District Court, San Miguel County, Colorado Court Address: PO Box 919, Telluride, CO 81435 Court Phone: 970 728-3891	EFILED Document CO San Miguel County District Court 7th JD Filing Date: Feb 9 2012 10:25AM MST Filing ID: 42412991 Review Clerk: Sara R Towsley
Plaintiffs: LESLIE EVANS and ESTHER EVANS **v.** **Defendants:** **BCB PROPERTIES, LLC, ALAN TOWBIN, PORTAL ONE CORPORATION, and MICHAEL METZ**	**COURT USE ONLY** Case Number: 2010 CV 79 Division: 4

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came before the Court on Jan. 23-25, 2012 for a trial to the Court. Plaintiffs appeared with their attorney Mr. Gregory. Defendants BCB Properties, LLC (BCB) and Towbin (collectively, Defendants) appeared with their attorney Mr. Steel. Having considered the evidence presented, the arguments of counsel, and the applicable law, the Court now finds, concludes and orders as follows:

This action involves claims brought by Plaintiffs against Defendants for unreasonable interference with the use and enjoyment of their property (condo) based on theories of nuisance and breach of the Condominium Declaration (Declaration) pertaining to the property.

The condominium at issue is a part of a small condominium project in the Town of Telluride known as the San Juan Warehouse Condominium Building. A Declaration for the condominium was recorded on June 17, 1999, at Reception No. 327265. The

building consists of a combination of residential units and commercial units. One of the commercial units is a restaurant and brew pub (brew pub). The unit occupied by the brew pub is owned by BCB and leased to the brew pub owners. BCB owns several of the other units in the building. Towbin manages BCB.

Plaintiffs previously owned one of the residential units. Plaintiffs contracted to purchase their unit on March 3, 2006, and closed on the unit on June 13, 2006. They intended to use the condo as a vacation home. They purchased the condo unit with knowledge that there was a brewery and restaurant immediately below their condominium unit, and an exhaust fan just outside a window of their condo. They also knew that the condo Declaration contained the following provision: "Each Unit Owner, by purchasing a Unit, acknowledges and accepts the existence of a brew pub and restaurant and a health food market within the Common Interest Community."

This same provision in the Declaration also bars any claim for nuisance caused by the normal a reasonable use of the brewery or restaurant so long as the exhaust fan is maintained to a high level. There was no evidence presented by Plaintiffs that the fan was not maintained to such a level. To the extent that Plaintiffs previously claimed that Defendants failed to adequately maintain the fan, they implicitly withdrew that claim. To the extent Plaintiffs did not withdraw that claim, no evidence was presented to support that allegation.

Plaintiffs either knew or could have determined that there were no limitations in the condo Declaration or the lease by BCB of the premises to the brew pub owners regarding the amount of beer that could be brewed.

The brew pub has a restaurant area and a separate beer brewing area. The exhaust fan outside the window of Plaintiffs' unit services the restaurant and not the brewery. Any increase in odors from brewery activities would not result in increased odors from the exhaust fan.

Neither the condo declarations nor the lease impose any duty on the landlord to limit the brewing of beer to any amount or to take any affirmative action with respect to controlling the odors emanating from the brewing operation.

Plaintiffs purchased their condo at, or nearly at, the height of the condo market in Telluride.

Shortly after purchasing their condo, Plaintiffs sued the seller and the realtor for failing to disclose the extent of the smell and noise coming from the brew pub. That case was settled for $40,000. The day after that care was dismissed, Plaintiffs brought this action. In addition to suing Towbin and BCB, Plaintiffs sued the brew pub entity and the operator or owner of that entity. A default has been entered against the brew pub defendants.

By 2009, Plaintiffs had become financially stressed because of the downturn in the economy. They could no longer afford the costs associated with the condo so they decided to sell it. Plaintiffs became delinquent in property tax payments and mortgage payments to their lender. A tax lien was filed against the property. Foreclosure proceedings were initiated by the lender.

In November, 2009, Plaintiff's realtor sent them a listing contract. Plaintiffs heard from their realtor that there was a strong smell that, according the realtor, seemed particularly intense when the brewing was occurring. Mr. Evans notified both the home

owners association of the condominiums and the owner/manager of the unit, BCB and Towbin, of the conditions and their effect on the Plaintiffs' unit. He demanded that Defendants take steps to control what was occurring on the brew pub premises. He threatened to sue if no action was taken.

BCB and Towbin responded to the Plaintiffs' pleas by having their lawyer, Mr. Steel, respond with a letter back to Plaintiffs on November 12, 2009, that promised when Mr. Steel returned to Telluride in December, the conditions would be looked into.

