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KINSALE, LLC, ET AL. *v.* ROBERT TOMBARI ET AL.
(AC 26467)

Pellegrino, Flynn and Bishop, Js.*

Argued November 28, 2005—officially released May 23, 2006

(Appeal from Superior Court, judicial district of Middlesex, Aurigemma, J.)

Charlotte Croman, for the appellants (defendants).

Joshua A. Winnick, for the appellees (plaintiffs).

Opinion

BISHOP, J. In this appeal from the judgment of the trial court granting the plaintiffs' application for a prejudgment remedy,[1] the defendants, Robert Tombari and Nile Barrett, claim that there was insufficient evidence to support a finding of probable cause for an attachment in the amount of $100,000.[2] We affirm the judgment of the trial court.

The court found the following relevant facts. ''The plaintiff Kinsale, LLC, a limited liability company comprised of the plaintiffs Thomas Neligon and Diane Neligon, owned real property at 38 Economy Drive in Westbrook. Kinsale, LLC, had constructed a new house on the property and put that house on the market for a price of $799,900, in April, 2004. In April, 2004, and for some time prior thereto, Barrett and Tombari, resided in a house owned by Barrett and located next to the property of Kinsale, LLC, at 30 Economy Drive in Westbrook.

"In April, 2004, the Neligons resided in a house located at 50 Economy Drive. The Neligons decided to put both the Kinsale, LLC, property and their house on the market in April, 2004. Very shortly after the 'For Sale' sign went up on the two properties, the defendants caused several inoperable Jeep vehicles and a trailer to be placed on their property. The Jeeps looked like they had come from a junkyard. The trailer parked on the street right next to the Kinsale, LLC, property had bumper stickers that stated, 'Bambi makes cute sandwiches,' and, 'I'd Rather Be Loading My Muzzle.'

"The plaintiffs erected a six foot high fence between their property and that of the defendants, and Barrett thereafter constructed a ten foot high structure that consisted of two wooden posts with several rusty cylinders hanging on a wire between the posts. The defendants also put up 'No Trespassing' signs on their property and targets in their windows.

"On September 20, 2004, the Neligons sold 50 Economy Drive for a price of $700,000. Kinsale, LLC, conveyed 38 Economy Drive to the Neligons, and they moved into the house on that property."

The court found that the defendants had imported the junk vehicles and erected the structure with the hanging cylinders maliciously and with the intent to annoy and to injure the plaintiffs in the use and disposition of their property. The court concluded that there was probable cause to believe that the plaintiffs will prevail on their nuisance claim and on their claim for malicious erection of a structure in violation of General Statutes § 52-570. The court found that the defendants' conduct had the effect of depressing the fair market value of each of the plaintiffs' properties by $50,000.

The court further found that Tombari had sent an e-mail, dated April 9, 2004, to Webster Bank, where the plaintiff Thomas Neligon was employed. Finding that the statements contained in the e-mail were false and malicious, the court concluded that there was probable cause to support Thomas Neligon's claim of libel. The court granted a prejudgment attachment in the amount of $100,000 against the real and personal property of the defendants.[3] This appeal followed.

"This court's role on review of the granting of a prejudgment remedy is very circumscribed. It is not to duplicate the trial court's weighing process, but rather to determine whether its conclusion was reasonable. In the absence of clear error, this court should not overrule the thoughtful decision of the trial court, which has had an opportunity to assess the legal issues which may be raised and to weigh the credibility of at least some of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence

is left with the definite and firm conviction that a mistake has been committed.'' (Internal quotation marks omitted.) *Morris* v. *Cee Dee, LLC*, 90 Conn. App. 403, 411, 877 A.2d 899, cert. granted on other grounds, 275 Conn. 929, 883 A.2d 1245 (2005).

On appeal, the defendants claim that there was insufficient evidence to support the prejudgment remedy in the amount of $100,000. Specifically, the defendants claim that the court (1) employed the wrong legal standard in determining the existence of probable cause and (2) abused its discretion in its determination of the existence of probable cause that the defendants' actions diminished the value of the plaintiffs' properties by $100,000.[4] We are not persuaded.

The record belies the first part of the defendants' claim. In its memorandum of decision, the court made specific reference to our Supreme Court's recent decision in *Pestey* v. *Cushman*, 259 Conn. 345, 788 A.2d 496 (2002), in which the court explicitly adopted the principles set forth in 4 Restatement (Second), Torts § 822 (1979) regarding the elements of common-law private nuisance. Specifically included in the court's adherence to *Pestey* and its embrace of § 822 is the requirement that, to be liable, a defendant's conduct must be the proximate cause of an ''unreasonable interference with the plaintiff's use and enjoyment of his or her property.'' Distinguishing the facts at hand from those in *Pestey*, which involved the necessary operation of a dairy farm and the emission of odors incidental to its operation, the court here found that ''the defendants' conduct was completely unnecessary [and that] the defendants acted solely to annoy and hamper the plaintiffs.'' The court found, as well, that Barrett had ''maliciously erected the cylinder structure on her property with intent to annoy and injure the plaintiffs . . . .'' The court concluded that the defendants' actions had the effect of depressing the fair market value of each of the plaintiffs' properties in the amount of $50,000. From this record, it is clear that the court was mindful of the reasoning of *Pestey* and employed its teaching in making the probable cause determination.

