VERMONT SUPERIOR COURT
Rutland Unit
83 Center Street
Rutland VT 05701
802-775-4394
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 22-CV-01652

Sherry Greifzu and John M. Greifzu, Sr., Plaintiffs v. Wyman-Frazier Lumber Mill, Inc. and Tracy Wyman, Defendants	DECISION ON MOTIONS

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' PENDING MOTIONS

This action involves a dispute between neighbors. Plaintiffs John and Sherry Greifzu assert several claims against Defendants Wyman-Frazier Lumber Mill, Inc. (the "Lumber Mill") and Tracy Wyman alleging that Defendants have (1) interfered with Plaintiffs' deeded water rights by deliberately diverting water from their pond; (2) trespassed on Plaintiffs' property by placing stakes unrelated to a survey on their land; and (3) interfered with Plaintiffs' use and enjoyment of their land by placing "junk" to intentionally block Plaintiffs' view, creating a nuisance. A mere three months after the Court issued the Discovery Scheduling Order in this case, Defendants have moved for summary judgment, seeking to foreclose any opportunity for discovery and further litigation of Plaintiffs' claims. For the reasons discussed below, Defendants' motion is DENIED.

Factual Background

As an initial matter, the Court notes that the factual record in this case is largely undeveloped. It is comprised of two affidavits (one from each side), a deed, and a non-expert diagram of the water system. Plaintiffs also include a five-page "timeline" of Ms. Greifzu's observations of pond levels, rainfall, and other information, which is not sworn and would likely be hearsay if introduced at trial. The parties have taken no depositions, nor have any experts been disclosed. Moreover, many of the "facts" asserted and relied upon in the parties' briefs are unsupported and not included in the parties' Rule 56(c) Statements of Undisputed Material Fact. Accordingly, the Court does not consider them.

The following relevant facts are undisputed. Plaintiffs John and Sherry Greifzu and Defendant Lumber Mill own neighboring parcels of land in Brandon, Vermont. Defendant Tracy Wyman is a principal in the Lumber Mill and acted as its agent at all times relevant to this

matter. The Greifzus acquired their land via warranty deed conveyed by the Lumber Mill in 2002. In relevant part, the deed grants the Greifzus the rights to any overflow of water from the water system above their property.[1] This overflow feeds a pond on the Greifzus' land. However, the Greifzus' overflow is not guaranteed; it is subordinate to the use of the existing "residential and accessory" users.[2] The deed also states that the Greifzus must pay a share of any maintenance and repair costs on the water system. Fluctuations in the Greifzus' pond levels have occurred since 2020. The "junk" (old machinery and other personal property) the Greifzus object to was placed entirely on the Lumber Mill's land.

Otherwise, just about every aspect of this case is disputed. For example, the parties disagree as to the causes of the decrease in the overflow water levels of the Greifzus' pond and who or what may be responsible. In addition, the parties dispute whether the four property stakes at issue were placed on the Greifzus' or the Lumber Mill's land.

Discussion

Summary judgment shall be granted when the moving party shows that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. V.R.C.P. 56(a). Thus, if "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to her case upon which she has the burden of proof," then summary judgment is warranted. *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 13, 178 Vt. 244, 249-50. "The court need consider only the materials cited in the required statements of fact, but it may consider other materials in the record." V.R.C.P. 56(c)(3). "In determining whether there is a genuine issue as to any material fact, [the court] will accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted). In other words, the "nonmoving party may survive the

---

[1] The relevant deed language is as follows:

> The property herein conveyed receives water that flows into one or more of the ponds on the property from a pipeline running from a dam located on other lands easterly of the herein conveyed parcel. Said pipeline provides water to three other landowners who use the water for residential and accessory uses. This conveyance is made together with the right and obligation of the Grantees [Plaintiffs] to continue to receive the overflow above what is needed and used by the existing residential and accessory uses. Grantor does not guarantee that there will be an overflow at all times, and existing residential and accessory users of the water supply shall have priority in the event there is not sufficient water to create an overflow. Grantees shall share the costs of maintaining the water pipe and dam supplying the water pipe on an equal basis with all other landowners served by this water system.

Defs.' Statement of Material Undisputed Facts, filed Sept. 15, 2022, Ex. A at 2.

[2] The record is unclear whether either Defendant is an "existing residential or accessory user."

motion if it responds with specific facts raising a triable issue, and it is able to demonstrate sufficient evidence to support a prima facie case." *Kelly v. Univ. of Vt. Med. Ctr.*, 2022 VT 26, ¶ 15, 280 A.3d 366 (quotation omitted). In deciding the summary judgment motion, the court must view all evidence "in the light most favorable to [the nonmoving party], affording him the benefit of all reasonable doubts and inferences." *O'Brien v. Synnott*, 2013 VT 33, ¶ 3, 193 Vt. 546 (quotation omitted). "Where a genuine issue of material fact exists, summary judgment may not serve as a substitute for a determination on the merits." *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 10, 179 Vt. 545 (citation omitted).

I. Plaintiffs' Claims for Diversion of Water and Trespass.

The Greifzus' claims that the Lumber Mill and Wyman interfered with their deeded water rights and trespassed on their land are both heavily disputed. In their summary judgment brief, Defendants simply deny that they have improperly diverted overflow water from Plaintiffs' pond, and suggest other possible explanations for the fluctuation in the pond level, relying entirely on Wyman's affidavit. In response, the Greifzus assert, through the affidavit of Sherry Greifzu, that the proposed natural causes can be eliminated and Defendants' conduct remains the most likely cause of the low water levels. Defendants complain that this evidence is purely circumstantial. However, circumstantial evidence *is* competent evidence, particularly given the early stage of the case, and the Court must view the evidence in the light most favorable to the Greifzus, drawing all inferences in their favor. Therefore, a reasonable jury could properly find for the Greifzus on this claim. In essence, Defendants are asking the Court to weigh the merits of the case and determine that their explanations are more likely and credible, which of course, the Court cannot do on summary judgment. As the Vermont Supreme Court has made clear, "it is not for the trial judge to adjudicate who is more credible, plaintiff or defendants and their affiants, in the context of a motion for summary judgment." *Provost*, 2005 VT 115, ¶ 15 (reversing lower court's grant of summary judgment where, in comparing the "plausibility of facts offered by" the parties, "the trial court failed to give the nonmoving party the benefit of all reasonable doubts and inferences, and instead implicitly weighed the merits of plaintiffs' case"). Accordingly, the evidence offered by the Greifzus is sufficient to raise disputed issues of fact.

