mistreats pigs to annoy and harass neighbors, Plaintiff's theory does not rely on the physical or odiferous elements that invade a neighboring property in a normal nuisance claim. See, e.g., *Coty v. Ramsey Assoc., Inc.*, 149 Vt. 451, 453–54, 457–59 (1988) (affirming finding defendant created a private nuisance when he turned his would-be hotel site on the Mountain Road in Stowe into a "highly offensive pig farm"). Without further discovery, it is impossible for the Court to determine if Defendant's actions crossed the line from petty annoyance to more substantial interference. Plaintiff has alleged interference with its management and functioning—and by extension its use and enjoyment of the property—but the evidence is limited, and the Court cannot conclude as a matter of law that Plaintiff is likely to prevail on this claim in a manner necessary and sufficient for Rule 65 purposes. For these reasons, Plaintiff's request for a preliminary injunction on this claim is denied.

Based on the foregoing, Plaintiff's requests for a broader preliminary injunction are denied at this time. The Court shall extend its September 22, 2022 temporary restraining order into a preliminary injunction without expansion.

Motion to Dismiss

Defendant has subsequently filed a Motion to Dismiss. The basis for this motion mirrors the basis for Defendant's Opposition to the Preliminary Injunction. However, for the purpose of this analysis, the Court must adopt a different standard. Unlike the preliminary injunction analysis, Defendant bears the burden on a Motion to dismiss under V.R.C.P. 12(b)(6). The Court must take Plaintiff's factual allegations in the complaint as true and give Plaintiff all reasonable inference from those facts. *Gilman v. Maine Mut. Fire Ins. Co.*, 2003 VT 5, ¶ 14.

In application, there are three claims where the shift in analysis does not alter the outcome.

Defendant's Motion regarding Plaintiff's claims of harassment under 13 V.S.A. § 1027 are dismissed for the basis cited above. There is no private right of action under this criminal statute, and Plaintiff's status and harm claimed do not correspond to an implied right of action under this statute. *Dalmer v. State*, 174 Vt. 157, 167–68 (2002).

Plaintiff's claim for breach of contract or breach of bylaws is similarly ill-founded given the facts of the present dispute. There is simply no legal basis that allows a Common Interest Ownership Association to block a unit owner from participating in internal association deliberations or blocking the unit owner from communicating with the Board. While the Board may act within their rights to stop an individual from interfering with the business of the Board or may ignore the unit owner, there is no provisions for this type of legal excommunication or enforced limitation on the unit owner's right to participate or communicate within the governing and deliberative process of the Association and the Board. As a matter of law, Plaintiff does not point to a legal provision that would give rise to a claim under the bylaws or Title 27A. As such, this claim must be dismissed as a matter of law.

Finally, Plaintiff's claims of Intentional Infliction of Emotional Distress simply do not rise to the necessary level of outrageous behavior. Taking these facts at face value, the evidence

shows annoying, repetitive, at times obnoxious, and hostile communications from Defendant to the Board, the Association's Manager, and individual Board members, but the Court does not see any communication or collective communications that cross the line into outrageous behavior. As noted above, Defendant's actions may be viewed as a breakdown in civil discourse, but they do not cross the line into the type of communication that would be necessary as a matter of law to establish an IIED claim. *Fromson v. State*, 2004 VT 29, ¶¶ 14, 15 ("We have never extended liability to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.") (quoting *Denton*, 163 Vt. at 66–67) (internal quotations omitted).

As to Plaintiff's claim of tortious interference with third-party contracts, the Court has extended the ex parte TRO to a preliminary injunction on this issue under V.R.C.P. 65, and by extension, this ruling is inclusive of a finding that Plaintiff has established the necessary factual and legal predicate to sustain this claim for purpose of Rule 12(b)(6).

The Court also denies Defendant's motion to dismiss the nuisance claims. While there has not been a sufficient showing for purposes of Rule 65 and a preliminary injunction, Plaintiff has made out the essential elements of a claim for nuisance under the theory that an interference with an interest in the pleasure, comfort, and enjoyment of the land constitutes a nuisance, even if such interference is not physical or invasive. 2021 VT 61, at ¶32. To this point, *Jones* instructs that:

> . . . if the activity causing the interference has no utility, less harm is required to demonstrate that an interference causing discomfort and annoyance is unreasonable. . . . One specific example of an activity that has no utility is a person intentionally annoying and harassing a neighbor. . . . Consistent with these general principles of nuisance law, several jurisdictions have recognized that a sustained and intentional campaign to annoy a neighbor can amount to a private nuisance. Although such campaigns primarily involve only discomfort and annoyance—and therefore cause relatively little harm, as compared to other categories of interferences—they qualify as a private nuisance because the harassment and annoyance is repeated over a prolonged period and the activity causing the interference has no utility.

Id. at ¶¶ 36, 37 (citing the Restatement (Second) of Torts §§ 827, 828) (citations omitted)).

Here, Plaintiff has made out a basic allegation in its verified complaint that Defendant's actions were part of an on-going campaign to assert his beliefs over the consensus and decisions

of the Board, and that these communications could be characterized as being without utility (a point that Defendant is likely to dispute) and intended to cause discomfort and annoyance.

While this denial is by no means a resolution of the issues that are likely to arise with this relatively novel claim, Plaintiff is entitled to proceed on this claim, to develop a record for either trial or further motion practice.

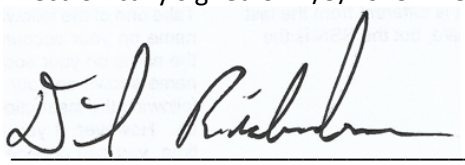
ORDER

Based on the foregoing, Plaintiff's preliminary injunction is **Granted in Part** to continue to require Defendant to refrain from making or having contact with any third-party contractors hired or retained by the Association to perform maintenance, repairs, or other work in the common areas or to the infrastructure of the property. The remainder of Plaintiff's Motion for a Preliminary Injunction is **Denied.**

Defendant's Motion to Dismiss is **Granted in Part.** Plaintiff's Claim I (Breach of Declaration and Bylaws); Claim III (Harassment); and Claim V (Intentional Infliction of Emotional Distress)[5] are **Dismissed as a Matter of Law.** The remainder of Defendant's Motion to Dismiss is **Denied.**

The Parties shall have 30 days to complete and file a stipulated discovery schedule with the Court including provisions for alternative dispute resolution under V.R.C.P. 16.3. The Court will not plan for a discovery conference unless a party requests such a conference.

Electronically signed on 1/9/2023 11:50 AM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge

[5] As a minor note, this Claim is mislabeled as "Count VI" in Plainitff's complaint, but it is actually the fifth and not sixth claim in the pleading.