The defendants next claim that the court abused its discretion in calculating that their actions had the effect of depressing the fair market value of the plaintiffs' properties by $100,000 because (1) Diane Neligon was the only witness to testify for the plaintiffs as to the value of the properties and (2) the testimony of their expert appraiser was not accorded the appropriate weight.

At trial, Diane Neligon testified as to the value of the properties at issue.[5] She stated that in April, 2004, she and Thomas Neligon listed 50 Economy Drive for sale for $849,000 and 38 Economy Drive for $799,900 with the assistance of two different Realtors. She opined that in posting signs on their property, importing the

junk vehicles and erecting a structure higher than their fence, the defendants dissuaded potential buyers from purchasing their properties, resulting in reduced sales prices of $700,000 each, a loss of approximately $250,000.

Francis Buckley, a certified appraiser of residential property, testified on behalf of the defendants. Buckley opined that when the two properties were sold in September, 2004, the fair market value of each property was $700,000.

"Diminished value may be established by opinion if, based on all the evidence, the trier finds the opinion credible. . . . Homeowners are allowed to testify as to that diminution as well as to their opinion that the loss in value is attributable to the maintenance of a private nuisance by a defendant. . . . It is also clear that homeowners are allowed to testify as to their opinion of fair market value." (Citations omitted; internal quotation marks omitted.) *Gregorio* v. *Naugatuck*, 89 Conn. App. 147, 156, 871 A.2d 1087 (2005).

Here, in finding a total depreciation of the properties of $100,000 instead of the claimed $250,000, the court stated that it considered both the testimony of Diane Neligon and the defendants' appraiser. As noted, when the court's findings are supported by the record, it is not our role to duplicate its weighing process. Accordingly, the court's findings were not clearly erroneous.

The judgment is affirmed.

In this opinion PELLEGRINO, J., concurred.

* The listing of judges reflects their status on this court as of the date of oral argument.

[1] The granting of a prejudgment remedy is appealable pursuant to General Statutes § 52-278*l* (a).

[2] The defendants also claim that the court violated their rights to free speech in characterizing their art as junk, that the court improperly denied their motion to modify the amount of the prejudgment remedy and that the court improperly found libel without evidence of damages. We decline to review these claims, however, because the defendants have failed to brief them adequately. See *Greco* v. *United Technologies Corp*., 277 Conn. 337, 364 n. 27, 890 A.2d 1289 (2006).

[3] The basis of the $100,000 attachment is not totally clear. The court found probable cause as to three of the plaintiffs' claims: nuisance, malicious erection of a structure and libel. Because the evidence of damages presented at the hearing related to the diminished value of the plaintiffs' properties, we assume that the prejudgment remedy was based on the claims of nuisance or malicious erection of a structure or both. Although the defendants filed a motion for articulation of the court's decision, they did not seek an elucidation of the amount awarded for each of the claims for which the court found probable cause.

[4] The dissent contends that the nuisance, if any, was only temporary because it could have been removed and, therefore, the decrease in the rental value and not the diminution in fair market value should have been employed as the proper measure of damages. Because this issue was not raised by either party on appeal, we decline to address it. It appears, however, that the court's measure of damages is in accord with traditional nuisance law that whether a nuisance is temporary or permanent is a question of fact and that, in making that determination, a fact finder may look at the permanent nature of the damages in assessing whether damages are of a permanent or temporary nature. Thus, the fact that the objects placed and erected by the defendants to annoy and to deter the plaintiffs could have been removed is not dispositive of the question of the temporary or perma-

nent nature of the plaintiff's damages. Rather, if a nuisance, albeit one that could be removed, causes a reduction in the sales price of a property burdened by the nuisance, the damages realized by the seller may be viewed as permanent. See *Herbert* v. *Smyth*, 155 Conn. 78, 230 A.2d 235 (1967).

[5] Diane Neligon testified that she had experience as a real estate lender for commercial banks and that, at one point, she had a real estate license as an agent. The defendants objected to her being qualified as an expert because she was not a licensed certified appraiser. The court allowed her to provide an opinion, noting that her lack of credentials would pertain to the weight of her testimony.