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DOCKET NO.: NNH-CV-21-6115907-S	:	SUPERIOR COURT
PETISIA ADGER, ET AL	:	J. D. OF NEW HAVEN
VS.	:	AT NEW HAVEN
PAW HAVEN, LLC, ET AL	:	NOVEMBER 3, 2021

DEFENDANTS' JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Practice Book § 10-30, the Defendants, Kevin Rocco, John R. McFayden, Jacqueline Carelton a/k/a Jacqueline McFayden and Paw Haven, LLC, jointly move to dismiss the Plaintiffs' Complaint and deny their Application for Temporary Injunction without prejudice on the grounds that this Court lacks subject matter jurisdiction because the Plaintiffs failed to exhaust their administrative remedies and lack standing. In support of this motion the Defendants attach a Memorandum of Law.

THE DEFENDANTS,
KEVIN ROCCO and
PAW HAVEN, LLC

By: /s/ 429443
Sylvia K. Rutkowska, Esquire, for
Dzialo, Pickett & Allen, P.C.

THE DEFENDANTS,
JOHN R. MCFADYEN AND
JACQUELINE CARELTON A/K/A
JAQUELINE MCFADYEN and
PAW HAVEN, LLC

By: /s/ 415741
Robert M. Frost, Jr, Esquire, for
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CERTIFICATION

I hereby certify that a copy of this document was mailed or delivered electronically or non-electronically on the date herein to attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery. Namely:

Gregory W. Piecuch, Esq.
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/s/ 429443
Sylvia K. Rutkowska
Commissioner of Superior Court

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MEMORADUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Defendants, Kevin Rocco, John R. McFayden, Jacqueline Carleton a/k/a Jacqueline McFayden and Paw Haven, LLC submit this Memorandum of Law to support the position that this Court has no subject matter jurisdiction over the Plaintiffs' allegations in the Complaint with respect to alleged violations of New Haven Code of Ordinances ("Code") and Conn. Gen. Stat. §22-363 because the Plaintiffs failed to exhaust their administrative remedies and lack standing. Therefore, in addition to the dismissal of the Complaint, the related Application for Temporary Injunction should be denied without prejudice.

II. STATEMENT OF FACTS

The Plaintiffs allege that the Defendants continue to permit barking noises to be emitted from Paw Haven "in excess of the limits set forth in the New Haven Code of Ordinances, which are violative of the New Haven Code of Ordinances …." (See Pl Complaint ¶ 49). Plaintiffs further seek an order, pursuant to Conn. Gen. Stat. § 22-363 concerning the restraint or disposal of such dog or dogs as may be deemed necessary. In all Counts of the Complaint, the Plaintiffs specifically invoke the alleged violations of Code §§ 18-72, 18-75(a), and 7-5 as the basis for their claims.

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Of import, Code § 18-89(a) specifically delegates authority for the enforcement of Article II: Noise Control (i.e. §§ 18-71 *et seq.*) regarding stationary or fixed noise sources to "the city's health director or his/her designee."[1] Further, Code § 18-90 states:

> Any person aggrieved by a decision rendered by the issuer may appeal said decision in accordance with the procedure set forth in the Licenses and Permits chapter[2] of this Code as it is amended from time to time.

In the present matter, it is undisputed that the Plaintiffs lodged their complaints of Paw Haven's alleged violations of the above referenced Code/statute to authorized officials with the City of Haven and, as a result thereof, on or about October 20, 2020, the City of New Haven obtained noise measurements which were documented as exceeding the New Haven Noise Ordinance. However, thereafter, the Plaintiffs acknowledge that the Defendants commenced the implementation of the recommended mitigation technique of installing a sound-blocking

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[1] A copy of the relevant provisions of the Code were marked as an exhibit at the first day of the injunction hearing in this matter and another copy is attached to this Memorandum of Law as **Exhibit A**.

[2] The Licenses and Permits chapter, specifically § 17.1.16(c) states:

> The aggrieved person may use either or both of the following procedures to appeal the disputed action:
> (1) The aggrieved person may request a hearing before the issuer. The request must be made in writing within one (1) week of receipt of the written notice of the disputed action. If a hearing is requested, the issuer will set a date and a place for it, and provide the appellant with due notice in advance thereof. The appellant will have the opportunity to be represented by counsel at such hearing.
> (2) The aggrieved person may appeal to the city official, board or other authority having cognizance of the matter under this Code. The request must be made in writing within one (1) week of receipt of the written notice of the disputed action. If no authority has supervision on the subject matter, then the appeal shall be submitted to the board of aldermen

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and absorptive acoustic isolation barrier along the slatted chain link fence at Paw Haven. Due to the exorbitant cost of the full recommended mitigation, it was determined that additional noise measurements would be obtained to determine if the implemented mitigation reduced the noise measurement to within the Code.

It is also undisputed that, despite the pending implementation of the above referenced mitigation technique, the Plaintiffs made additional complaints to officials with the City of New Haven which further resulted in the New Haven Police Department issuing an infraction to Mr. McFadyen on December 28, 2020 (Case #A132331-3) and to an infraction to Ms. Carleton on January 7, 2021 (Case # S964300-3), both for violation of Conn. Gen. Stat. §22-363 (See also See Pl Complaint ¶¶ 37 and 39). Both violation have been reviewed by the Central Infractions Bureau and remain pending in the New Haven GA 23.

Thereafter, the Plaintiffs acknowledge that, in March of 2021, after the installation of the acoustic barrier along the fence, the City of New Haven Department of Health obtained noise measurements at relevant locations. As a result, on March 25, 2021, Brian Wnek of the City of New Haven Department of Health issued a report determining the noise levels were ***below*** the City of New Haven Code of Ordinances Noise Section. Pursuant to testimony elicited during the pending hearing on the Application for Temporary Injunction, the Plaintiffs acknowledge receipt and notice of said decision. Further, the Plaintiffs admit that they failed to appeal from said decision despite being aggrieved therefrom. Rather, the Plaintiffs seek to circumvent the established administrative process by way of a direct Complaint and Application for Temporary Injunction.

