

STATE OF MICHIGAN
COURT OF APPEALS

ERIC A. ADAMS,

Plaintiff-Appellant,

v

JOE BEAUDRY,

Defendant-Appellee.

UNPUBLISHED

March 2, 2004

No. 244485

Cheboygan Circuit Court

LC No. 01-006945-CH

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of no cause of action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant owns property on Burt Lake. In 1991-1992, he erected a wooden fence along the northern boundary of his property. He obtained a variance to enable him to erect the fence to within five feet of the shore. The fence is approximately seven and one-half feet high and is located entirely on defendant's property. The fence complied with all regulations in effect at the time it was built.

In 2000, plaintiff acquired a majority interest in property located immediately to the north of defendant's property. Several rental cabins are located on plaintiff's property. Two of the cabins were built two feet from the southern boundary of the property and thus are positioned approximately two and one-half feet from defendant's fence. The view from the south windows of the cabins is blocked by the fence.

Plaintiff filed suit alleging that the fence constituted a nuisance in that it blocked his view of the lake, infringed upon his enjoyment of his property, and diminished the market value of his property. He sought damages and an injunction requiring defendant to remove the fence. At trial, defendant testified that when he purchased his property, the property immediately to the north was used as a commercial resort, and that he sought and obtained a variance to build a fence to a point close to the lake to prevent persons from trespassing on his property. Defendant maintained that Wilbur Chard, plaintiff's predecessor in interest, agreed to the construction of the fence. Janis Jones, the holder of a minority interest in the property with plaintiff, testified that defendant's fence prevented light and air from entering the south windows of two cabins on

the property and that some prospective renters had refused to rent the cabins for that reason. Jones testified that Wilbur Chard was her father and that she was not aware that he agreed to the construction of the fence on defendant's property. Plaintiff testified that he acquired a majority interest in the property in October 2000 from Jones, who held a land contract with the Chard Trust.¹ He asserted that in 2002 he lost rental income in the amount of \$12,300 due to the presence of the fence.

The trial court concluded that plaintiff had no cause of action. The trial court observed that the evidence showed that defendant constructed the fence in 1991-1992 with the consent of Wilbur Chard and that he did so not with malicious intent but rather to prevent persons who rented the cabins on plaintiff's property from trespassing on his property. Finally, the trial court noted that the evidence showed plaintiff was aware of the existence of the fence when he acquired an ownership interest in the property in 2000.

II. STANDARD OF REVIEW

We review a trial court's findings of fact in an equitable action for clear error and its conclusions of law de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

III. ANALYSIS

An actor is subject to liability for a private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if: (1) the other has property rights and privileges attached to the use or enjoyment interfered with; (2) the invasion resulted in significant harm; (3) the actor's conduct was the legal cause of the invasion; and (4) the invasion was either intentional and unreasonable or unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultra hazardous conduct. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995). To establish the existence of a nuisance in fact, also known as a nuisance under the circumstances, the plaintiff must show significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of the property. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999).

The elements of a spite fence nuisance case are that the defendant: (1) erected a fence or other obstruction; (2) which serves no useful purpose or advantage to him; and (3) did so with malicious intent. *Kuzniak v Kozminski*, 107 Mich 444, 445-446; 65 NW 275 (1895). Where the erection of a fence is motivated both by spite and a useful purpose to the defendant, a cause of action cannot be maintained. *Id.*, 446.

Plaintiff argues that the trial court erred by entering a judgment of no cause of action. We disagree and affirm. The trial court's finding that defendant erected the fence not with

¹ Plaintiff maintained that prior to this transaction he held an informal interest in the property. He conceded that he did not have documentation to establish this interest.

malicious intent, but rather to prevent persons from trespassing on his property in order to gain access to the lake was not clearly erroneous. *Killips, supra*. Furthermore, plaintiff's assertion that the fence constitutes a nuisance in fact notwithstanding its useful purpose to defendant is without merit. Defendant erected the fence in 1991-1992 and plaintiff was aware of the construction when it took place. Plaintiff took no formal action to attempt to enjoin the construction of the fence, notwithstanding the fact that he purportedly owned a minority interest in the property at the time the fence was constructed. Plaintiff gained a documented ownership interest in the property in 2000. As a general rule, injunctive relief will not be granted where the alleged nuisance existed prior to the complainant's arrival. *Conway v Gampel*, 235 Mich 511, 513; 209 NW 562 (1926). Although this rule does not control under all circumstances, plaintiff has not shown that defendant's use of the fence or its effect on his property changed in any way from the time the fence was erected until the time the complaint was filed. Cf. *Ensign v Walls*, 323 Mich 49, 58-63; 34 NW2d 549 (1948) (preexisting dog kennel found to constitute nuisance due to increased construction of surrounding residences). The trial court correctly concluded that defendant's fence did not constitute a nuisance and that plaintiff was not entitled to injunctive relief. *Kuzniak, supra; Conway, supra*.

Affirmed.

/s/ Bill Schuette

/s/ Patrick M. Meter

/s/ Donald S. Owens