Defendants chose to do nothing about the odors or Plaintiffs' demands and threats. Defendants' position can be summarized as follows: Plaintiffs knowingly relinquished any claim for nuisance cause by the brewing operations beneath their condominium apartment and noise from the exhaust fan; Plaintiffs have no claim that an increase in brewery production annuls the provision in the Declaration barring the claim for nuisance; There was no limit in the Declaration or the lease regarding production or off-site sales of beer; There is no legal basis to claim that the provisions in the Declaration are not binding on the Plaintiffs; Plaintiffs cannot meet their burden of proof that any increase in beer production was of such amount and character that it created a separate and independent nuisance distinct from the brewery operation; Neither BCB nor Towbin committed any act, or omitted to take any action, with respect to BCB's tenant's brewing operation which, if committed or omitted, is actionable in contract or tort against them.

When Plaintiffs' realtor tried to hold on open house on December 27, 2009, it had to be cut short on the second day because the smell was so bad The realtor reported that unless this situation gets remedied there is no way they could sell the unit.

Plaintiffs continued to try and sell their unit. They dropped the price significantly.

On May 14, 2010, Plaintiffs filed this action.

Defendants' tenant hired an engineer in August of 2010. After the engineer reported his findings, the parties agreed that the suggested remedial work would be acceptable. Generally, it was understood that the tenant brew pub owners would be responsible for completing the work necessary to remedy the smell issue. However, the tenant was having its own financial struggles. Therefore, the work as recommended by the engineer was never completed. Even the engineer had difficulty in getting paid. The tenant's attorney did not get paid and eventually withdrew from representing the tenant in this action.

Plaintiffs informed Defendants at that time that negotiations were underway with a potential purchaser who would require that the conditions allowing the odors to escape Defendants' unit and invade the Plaintiffs' unit be remedied prior to closing.

Defendants filed a cross claim against their tenant. Defendants took the position that they could not force their tenant to reduce the odors, but that if Defendants were held liable, then Defendants should be indemnified by their tenant.

On August 26, 2010, Plaintiffs reported to Defendants that "the buyer...has now backed away."

On November 15, 2010, almost a year from the Plaintiffs first demanded a remedy to the situation at Defendants' expense, Plaintiffs again notified Defendants that "the smell is continuing (and) the potential buyer will not make an offer unless the odor is mitigated."

Plaintiffs commissioned their own engineer, Mark Burggraff, P.E., to review the premises and determine whether the work recommended by the tenant's engineer had been completed. As of November 30, 2010, it had not. A subsequent visit by Mr. Burggraff on May 16, 2011, revealed that while some additional work had been done, the original recommendations made by the tenant's engineer were still not fully satisfied.

The purchasers who had first shown interest in August of 2010 later made an offer, entered into a contract with Plaintiffs, and agreed to close on June 15, 2011. The contact was conditioned on the buyers being present during brewing operations and satisfying themselves that any problem with the smell had been remedied. The buyer's broker actually spearheaded some additions or alterations to the brew pub unit that remediated the smell sufficiently for his clients to close the transaction. The broker worked with the brew pub operator to make some alterations. The alterations cost less than a few thousand dollars. They included relatively minor things like putting a door on the brew room in the basement of the brew pub unit so that the odors could not escape up the stairwell and into Plaintiffs' unit.

Plaintiffs allege that as a result of Defendants' conduct in allowing a nuisance to exist on their property, and allowing it to persist after being notified of its adverse effect on Plaintiffs' unit, they suffered damages in the form of a diminution in value to their unit of $125,000.00 to $150,000.00. Plaintiffs claim that they were further damaged as a result of Defendants delaying any attempt to remediate period of ten months during which Plaintiffs were forced to incur approximately $10,749.07 per month in carrying

costs. Therefore, Plaintiffs claim total damages estimated between $232,490.70 and $257,490.70.

Plaintiffs sold their condo unit in a real estate market substantially depressed from the market that existed when they purchased the unit.

Plaintiffs sold the condo unit at a fair price considering market conditions, the environmental factors bearing on the condo unit, their desperation to sell the unit, and the negative publicity regarding the unit brought about by Plaintiffs' choice to bring two lawsuits.

Plaintiffs failed to take reasonable steps to mitigate the problem complained of. Plaintiffs could have pressurized their unit to keep smells from coming in. Although this may have been a costly approach, the cost would likely have been less than the claimed damages. Plaintiffs could have paid for the alterations to the brew pub needed to reduce the smells coming into Plaintiffs' unit. Although Plaintiffs did not have the authority to authorize repairs to a unit that they did not own, they could have reduced the delay and thereby reduce their claimed damages by offering to pay for the repairs up front, with ultimate responsibility for the costs to be decided later. In fact, this reasonable approach ultimately proved to be successful when the broker for the buyer helped arrange for the alterations for a reasonable cost. Instead of investing a small amount of upfront cost and seeking a cooperative agreement to arrange for the necessary alterations, Plaintiffs demanded that Defendants pay for any alterations needed, threaten to sue if Defendants refused, and eventually sued. Plaintiffs could have taken other simple measures like reducing the airflow into their unit by making sure their own doors were properly sealed.