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III. ARGUMENT

A. STANDARD OF REVIEW FOR MOTION TO DISMISS.

The standard of review for a court's decision on a motion to dismiss is well settled. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction..." *First Union Nat. Bank v. Hi Ho Mall Shopping Ventures, Inc.,* 273 Conn. 287, 291(2005). "The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss...It is the burden of the party who seeks the exercise of jurisdiction in his favor...clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute..." *May v. Coffey*, 291 Conn. 106, 113 (2009). "A motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts....If a resolution of a disputed fact is necessary to determine the existence of standing when raised by a motion to dismiss, a hearing may be held in which evidence is taken." Id. at 108–09.

A motion to dismiss which challenges subject matter jurisdiction can be filed at any time. Practice Book Section 10-31 et seq. *Stroiney v. Cresent Lake Tax District*. 205 Conn. 290, 294 (1987). Moreover, once the court's subject matter jurisdiction is called into question, "[i]t must be disposed of no matter in what form it is presented and the court must fully resolve it before proceeding with the case." *Community Collaborative of Bridgeport, Inv. v. Ganim,*241 Conn. 546, 552 (1997).

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B. THE COURT LACKS SUBJECT MATTER JURISDICTION

The Complaint, and therefore the Application for Temporary Injunction relying on the same, should be dismissed as it seeks to ignore and override a standing decision of the local authorized official and pending infraction proceeding. Under governing failure to exhaust principles, the Plaintiffs' failure to file an administrative appeal pursuant to §18-90 of the Code they seek to enforce precludes them from contesting the same in this court. Further, the Plaintiffs lack standing to seek further relief pursuant to Conn. Gen. Stat. §22-363 as proceedings are already pending and the statute does not afford a private right of action.

"It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter…[B]ecause the exhaustion doctrine implicates subject matter jurisdiction, we must decide as a threshold matter whether that doctrine requires dismissal of the plaintiffs' claims." *Piquet v. Town of Chester*, 306 Conn. 173, 179-180 (2012); *Housing Authority v. Papandrea*, 222 Conn. 414, 420 (1992).

The Supreme Court has consistently upheld the dispositive principle that when an individual receives notice from an authorized official of a determination as to whether an act is in violation of an applicable ordinance or regulation, that interpretation constitutes a decision from which an aggrieved person can appeal to the local agency pursuant to local ordinance or regulation. The Court further noted that this precept aligns "with the underlying purpose of requiring parties to exhaust administrative appeals before bringing actions in the Superior Court." Id. At 186.

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"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law.... The doctrine provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted...." *McKart v. United States,* 395 U.S. 185, 193 (1969). The requirement of exhaustion may arise from explicit statutory language or from an administrative scheme providing for agency relief. *Howell v. Immigration & Naturalization Service,* 72 F.3d 288, 291 (2d Cir.1995).

"A primary purpose of the doctrine is to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review...." *Shortt v. New Milford Police Dept.,* 212 Conn. 294, 306 n. 10 (1989). Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs or ordinances they are charged to administer or enforce. *Cannata v. Dept. of Environmental Protection,* 215 Conn. 616, 625 (1990).

Therefore, exhaustion of remedies serves dual functions: "it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities." *Hartford v. Hartford Municipal Employees Assn.,* 259 Conn. 251, 281–82 (2002).

The exhaustion doctrine is applied in a number of different situations. Like most judicial doctrines, while it is also subject to exceptions the Supreme Court has recognized that such

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exceptions "only infrequently and only for narrowly defined purposes such as when recourse to the administrative remedy would be futile or inadequate." *Fish Unlimited v. Northeast Utilities Service Co.,* 254 Conn. 1, 13 (2000), *overruled on other grounds*, *City of Waterbury v. Town of Washington*, 260 Conn. 506, 539 (2002); s*ee, e.g.*, *Simko v. Ervin*, 234 Conn. 498, 507 (1995) (plaintiffs' mere suspicion of bias on part of defendant, without more, not sufficient to excuse them, on ground of futility, from exhaustion requirement); *O & G Industries, Inc. v. Planning & Zoning Commission,* 232 Conn. 419, 429 (1995) (actual bias, rather than mere potential bias, of administrative body renders resort to administrative remedies futile); *Polymer Resources, Ltd. v. Keeney,* 227 Conn. 545, 561 (1993) (mere conclusory assertion that agency will not reconsider decision does not excuse compliance, on basis of futility, with exhaustion requirement);*Housing Authority v. Papandrea,* supra, 222 Conn. at 432, 610 A.2d 637 (fact that commissioner of housing previously indicated how he would decide plaintiff's challenge to voucher program did not excuse compliance, on ground of futility, with exhaustion requirement).

Thus, under this established principle, if the Plaintiffs seek to invoke the New Haven Code with respect to Paw Haven's conduct and use of its facility, and effectively override the authorized official's interpretation and decision, they were obligated to do so in the first instance by a timely filed appeal pursuant to said ordinance. An administrative appeal and further proceedings would then allow the City and the other parties to address the claims in the first instance, developing an administrative record that can be reviewed by this Court in a subsequent proceeding if the matter is not otherwise resolve din the interim. Their failure to exhaust that

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administrative remedy leaves this Court without subject matter jurisdiction over the Complaint and therefore the Application for Temporary Injunction should be denied without prejudice.

In addition, the Plaintiffs have asserted a cause of action based on enforcement of Conn. Gen. Stat. §22-363, and they seek an injunction concerning "restraint or disposal" of dogs at the Paw Haven facility. *See* Pl.'s Comp., Count One, ¶58. The statute relied upon by Plaintiffs does not provide for a private right of action, and, as with the Code sections referenced above, Plaintiffs have an available administrative remedy through the State of Connecticut Department of Agriculture.

> General Statutes § 22-363 provides that "[n]o person shall own or harbor a dog or dogs which is or are a nuisance by reason of ... excessive barking ... Violation of any provision of this section shall be an infraction for the first offense and such person shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both for each subsequent offense ..." According to § 22-328 the Commission of Agriculture is charged with enforcing the provisions of § 22-363. General Statutes § 22-328. The court concludes that § 22-363 does not provide the plaintiff with a private civil remedy.

Auster v. Norwalk United Methodist Church, No. CV010184999, 2004 WL 423189, at *4 (Conn. Super. Ct. Jan. 27, 2004); *see also Bartkowski v. Case*, No. CV020089082, 2004 WL 944267, at *2 (Conn. Super. Ct. Apr. 6, 2004).[3]

Thus, Plaintiffs' Complaint fails to state a claim and it seeks enforcement of Conn. Gen. Stat §22-363, for which it has no standing and without first exhausting administrative remedies.

IV. CONCLUSION

WHEREFORE, the Defendants move to dismiss the Plaintiffs' Complaint with respect to alleged violations of New Haven Code and Conn. Gen. Stat. §22-363 and for an order denying

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[3] Copies of these unreported decisions are attached as Exhibit B.

the Application for Temporary Injunction without prejudice because the Plaintiffs failed to exhaust their administrative remedies and this Court lacks subject matter jurisdiction.

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Exhibit A

ARTICLE II. - NOISE CONTROL

Sec. 18-71. - Title.

This article shall be known as the "Noise Control Ordinances."

(Ord. No. 1422, 7-6-06)

Sec. 18-72. - Purpose.

It is recognized that people have a right to and should be ensured an environment free from excessive sound and vibration that may jeopardize their health, safety, welfare, or quality of life. This article is enacted to protect, preserve and promote these values for the citizens of New Haven through the reduction, control and prevention of unlawfully excessive noise.

(Ord. No. 1422, 7-6-06)

Sec. 18-73. - Definitions.

The following definitions shall apply in the interpretation and enforcement of this article:

(a) *Ambient noise* or *background noise* means a noise of a measurable intensity which exists at a point as a result of a combination of many distant individually indistinguishable sources. In statistical terms, it is the level which is exceeded ninety (90) percent of the time (L90) in which the measurement is taken.

(b) *Collection* means the act of picking up refuse at its point of generation or storage, placing it in a vehicle, and completing the process at each location.

(c) *Commercial zone* means all commercial districts and business districts, including BA, BB, BC, BD, BD-1 and BE as defined in the zoning regulations of the City of New Haven, and all uses associated therewith permitted either as a right or as a special use.

(d) *Compression release type braking system* means any device equipped on certain commercial vehicles, including but not limited to, tractors, semi-trucks, motor carriers and buses that utilize engine compression release or engine retardants as a means of slowing or braking the speed of the vehicle in lieu of applying the clutch or brakes. These devices are also known as Jake brakes.

(e) *Construction* means any site preparation, assembly, erection, substantial repair, alteration or similar action for or of public or private rights-of-way, structures, utilities or similar property. This term does not encompass demolitions.

(f) *Construction equipment* means any equipment or device operated by fuel, electric power, air or hydraulic pressure used in construction or demolition work.

(g) *Daytime hours* means the hours between 7:00 a.m. and 10:00 p.m. Mondays through Saturdays, and the hours of 9:00 a.m. through 9:00 p.m. Sundays and federal and state holidays. Unless otherwise provided, all other hours shall be construed as nighttime hours.

(h) *Decibel* means a logarithmic unit of measure used in measuring magnitudes of sound. The symbol is dB. SPL (sound-pressure level) is defined as:

SPL = 20 log P in dB/Po

Where Po = 0.0002 microbars

(i) *Demolition* means any dismantling, intentional destruction or removal of structures, utilities, public or private right-of-way surfaces or similar property.

(j) *Domestic power equipment* means power saws, drills, grinders, lawn and garden tools and other similar devices.

(k) *Emergency* means any occurrence or set of circumstances involving actual or imminent physical trauma or property damage which demands immediate action.

(l) *Emergency vehicle* means any motor vehicle authorized by Conn. General Statutes section 14-283 as amended from time to time and the City of New Haven to have sound-warning devices such as sirens and bells which can lawfully be used when responding to an emergency.

(m) *Emergency work* means work made necessary to restore property to a safe condition following an emergency, or work required to protect persons or property from exposure to imminent danger.

(n) *Impulse noise* means a sound of short duration, usually less than one (1) second, with an abrupt onset and rapid decay.

(o) *Industrial zone* means all industrial districts as defined by the zoning regulations of the City of New Haven, including but not limited to IL, IM and IH Districts.

(p) *Loud amplification device or similar equipment* shall include, but not be limited to, a radio, television, stereo, record player, tape player, cassette player, compact disc player, loud speaker or sound amplifier which is operated in such manner that it creates noise.

(q) *Motor vehicle* is defined as per section 14-1(51) of the Conn. General Statutes as amended from time to time.

(r) *Muffler* means a device for abating sounds such as those produced by escaping gases.

(s) *Noise* means any sound, the intensity of which exceeds the standards set forth in this article as it is amended from time to time.

(t) *Noise level* means the sound-pressure level in decibels as measured with a sound-level meter using the A-weighting network. The level so read is designated dB(A) or dBA.

(u) *Person* means any individual, firm, partnership, association, syndicate, company, trust, corporation, municipality, agency or political or administrative subdivision of the state or other legal entity of any kind.

(v) *Premises* means any building, structure, land or portion thereof, including all appurtenances, yards, lots, courts, inner yards, and real properties without buildings or improvements, owned or controlled by a person. The emitter's "premises" includes contiguous publicly dedicated street and highway rights-of-way, all road rights-of-way and waters of the state.