Likewise, the parties disagree about whether Defendants' stakes were placed on the Lumber Mill's or the Greifzu's land (again, based on the Wyman and Greifzu affidavits), and they may even dispute the correct location of the property line. The Court cannot possibly resolve these factual disputes on summary judgment; therefore, the issue must be tried to a jury. *See, e.g., In re Estate of Holbrook*, 2017 VT 15, ¶ 13, 204 Vt. 276 (noting that when "the evidence is in conflict on a genuine, material issue of fact . . . the usual and proper course is not to ignore that evidence . . . but to deny the motion for summary judgment and permit the case to proceed to trial, where the trier of fact may weigh all of the evidence, assess the credibility of the witnesses, and ultimately resolve the factual dispute").

In short, Defendants have failed to demonstrate that they are entitled to summary judgment on Plaintiffs' claims for interference with their water rights and trespass.

II. Plaintiffs' Nuisance Claim.

The Greifzus assert a claim for nuisance alleging the Lumber Mill and Wyman have interfered with the use and enjoyment of their land by placing old machinery and other personal property at the boundary line which is unsightly and blocks their view. *See* Greifzu Aff. ¶ 13. "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., Inc.*, 149 Vt. 451, 457, 546 A.2d 196 (1988) (citations omitted). Whether a particular type of interference is substantial depends on if it entails "definite offensiveness, inconvenience or annoyance to the normal person in the community." *Id*. (quoting William L. Prosser, *Law of Torts* § 87, at 578 (4th ed. 1971)). Put another way, "substantial harm" requires something "in excess of the customary interferences a land user suffers in an organized society." *Id*. (quotation omitted). An interference is "unreasonable if the gravity of the harm outweighs the utility of the actor's conduct." *Jones v. Hart*, 2021 VT 61, ¶ 26, 215 Vt. 258 (quotation omitted). Typically, "[w]hether a particular interference is unreasonable is a question for the factfinder." *Myrick v. Peck Elec. Co.*, 2017 VT 4, ¶ 4, 204 Vt. 128.

Defendants contend that the nuisance claim fails as a matter of law under *Myrick* because it is based on purely aesthetic harm. *See Myrick*, 2017 VT 4, ¶ 1 ("We uphold Vermont's long-standing rule barring private nuisance actions based upon aesthetic disapproval alone."). However, this argument ignores the Greifzus' allegation that Defendants' junk collection interferes with the use and enjoyment of their land by blocking their view. In *Myrick*, 2017 VT 4, ¶ 5, the Court held the assertion by neighboring landowners that a solar farm was unsightly and ruined the area's rural aesthetic was insufficient to support a nuisance claim. The Court explained this was because aesthetic preferences are inherently subjective, making the question of unreasonableness impossible to answer. *See id*. ¶ 6. Here, the Greifzus contend that Defendants' junk is more than simply unattractive, but it also blocks the view from their house. *Cf*., 24 V.S.A. § 3817 ("A person shall not erect or maintain an unnecessary fence or other structure for the purpose of annoying the owners of adjoining property by obstructing their view or depriving them of light or air."). Whether such interference is unreasonable and substantial is a question for the jury.

Moreover, even if Defendants' placement of junk on the property line constituted purely aesthetic harm, the Greifzus assert that the Lumber Mill and Wyman acted with malice, and not for any legitimate purpose. Defendants' motion fails to show there are no disputed facts on this issue. A defendant's malicious motive is a factor to be considered in a nuisance case. *See Coty*, 149 Vt. at 458. Contrary to Defendants' suggestion, in *Myrick*, the landowners did not argue "that the solar panels at issue were constructed out of spite or malice," and therefore the Court did "not address the role of aesthetics in the context of a spite case." *Myrick*, 2017 VT 4, ¶ 9 n.*. Indeed, the *Myrick* Court observed that "actions taken out of spite are different from traditional nuisance analysis," and noted "the great majority of jurisdictions have held that where a defendant has acted solely out of malice or spite, such conduct is indefensible on social utility grounds, and nuisance liability attaches." *Id*. (quoting *Coty*, 149 Vt. at 458); *see also Jones*, 2021 VT 61, ¶ 29 (concluding that "a sustained and intentional campaign to annoy a neighbor by interfering with the use and enjoyment of the neighbor's property can amount to a private nuisance"). Accordingly, the Greifzus' nuisance claim survives the summary judgment motion.

Order

For the foregoing reasons, Defendants Wyman-Frazier Lumber Mill, Inc. and Tracy Wyman's Motion for Summary Judgment regarding the claims asserted by Plaintiffs John and Sherry Greifzu is DENIED.

Plaintiffs' motion for permission to file a surreply memorandum (Motion 2) is GRANTED.

Plaintiffs' motion to suspend the deadlines in the Discovery Scheduling Order (Motion 3) is GRANTED. It is hereby ORDERED that the parties shall submit a stipulated proposed amended scheduling order within 30 days of the date of this Order.

Electronically signed on March 14, 2023 at 5:30 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge