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08/23/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-004090 08/22/2017

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT
S. Marx
Deputy

FLYING E, L L C, et al. DALE S ZEITLIN

v.

DERBY-R R, L L C, et al. JOHN L CONDREY

UNDER ADVISEMENT RULING

The Court has considered Defendant Derby-RR, LLC's Motion to Dismiss Count One, Defendants Phelps, Inc. and Hensel Phelps Services' Notice of Joinder in Motion to Dismiss Count One, Plaintiffs' Response to Motion to Dismiss Count One, Plaintiffs' Notice of Filing Out of State Authorities, Defendants' Reply in Support of Motion to Dismiss Count One, and the oral argument of counsel.

Defendant Derby-RR, LLC has begun construction on a 19-story apartment building (the "Apartments") next to Plaintiff's single-story restaurant and bar known as Angels Trumpet Ale House (the "Restaurant"). In Count I of its Complaint, Plaintiff alleges that that the Apartments will ruin the economic viability of Restaurant by blocking sunlight and casting shadows on the outside patio and that the Apartments' garage will generate loud noise and obnoxious odors, and therefore constitutes a private nuisance by unreasonably interfering with Plaintiffs' use and enjoyment of their property. C*omplaint, ¶¶11-14*. Thus Plaintiffs seek, *inter alia,* damages and injunctive relief permanently enjoining Defendants from building the Apartments. *Complaint, prayer, ¶¶A-D.*

In their Motion, Defendants argue that (1) Plaintiffs have no protectable interest in access to sunlight, (2) the judiciary may not "overturn" legislative zoning ordinances, and (3) the allegations pertaining to the garage are speculative as the garage has not yet been built.

To prevail on a nuisance claim, plaintiffs must show that the defendant's actions "unreasonably interfered with their use and enjoyment of their property, causing significant harm." *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, ¶ 32, 167 P.3d 1277, 1284 (App.2007), *citing Graber v. City of Peoria, 156 Ariz.533, 555 (App. 1998).* Additonally, the interference must be 'substantial, intentional and unreasonable under the circumstances." *Id., quoting Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 7, 712 P.2d 914, 920 (1985). What constitutes an unreasonable interference with another person's use and enjoyment of his property is determined by the injury caused by the condition and is not determined by the conduct of the party creating the condition. *Graber*, 156 Ariz. at 555.

As to the zoning argument, the Court finds that legislative bodies have the power to determine the type of business to be permitted in a particular neighborhood, but the manner in which that business is carried out is within the province of the judiciary. *Armory Park Neighborhood Ass'n v. Espiscopal Community Services in Arizona*, 148 Ariz. 1, 8-9 (1985). Thus, the mere existence of and compliance with a zoning ordinance does not preclude a cause of action for nuisance.

Defendants next rely on *Kubby v. Hammond*, 68 Ariz. 17 (1948) for their argument that no action for nuisance will lie absent proof of an existing harm. In *Kubby*, the trial court enjoined the defendant from constructing and operating an automobile wrecking plant. The plaintiff owned the lot adjoining the wrecking yard. After a review of the record, the Arizona Supreme Court found that no activity was carried on at defendant's place of business, with the exception that on one day an offensive noise occurred when a motor was being removed from one of the cars. Thus, as to the issue of nuisance, the Court held:

> While the factual situation was different in the case of *Murphy v. Cupp*, 182 Ark. 334, 31 S.W.2d 396, 401, the following quotation is apropos to the problem before us.
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> > 'The erection of a building to be used for a certain business will not be restrained on the ground of anticipating nuisance therefrom where it is not necessarily a nuisance but may become one under some circumstances. The anticipated injury being contingent and possible only, the court will refrain from interfering.' Joyce on Nuisances, p. 226. Noise, in order to entitle one to an injunction, must be such as to produce a substantial injury, and the annoyance must be such as to injure or annoy a normal person. Of course it may be a nuisance merely by decreasing the value of the property, but, from the evidence in this case, it appears that all the annoyance and injury is anticipated and may never occur.'
>
> See also 39 Am.Jur., Nuisances, Sec. 47.