(w) *Property line* means that real or imaginary line along the ground surface and its vertical extension which separates real property owned or controlled by any person from contiguous real property owned or

controlled by another person, and separates real property from the public right-of-way.

(x) *Public right-of-way* means any street, avenue, boulevard, highway, sidewalk, alley, park, waterway, railroad or similar place which is owned or controlled by a governmental entity.

(y) *Recreational vehicle* means any internal-combustion-engine-powered vehicle which is being used for recreational purposes.

(z) *Refuse* means municipal solid waste, bulky waste and yard waste, garbage, household rubbish, ashes and any organic wastes normally produced from the handling and use of foods, except dishwater and wastewater.

(aa) *Residential zone* means all city-owned property used for recreational or educational purposes, all residential districts (RS-1, RS-2, RM-1, RM-2, RH-1, RH-2 and RO), any commercial district when used for residential purposes, as defined in the zoning regulations of the City of New Haven as they are amended from time to time, and all uses permitted therewith either as a right or as a special use.

(bb) *Sound* means a transmission of energy through solid, liquid or gaseous media in the form of vibrations, which constitute alterations in pressure or position of the particles in the medium, and which, in air, evoke physiological sensations, including but not limited to an auditory response when impinging on the ear.

(cc) *Sound-level meter* means an instrument used to take sound-level measurements and which should conform, at a minimum, to the operational specifications of the American National Standards Institute for Sound Level Meters, S1.4—1971 (Type S2A) as amended from time to time.

(dd) *Sound-pressure level* means twenty (20) times the logarithm to the base ten (10) of the ratio of the pressure of a sound to the reference pressure of twenty (20) micronewtons per square meter (20×10^{-6} newtons/meter^2) and which is expressed in decibels (dB).

(Ord. No. 1422, 7-6-06)

Sec. 18-74. - Noise level measurement procedures.

For the purpose of determining noise levels as set forth in this article, the following guidelines shall apply:

(1) All personnel conducting sound measurements shall be trained in the current techniques and principles of sound-measuring equipment and instrumentation;

(2) Instruments used to determine sound-level measurements shall conform to the performance standards as defined in the section captioned "Noise levels" as amended from time to time;

(3) The general steps listed below shall be followed when preparing to take sound-level measurements:

(i) The instrument manufacturer's specific instructions for the preparation and use of the instrument shall be followed;

(ii) The sound-level meter shall be calibrated before and after each set of measurements;

(iii) When measurements are taken out of doors, a wind screen shall be placed over the microphone of the sound-level meter as per the manufacturer's instructions;

(iv) The sound-level meter shall be placed at an angle to the sound source as specified by the manufacturer's instructions, and be at least four (4) feet above the ground. The meter shall be

placed as to not be interfered with by individuals conducting the measurements; and

(v) Measurements shall be taken at a point that is located about one (1) foot beyond the boundary of the emitter's premises and within the receptor's premises. The emitter's premises include his/her individual unit of land, or ground of contiguous parcels under the same ownership as indicated by public land records.

(Ord. No. 1422, 7-6-06)

Sec. 18-75. - Noise levels.

(a) It shall be unlawful for any person to emit or cause to be emitted any noise beyond the boundaries of his/her premises in excess of the noise levels established in these regulations as amended from time to time.

(b) Noise level standards.

(1) No person in a residential zone shall emit noise beyond the boundaries of his/her premises that exceeds the levels stated herein, and applies to adjacent residential, commercial or industrial zones.

Emitter's zone: Residential

Receptor's zone: Maximum level:

Industrial .....62 dBA

Commercial .....55 dBA

Residential/Day .....55 dBA

Residential/Night .....45 dBA

(2) No person in a commercial zone shall emit noise beyond the boundary of his/her premises that exceeds the levels stated herein, and applies to adjacent residential, commercial or industrial zones:

Emitter's zone: Commercial

Receptor's zone: Maximum level:

Industrial .....62 dBA

Commercial .....62 dBA

Residential/Day .....55 dBA

Residential/Night .....45 dBA

(3) No person in an industrial zone shall emit noise beyond the boundary of his/her premises that exceeds the levels stated herein, and applies to adjacent residential, commercial or industrial zones:

Emitter's zone: Industrial

Receptor's Zone: Maximum level:

Industrial .....70 dBA

Commercial .....66 dBA

Residential/Day .....61 dBA

Residential/Night .....51 dBA

(4) Any non-conforming use shall be deemed to be in the zone which corresponds to the actual use.

(Ord. No. 1422, 7-6-06)

Sec. 18-76. - High background noise levels and impulse noise.

(a) If background noise levels caused by sources not subject to these regulations exceed the standards contained herein as amended from time to time, a source shall be considered to cause excessive noise if its emission exceeds the background noise levels by five (5) decibels, provided that no source subject to this article shall emit noise in excess of eighty (80) decibels at any time, and provided that this section does not decrease the permissible levels of other sections of this chapter as amended from time to time.

(b) No person shall cause or allow the emission of impulse noise in excess of eighty (80) decibels peak sound-pressure level during the nighttime to any residential noise zone.

(c) No person shall cause or allow the emission of impulse noise in excess of one hundred (100) decibels peak sound-pressure level at any time in any zone.

(Ord. No. 1422, 7-6-06)

Sec. 18-77. - Exclusions.

The above restrictions of sound levels shall not apply to noise emitted by or related to:

(1) Natural phenomena;

(2) Any bell or chime from any building clock, school or church;

(3) Any siren, whistle or bell lawfully used by emergency vehicles, or any other alarm systems used in an emergency situation; provided, however, that burglar alarms not terminating within fifteen (15) minutes after being activated shall be unlawful. Notwithstanding the foregoing, repetitive activation of any alarm system due to malfunction or lack of proper maintenance shall not be excluded. However, the owner of an alarm mechanism will not be held liable if it is activated without his/her fault or negligence;

(4) Warning devices required by Occupational Safety and Health Administration or other state or federal safety regulations; and

(5) Farming equipment or farming activity.