Plaintiffs exacerbated their problems in selling the condo unit by instituting two lawsuits emphasizing their discomfort in living over a brewery and restaurant. This approach taken by Plaintiffs likely contributed to the delay in selling the condo.

Plaintiffs also diminished their ability to command a higher sale price by becoming delinquent on property taxes resulting in a tax lien and allowing the unit to go into foreclosure.

The Declaration, Section 8.06 provides in part as follows:

> No annoying lights, sounds or odors. ... and no sound or odor shall be emitted from any portion of the common interest community which would reasonably be found by others to be noxious or offensive ... This Section 8.06 shall be subject to the provisions of Section 8.05 above.

Section 8.05 contains the following material language:

> Nuisance is defined as any activity which poses an unreasonable risk of harm to the unit owners which constitutes a substantial invasion of any unit owner's use and enjoyment of the unit. No nuisance shall be permitted within the common interest community, nor any use activity or practice which is the source of unreasonable annoyance or embarrassment to, or which unreasonably offends or disturbs, any unit owner or which may unreasonably interfere with the peaceful enjoyment or possession of the proper use of a unit....
>
> Each unit owner, by purchasing a unit, acknowledges and accepts the existence of a brewpub and restaurant and a health food market with in the common interest community. The normal and reasonable use of the units for their intended use shall not constitute a nuisance....

Section 8.06 is subject to Section 8.05. Section 8.05 does not limit the volume of beer Defendants' tenant is allowed to brew. There is no evidence that Defendants or their tenant allowed their brew pub to fall into a state of disrepair. Instead, the odors generated in the brew pub unit invaded Plaintiffs' unit because of the airflow patterns between the two units. While the odors emanating from the brew pub restricted the

enjoyment and use of their unit, nevertheless, Section 8.06 and Section 8.05 are properly construed as allowing the reasonable use of the brew pub for its intended use. The use of the brew pub to brew beer was a reasonable and intended use of the unit.

If the Court were to accept Plaintiffs' position that Defendants' unit could not be put to a use that would cause an odor that "would reasonably be found by others to be noxious or offensive", then the use of the brew pub could be found to be a nuisance in spite of the language in the Declaration that the owners accepted the use of the brew pub and regardless whether beer production increased or the quality of the smell changed over time.

The Court rejects Plaintiffs' argument that the brew pub has been transformed into a beer manufacturing plant, that it engages in a beer manufacturing operation that is substantially different than the operation at the time Plaintiffs purchased their condo, and that, therefore, Defendants should be liable to Plaintiffs. Beer was being brewed when Plaintiffs bought their condo. In that sense, the brew pub has been a manufacturing plant all along. When beer is brewed, a smell is unavoidably produced.

There is no specific evidence regarding the increase in beer production during the period when Plaintiffs owned their condo. There is evidence that beer production generally increased over time between 2003 and 2009. An increase in beer production does not change the basic nature of the brew pub or the business it engages in. An increase in beer production is still a reasonable and intended use of the unit occupied by the brew pub. Also, an increase is beer production does not demonstrate that the smells were more intense or of a different quality, as opposed to simply being present more often.

The fact that smells generated by the brew pub are offensive to some does not lead to the conclusion that Defendants are, therefore, liable to Plaintiffs for difficulty or delay in selling their condo. Plaintiffs have simply failed to convince the Court that the smells from the brew pub are so qualitatively and quantitatively different than the smell existing at the time Plaintiffs purchased the condo that Defendants should be liable for delays in selling the condo or diminished value of the condo.

Even if Plaintiffs were able to persuade the Court that Defendants should be liable for costs associated with delays in selling the condo, Plaintiffs have not proven that the value of the condo was diminished by the smell. The problem with the smell was eventually rectified. The buyer would not close until the smell problem was addressed. The contract offer was conditioned on the smell problem being addressed and, therefore, assumed that the smell would not diminish the value of the condo. The condo was sold.

The lease between the brew pub and Defendants expressly obligated the brew pub to operate its premises in compliance with the Condominium Declarations and "that said Declaration, Rules and Regulations shall have the same force and effect as covenants of this Lease, and that Lessee will observe and comply with all such requirements, rules and regulations." The brew pub contractually obligated itself to comply with the provisions of the Declarations. The lease between BCB and the brew pub also provided that the brew pub is not entitled to "make any additions, alterations or improvements to the leasehold Premises without obtaining the prior written consent of the Lessor." The brew pub operators eventually made alterations that substantially reduced the smell present in Plaintiffs condo.