Id., 68 Ariz. at 26. The issue of anticipatory nuisance was likewise rejected in *Grossman v. Hatley*, 21 Ariz. App. 581, 585, 522 P.2d 46, 50 (1974):

> Plaintiffs next contend that the trial court erred in granting defendants' motion for summary judgment as to Count Two of their complaint which alleges that defendants have created a nuisance. Their theory is that the increased traffic caused by the use of Mrs. Hatley's property as a public street amounts to a nuisance. While defendants allege in Paragraph II of Count Two that defendants, by their conduct, have caused increased traffic, vehicle congestion, noxious odors and noises, destruction of native growth and diminution of natural beauty, they allege in Paragraph VI of Count One (incorporated into Count Two) that defendants have entered into an agreement which Will allow Mrs. Hatley's property to be used as a roadway. The complaint is therefore contradictory as to whether there actually is a street which has been constructed, the public use of which is causing a nuisance. Conduct ordinarily will not be enjoined on the grounds of anticipating a nuisance therefrom where it is not necessarily a nuisance but may become one in the future. [Citing *Kubby*.] Moreover, plaintiffs have not submitted anything in connection with the motions for summary judgment which tends to support their allegations that a nuisance has been created. On the other hand, defendants presented an affidavit indicating that the street has been accepted by the County of Pima upon the recommendation of the County Engineer.

Id., 21 Ariz. App. at 585.

In our case, Plaintiffs allege that Defendants "have recently begun construction of a high-rise apartment complex". *Complaint, ¶7*. They then allege that the high-rise project "will" block sunlight and cast shadows on the patio, "will" ruin the economic viability of the patio, and "will" generate loud noise and obnoxious odors. *Id*., ¶¶11, 12, 13. Thus the Complaint on its face makes clear that its damages and request for injunctive relief is based upon the speculation of what will happen at some future time.[1] As such, the claim must be dismissed. Additionally, to state an action for nuisance, Plaintiff must that the alleged interference is substantial, intentional, and unreasonable under the circumstances, yet Plaintiff cannot now show any significant harm or any unreasonable interference. Thus, Plaintiff cannot meet the elements of a viable nuisance claim.[2]

[1] While it is true that in the context of a motion to dismiss, "the court must assume the truth of all of the complaint's material allegations, accord the plaintiffs the benefit of all inferences [that] the complaint can reasonably support, and deny the motion unless certain that plaintiffs can prove no set of facts [that] will entitle them to relief upon their stated claims." *Stauffer v. Premier*, 240 Ariz. 575, 577-78, ¶2, 382 P.3d 790, 792-93 (App. 2016), quoting *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 508, 744 P.2d 29, 35 (App. 1987), this rule does not require a Court to accept a party's speculative allegations concerning future events.

[2] The Court need not reach the issue of whether a nuisance claim lies for the blocking of sunlight given its ruling herein.

For the foregoing reasons,

IT IS ORDERED granting Defendant Derby-RR, LLC's Motion to Dismiss Count One, and dismissing Court I, Nuisance.

The Court has also considered Plaintiffs' Motion to Dismiss Counterclaim, Defendant and Counterclaimant Derby-RR LLC's Response to Motion to Dismiss Counterclaim, Plaintiffs' Reply in Support of Motion to Dismiss Counterclaim, and the oral argument of counsel.

Defendants seek declaratory judgment as to whether Plaintiff "is entitled to injunctive relief for any cause of action or alleged injury in its Complaint", and that Plaintiff is entitled "to recover only money damages." *Answer and Counterclaim, ¶¶1-6.* The Court agrees that this issue will be fully resolved through Plaintiffs' Complaint, and that the issue here could have be adequately stated as a defense. However, the case law does not preclude Defendants from alleging declaratory relief as a counterclaim.

IT IS ORDERED denying Plaintiffs' Motion to Dismiss Counterclaim.