(Ord. No. 1422, 7-6-06)

Sec. 18-78. - Exemptions and special conditions.

The following shall be exempt from these regulations, subject to special conditions as provided herein:

(1) Noise generated by any construction equipment which is operated between the hours of 7:00 a.m. and 10:00 p.m. on Mondays through Saturdays, and 9:00 a.m. and 9:00 p.m. on Sundays. The building official or the director of the department of public works must approve the operation of the same during hours other than those allowed by this section. The person requesting such approval must apply for it at least seven (7) days before the date for which approval is sought. Approval may be granted if the requesting person makes an advanced payment for the actual cost of such inspection services as may be required under applicable rules and regulations as amended from time to time;

(2) Noise created as a result of or relating to an emergency;

(3) Noise from domestic power equipment such as, but not limited to, power saws, sanders, grinders, lawn and garden tools or similar devices operated between the hours of 7:00 a.m. and 10:00 p.m. on Mondays through Saturdays, and 9:00 a.m. and 9:00 p.m. on Sundays, provided that noise discharged from exhaust is reasonably muffled;

(4) Noise from snow removal equipment, provided it is maintained in good repair and exhaust is reasonably muffled;

(5) Noise from demolition work conducted between the hours of 7:00 a.m. and 10:00 p.m. on Mondays through Saturdays, and 9:00 a.m. and 9:00 p.m. on Sundays, provided that demolition shall be exempted at all times from the noise levels set in this regulation when it is considered emergency work;

(6) Noise created by any aircraft flight operations, which the Federal Aviation Administration specifically preempts;

(7) Noise created by any lawful recreational activities, and for which the city has granted a license or permit, including but not limited to parades, sporting events, outdoor concerts, firework displays and non-amplified religious activities;

(8) Noise involving blasting other than that conducted in connection with construction or demolition activities, provided that the blasting is conducted between the hours of 7:00 a.m. and 10:00 p.m. on Mondays through Saturdays, and 9:00 a.m. and 9:00 p.m. on Sundays, at specified hours previously announced to the local public, or provided that a permit for such blasting has been obtained from local authorities;

(9) Noise created by products undergoing tests, where one (1) of the primary purposes of the test is to evaluate product noise characteristics, and where practical noise control measures have been taken;

(10) Noise generated by transmission facilities, distribution facilities and substations of public utilities providing electrical power, telephone, cable television or other similar services, and located on property which is not owned by the public utility, and which may or may not be within utility easements.

(Ord. No. 1422, 7-6-06)

Sec. 18-79. - Motor vehicle noise.

(a) All motor vehicles operated within the limits of the City of New Haven shall be subject to the noise standards and decibel levels set forth in the regulations authorized in federal, state and local laws and regulations, including but not limited to Conn. regulation sections 14-80a-1a through 14-80a-10a as amended from time to time.

(b) No motor or recreational vehicles shall emit noise from a loud amplification device or similar equipment which exceeds noise level standards for residential zoned areas.

(Ord. No. 1422, 7-6-06)

Sec. 18-80. - Refuse collection noise.

All refuse collectors shall comply with the noise level standards as established in this article while engaging in refuse collection at each location. For purposes of this article, the term "refuse collectors" shall be synonymous with private haulers, and all other persons that commercially engage in the collection and transportation of refuse and other debris.

(Ord. No. 1422, 7-6-06)

Sec. 18-81. - Inspections.

For the purpose of determining compliance with the provisions of this article, the following provisions shall apply:

(1) The city's health director or his/her designee is hereby authorized to make inspections of stationary or fixed noise sources, and to take measurements and make tests whenever necessary to determine the quantity and character of noise.

(2) The city's chief of police or his/her designee is hereby authorized to make inspections of mobile noise sources including refuse collection, demolition, construction and vehicular activities, and to take measurements and make tests whenever necessary to determine the quantity and character of noise.

(3) In the event that any person refuses or restricts local authorized officials from entry and free access to any part of a premises, or refuses to allow such officials to inspect, test or measure noise generated from any activity, device, facility or process, said officials may seek an administrative warrant from an appropriate court to obtain such access for the aforesaid purposes.

(4) It shall be unlawful for any person to refuse to allow or permit local authorized officials free access to any premises when they are acting in compliance with a warrant for inspection that is issued by the appropriate court.

(5) It shall be unlawful for any person to violate the provisions of any warrant or court order requiring inspection, testing or measurement of noise sources.

(6) No person shall hinder, obstruct, delay, resist, prevent in any way, interfere or attempt to interfere with any authorized person while in the performance of his/her duties under this article as amended from time to time.

(Ord. No. 1422, 7-6-06)

Sec. 18-82. - Violations and penalties.

Any person violating this article shall be fined up to the maximum amount authorized by state statutes or this Code per occurrence. Each day such violation continues shall constitute a separate violation.

(Ord. No. 1422, 7-6-06)

Sec. 18-83. - Variances.

(a) Any person residing or doing business in New Haven, who is negatively affected by the application of this article's provision(s), may seek a variance to engage in the prohibited activity. An applicant for a variance must supply the following information:

(1) Location and nature of activity;

(2) The time period and hours of operation of said activity;

(3) The nature and intensity of the noise that will be generated; and

(4) Any other information required by the appropriate city authority.

(b) No variance from these regulations shall be issued unless it has been demonstrated that:

(1) The proposed activity will not violate any Connecticut Department of Environmental Protection regulation(s) as amended from time to time;

(2) The noise levels generated by the proposed activity will not constitute a danger to public health, safety, welfare or quality of life; and

(3) Compliance with the regulations constitutes an unreasonable hardship on the applicant.