The essential question to be resolved when a private nuisance is claimed is whether the offending party has unreasonably interfered with the claimant's use and enjoyment of his property. The interference which occurs must also be substantial in nature as measured by the standard that it would be of definite offensiveness, inconvenience, or annoyance to a normal person in the community. Northwest Water Corp. v. Pennetta, 479 P.2d 398, 400 (Colo. App. 1970); and RESTATEMENT (SECOND) OF TORTS, § 826, Comment b.

The question of unreasonableness is an issue of fact and should be left to the determination of the trier of fact. Public Service Company v. Van Wyk, 27 P.3d 377, 391 (Colo. 2001). "The unreasonable and substantial interference test ... necessarily includes a consideration whether the questioned activity is reasonable under all surrounding circumstances." Allison v. Smith, 695 P.2d 791, 794 (Colo.App. 1984). Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient. Van Wyk, supra, at 391.

To prove a private nuisance claim, a plaintiff must establish that (1) the defendant's conduct unreasonably interfered with the use and enjoyment of the plaintiff's property, (2) the interference was so substantial that it would have been offensive or caused inconvenience or annoyance to a reasonable person in the community, and (3) the interference was either negligent or intentional. Saint John's Church in Wilderness v. Scott, 194 P.3d 475 (Colo. App. 2008); see also Woodward v. Board of Directors of Tamarron Ass'n of Condominium Owners, Inc., 155 P.3d 621 (Colo. App. 1997).

Given the circumstances and findings stated above, the Court concludes that Defendants did not unreasonable interfere with Plaintiffs' use and enjoyment of their condo.

By purchasing the property and accepting the brewery and restaurant, Plaintiffs knowingly relinquished any right to make a claim for nuisance caused by their operations. Although exculpatory agreements such as these are carefully examined to determine enforceability, a court will hold such an agreement valid by weighing four factors: "(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language." Heil Valley Ranch, Inc., v Simkin, 784 P.2d 781, 787 (Colo. 1989), citing Jones v. Dressel, 623 P.2d 370 (Colo. 1981). Here, the acceptance of the brewery and restaurant operation was clear, was voluntarily accepted at a time when the Plaintiffs had the option to walk away from the transaction, and the Plaintiffs had every opportunity to inspect. In addition, Plaintiffs have not argued that the agreement is unenforceable.

In this case, neither the landlord nor the tenant had a duty to take action upon the demands of Plaintiffs. Any action taken by the tenant was out of caution, prevention or simple neighborliness, as opposed to a legal duty. Furthermore, even if the tenant had a legal duty to act, the circumstances under which a duty on a landlord to act against its tenant to prevent injury to a third person are not present in this case. There is a distinction between the negligent failure to act to prevent injury, and negligent affirmative action of inflicting injury. Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987) (holding that the university that leased land to a fraternity does not have a

duty of care to an injured third party unless there is a specific relationship between the university and that third party; and that possession of authority by the landlord University to regulate the tenant fraternity's use of the property is not sufficient to establish that the landlord had the duty to exert such control). In general there is no duty imposed on a landlord to take affirmative action to prevent injury to a third party, absent a special relationship not here in evidence. The absence of a duty to take action even extends to dangerous conditions, except where the dangerous condition existed at the time possession was transferred to the lessee. Perez v. Grovert, 962 P.2d 996 (Colo. App. 1998). Thus, BCB's failure to take action against the brew pub is not actionable in a nuisance claim against BCB.

Even had Plaintiffs proved Defendants' were liable for nuisance or breach of the Declarations, Plaintiffs would still have to prove damages. In order to recover damages, Plaintiffs have to show that their loss was the proximate result of Defendants' actions. Bruckman v. Pena, 487 P.2d 566 (Colo. App. 1971) (burden of proof is upon plaintiff to establish that damages he seeks were proximately caused by defendant's negligence); City of Aurora v. Loveless, 639 P.2d 1061 (Colo. 1981). Plaintiffs must prove the source of the damages with reasonable certainty. Vanderbeek v. Vernon Corp., 50 P.3d 866 (Colo. 2002) ("the purpose of the reasonable certainty rule is to avoid making compensatory damages...which are fabricated or based on mere conjecture or speculation"). Plaintiffs failed to carry their burden of proof regarding damages.

IT IS, THEREFORE, ORDERED that Plaintiffs' claims against Defendants are denied. Defendants are awarded costs as the prevailing parties. A bill of costs can be submitted as is provided for by rule.

Signed this 9th day of Feb., 2012.

By the Court:

James Schum
District Court Judge