(Ord. No. 1422, 7-6-06)

Sec. 18-84. - Noise variance review committee.

(a) A noise variance review committee is hereby established to consider variance requests.

(b) This committee shall consist of the city's health director, chief of police, public works director and building official or their respective designees. Additionally, the committee shall include an alderman who is appointed by the president of the board of aldermen.

(c) The committee shall review each variance application, and either approve or reject it within fifteen (15) days of its receipt. The approval or rejection shall be in writing, and shall state the condition(s) of approval, if any, or the reasons for rejection.

(d) Failure to rule on the application within the designated time shall constitute approval of the variance.

(Ord. No. 1422, 7-6-06)

Sec. 18-85. - Administration.

The city's health director and chief of police are hereby authorized to make regulations from time to time that are consistent with the State Public Health Code, and the regulations of the State Department of Environmental Protection regarding noise as each is amended from time to time. Such regulations shall become effective upon the

board of aldermen's approval.

(Ord. No. 1422, 7-6-06)

Sec. 18-86. - Contracts.

Any written agreement, purchase order or contract whereby the City of New Haven is committed to expending funds in return for work, labor, services, supplies, equipment, materials or any combination thereof shall not be entered into unless such document contains provisions that any equipment or activities which are subject to the provisions of this article will be operated, constructed, conducted or manufactured without violating this article as it is amended from time to time.

(Ord. No. 1422, 7-6-06)

Sec. 18-87. - Mediation.

(a) If the city's chief of police receives a complaint alleging a violation of this article by noise emanating from a construction, demolition, refuse collection or vehicular activity, he/she is expressly authorized to mediate such dispute within forty-eight (48) hours, provided that the following conditions apply:
    (1) He/she is satisfied that the complainant is aggrieved by the alleged violation;
    (2) There are reasonable grounds to believe that there is a violation of this article; and
    (3) He/she determines that the particular facts and circumstances suggest that such mediation may result in a satisfactory resolution of the complaint.
(b) Nothing herein is intended to affect or in any way limit any other procedures established elsewhere in this article, limit any other powers granted to the local authorized officials, or require the city's chief of police to invoke the mediation powers herein established.

(Ord. No. 1422, 7-6-06)

Sec. 18-88. - Effect on other regulations.

All of the city's zoning regulations which are more stringent than those set forth herein shall remain in full force and effect. If any word, clause, paragraph or section of this article is held to make the same unconstitutional, this article shall not thereby be invalidated, and the remainder of it shall continue in effect. Any provision herein which conflicts with the Connecticut General Statutes or the state's Public Health Code as each is amended from time to time is hereby repealed, inasmuch as said statutes and code shall take precedence over this article.

(Ord. No. 1422, 7-6-06)

Sec. 18-89. - Enforcement.

(a) Notwithstanding anything contained herein to the contrary, the city's health director or his/her designee is hereby authorized to enforce this article regarding stationary or fixed noise sources.
(b) Notwithstanding anything contained herein to the contrary, the city's chief of police or his/her designee is

hereby authorized to enforce this article regarding mobile noise sources, including refuse collection, demolition, construction and vehicular activities.

(c) Notwithstanding anything contained herein to the contrary, all local authorized officials, including but not limited to zoning enforcement officers, shall have the authority to enforce this article.

(Ord. No. 1422, 7-6-06)

Sec. 18-90. - Appeals.

Any person aggrieved by a decision rendered by the issuer may appeal said decision in accordance with the procedure set forth in the Licenses and Permits chapter of this Code as it is amended from time to time.

(Ord. No. 1422, 7-6-06)

Secs. 18-91—18-110. - Reserved.

Sec. 7-5. - Keeping nuisance animals; animals roaming at large; penalty for violations.

(a) No person shall keep, harbor, or cause to be kept or harbored, any animal in any place or manner within the city, so as to cause a nuisance by reason of such animal's vicious disposition or other disturbance. Any animal that disturbs the peace and quiet of neighbors or the public is deemed to be a nuisance.

(b) No person having custody of any animal shall permit it to roam at large. Such action is deemed to be a nuisance and a danger to the public health and safety.

(c) Any person who violates this section shall be guilty of an offense, and on conviction shall be punished by a fine up to the maximum amount authorized by state statutes or this Code.

(Code of 1985, § 7-2.1; Ord. of 12-7-87, § 2; Ord. of 7-10-95, § 2; Ord. No. 1400, 1-3-06; Ord. No. 1849 , 11-8-18)

Exhibit B

2004 WL 944267
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Litchfield.

William BARTKOWSKI ppa
for Alexandra Bartkowski
v.
Lynn CASE, et al.

No. CV020089082.
|
April 6, 2004.

Attorneys and Law Firms

Robert A. Ziegler, Plainville, for William Bartowski.

Katz & Seligman PC, Hartford, for Lynn Case and Joseph Case.

Opinion

BRUNETTI, J.

***1** The defendants move to strike counts three and four of the plaintiff's amended complaint. Count three alleges nuisance and count four alleges statutory nuisance in violation of Connecticut General Statutes § 22-363.

Count three of the plaintiff's amended complaint alleges that the defendants maintained a dangerous condition at Breezy Pines Farm by harboring a dog that was known to startle horses used for riding lessons, and by maintaining a riding instruction area that was inadequate to keep the dog outside of the area. The plaintiff also alleges that the defendants knew or should have known that this condition involved an unreasonable risk of serious injury to riding students and that the usefulness of this condition to the defendants was slight in comparison to the risk that was posed to the students. The plaintiff goes on to allege that the minor plaintiff was injured during her riding lesson when the dog entered the riding area and startled the horse that she was on. The plaintiff further alleges that the minor plaintiff did not discover the dangerous condition or realize the risk involved, and that her injuries were proximately caused by the defendants' negligence.

The defendants move to strike count three on the grounds that the plaintiff has not alleged a private nuisance because there is no allegation that an interest in land has been affected. Additionally, the defendants claim that the plaintiff has not alleged facts sufficient to create a public nuisance because there are no facts showing the exercise of a public right. At oral argument, the plaintiff conceded that the facts alleged do not create a private nuisance because the plaintiff does not own land adjacent to the defendants' farm. [1]

According to § 821B of the Restatement (Second) of Torts, a public nuisance is defined as "an unreasonable interference with a right common to the general public." "The rights common to the general public can include, but certainly are not limited to, such things as the right to use a public park, highway, river or lake." *Pestey v. Cushman,* 259 Conn. 345, 356 n. 5, 788 A.2d 496 (2002), citing *State v. Tippetts-Abbett-McCarthy-Stratton,* 204 Conn. 177, 183, 527 A.2d 688 (1987), Restatement (Second) of Torts § 821D, comment (c). To establish a public nuisance claim, a plaintiff must show "that the condition or conduct complained of interfered with a right common to the general public ..." (Citations omitted; internal quotation marks omitted.) *Doe v. Manheimer,* 212 Conn. 748, 755-56 n. 4, 563 A.2d 699 (1989). A public nuisance "affects the rights enjoyed by citizens as part of the public, that is, the rights to which every citizen is entitled." (Citations omitted; internal quotations marks omitted.) *Massey v. The Mall at Buckland Hills,* Superior Court, judicial district of Hartford, Docket No. 531452 (February 4, 1994, Sheldon, J.) (11 Conn. L. Rptr. 30, 9 CSCR 233). "The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights." *Couture v. Board of Education,* 6 Conn.App. 309, 315, 505 A.2d 432 (1986), quoting *Nolan v. New Britain,* 69 Conn. 668, 678, 38 A. 703 (1897). "Nuisances are public where they violate public rights, and produce common injury, and where they constitute an obstruction to public rights, that is, the rights enjoyed by citizens as part of the public ... The plaintiff alleges that he was injured while he was a patron inside the shopping mall owned by [the defendant]. As a patron, the plaintiff was an invitee while in the defendant's establishment. While members of the general public were unquestionably welcome to enter the [mall] ... they were not entitled to do so by virtue of any public right enjoyed by citizens as part of the public ... [T]he defendant's establishment was not a public place where

the public had a right to be. The plaintiff was not in the exercise of any public right while on the defendant's premises, and he cannot base his right to recover upon the existence of a public nuisance." (Citation omitted; internal quotation marks omitted.) *Czark v. Westland Properties,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 00 0379394 (June 28, 2001, Hauser, J.); [1] *Dahlstrom v. Roosevelt Mills, Inc.,* 27 Conn.Sup. 355, 357, 238 A.2d 431 (1967); see also *Smith v. Monitor Management,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 272186 (January 9, 1991, Ballen J.) (3 Conn. L. Rptr. 167); *Laverty v. Stop & Shop Supermarket,* Superior Court, judicial district of Hartford, Docket No. CV 95 0554032 (October 16, 1996, Hennessey, J.); *Anzellotti v. National Amusements,* Superior Court, judicial district of Hartford, Docket No. 546129 (February 20, 1996, Hennessey, J.); *Auster v. Norwalk United Methodist Church,* Superior Court, judicial district of Stamford, Docket No. CV 0184999 (January 27, 2004, Hiller, J.); *Rizzo v. Spinelli Associates,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 03 405802 (January 23, 2004, Dewey, J.).

***2** At oral argument, the plaintiff argued that a public right was being exercised because anybody can take horse riding lessons. It is submitted that while anyone may be free to take riding lessons at the defendants' farm, it is not a public right or entitlement to do so. The court finds the plaintiff has failed to sufficiently plead facts establishing a public nuisance and therefore the defendants' motion to strike count three is granted.

Count four of the plaintiff's amended complaint realleges the facts set forth in count three, but seeks to establish a claim for a statutory nuisance in violation of Connecticut General Statutes § 22-363. The defendants argue that count four is silent as to a statutory violation and therefore does not conform with Practice Book § 10-3(a). The defendants further argue that § 22-363 does not give rise to a civil cause of action.

General Statutes § 22-363 provides that "[n]o person shall own or harbor a dog or dogs which is or are a nuisance by reason of vicious disposition or excessive barking or other disturbance, or, by such barking or other disturbance, is or are a source of annoyance to any sick person residing in the immediate vicinity. Violation of any provision of this section shall be an infraction for the first offense and such person shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both for each subsequent offense and the court or judge may make such order concerning the restraint or disposal of such dog or dogs as may be deemed necessary."

In *Auster v. Norwalk United Methodist Church,* Superior Court, judicial district of Stamford, Docket No. CV 0184999 (January 27, 2004, Hiller, J.), the court noted that "according to § 22-328, the Commission of Agriculture is charged with enforcing the provisions of § 22-363," and concluded that § 22-263 does not provide a private civil remedy. The court notes that, in his memorandum supporting his objection, the plaintiff slated an intention to file an amended complaint substituting [2] General Statutes § 22-357 for § 22-363, and requested that the court make an order regarding such substitution if the defendants' motion to strike count four is granted. [3] Section 22-357 provides that "[i]f any dog does any damage to either the body or property of any person, the owner or keeper ... shall be liable for such damage ..."

Accordingly the defendant's motion to strike the fourth count is granted and the plaintiff's request to amend the fourth count to substitute [4] General Statutes 22-357 for 22-363 is granted.

All Citations

Not Reported in A.2d, 2004 WL 944267

Footnotes

1 Because the plaintiff has alleged that the defendants owned and maintained the premises where the injury occurred and has not alleged interference or injury to his ownership interest in land, it is submitted that the plaintiff has failed to sufficiently state a claim for a private nuisance. See *Rizzo v. Spinelli Associates,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 03 405802 (January 23, 2004, Dewey J.); see also *Cruz v. Tosado,* Superior Court judicial district of Hartford, Docket No. 531845 (May 22, 1995,

Hennessey, J.) (14 Conn. L. Rptr. 272); *Auster v. Norwalk United Methodist Church,* Superior Court, judicial district of Stamford, Docket No. CV 0184999 (January 27, 2004, Hiller, J.); *Webel v. Yale University,* 125 Conn. 515, 524, 7 A.2d 557 (1939) ("[a] private nuisance ... exists only where one is injured in relation to a right which he enjoys by reason of his ownership of an interest in land").

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2004 WL 423189
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford-Norwalk.

Virginia AUSTER
v.
NORWALK UNITED METHODIST CHURCH.

No. CV010184999.
|
Jan. 27, 2004.

Attorneys and Law Firms

Discala Discala & Papcsy, Norwalk, for Virginia Auster.

Maher & Murtha, Bridgeport, for Norwalk United Methodist Church.

Opinion

HILLER, J.

***1** The plaintiff, Virginia Auster (plaintiff), filed a revised four-count complaint against the defendant, Norwalk United Methodist Church (defendant or Church), for personal injuries sustained when she was attacked by a dog on the defendant's property. The following facts are not in dispute: the defendant owned property located at 718 West Avenue in Norwalk (premises). The defendant leased a portion of the premises to one of its employees, Pedro Salinas (Salinas). According to the revised complaint, the plaintiff was attacked by a dog while lawfully on the defendant's premises. The dog was owned and kept by Salinas. The plaintiff asserts the following claims: violation of § 22-357, Connecticut's Dog Bite Statute (count one), common-law negligence (count two), nuisance (count three) and violations of § 22-363 (count four).

On June 12, 2003, the defendant filed a revised motion for summary judgment, with a memorandum of law and attached exhibits, contending that the defendant was not an "owner or keeper" of the dog, the defendant had no knowledge of the dog's vicious propensities, and that the defendant did not create any dangerous condition constituting a nuisance. On October 6, 2003, the plaintiff filed an objection with attached exhibits.

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party ... The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Gould v. Mellick & Sexton,* 263 Conn. 140, 146, 819 A.2d 216 (2003). "[A]lthough the party seeking summary judgment has the burden of showing the nonexistence of any material fact ... a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue ... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." (Internal quotation marks omitted.) *Schilberg Integrated Metals Corp. v. Continental Casualty Co.,* 263 Conn. 245, 252-53, 819 A.2d 773 (2003). Furthermore, "the issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law ... If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." (Citation omitted, internal quotation marks omitted.) *Mozeleski v. Thomas,* 76 Conn.App. 287, 290, 818 A.2d 893 (2003).

***2** The defendant first argues that the plaintiff was trespassing on the defendant's property at the time the dog attacked her and, thus, cannot seek recovery under § 22-357.[1] That statute specifically precludes trespassers from seeking recovery. General Statutes § 22-357. However, the affidavits and deposition excerpts supplied

by both parties clearly show that issues of material fact exist. According to the deposition testimony of James Stinson (defendant's "Exhibit E"), who is a pastor and chief administrative officer of the Church, the plaintiff had permission to be "in the church building" on the night she was attacked. In addition, Stinson's sworn affidavit (defendant's "Exhibit A") indicates that the plaintiff approached Salinas' apartment because she needed the key to open the front entrance. Finally, according to the deposition of Bruce Root (plaintiff's "Exhibit 9") visitors to Salinas' apartment are not considered trespassers.

The defendant next argues that it was neither an owner or keeper of the dog. Under § 22-357 "[i]f any dog does any damage to either the body or property of any person, the owner or keeper ... shall be liable for such damage ..." "Keeper" is "any person, other than the owner, harboring or having in his possession any dog." Connecticut General Statutes 22-327. "[T]he term 'harborer' means one who treats a dog as living in his home and undertakes to control the dog's actions ... [and] that the term 'harborer' includes one who provides lodging, shelter or refuge in addition to possession with control." (Citations omitted, internal quotation marks omitted.) *Stokes v. Lyddy,* 75 Conn.App. 252, 266-67, 815 A.2d 263 (2003). "[T]he term 'harborer' includes one who provides lodging, shelter or refuge in addition to possession with control." *Id.,* citing *Falby v. Zarembski,* 221 Conn. 14, 19, 602 A.2d 1 (1992). Our Appellate Court cited with approval a case where the defendant landlord was found to be a harborer of a dog because the dog was kept in an area of the yard under the direct control of the landlord; and a case where the defendant employer was keeper of his employee's dog. See *Buturla v. St. Onge,* 9 Conn.App. 495, 498, 519 A.2d 1235 (1987).

In this case, material issues of fact exist as to whether the defendant harbored the dog. Whether the dog was permitted to roam the common areas under the defendant's control is disputed. The affidavit of James Stinson indicates that the dog was not kept on church property or common areas. (Defendant's "Exhibit A.") However, since Salinas and the defendant did not enter into any lease agreement (plaintiff's "Exhibit 8"), the exact parameters of the leased property under Salinas' exclusive control versus what constituted a common area are material issues in dispute. Thus, "[u]nless it is definitely expressed in the lease, the circumstances of the particular case determine whether the lessor has reserved control of the premises or whether they were under the exclusive dominion of the tenant, and it becomes a question of fact and is a matter of intention in the light of all the significant and attendant facts which bear on the issue." (Internal quotation marks omitted.) *LaFlamme v. Dallessio,* 261 Conn. 247, 256-57, 802 A.2d 63 (2002). Furthermore, according to the affidavit of Michele Langlois (plaintiff's "Exhibit 22"), a former employee of the defendant, on at least on one occasion she found the dog unchained near a fire escape on the defendant's property and noted that the dog was "often chained in the area at the base of the steps at the rear part of the Church ..." This court concludes that material issues of fact exist with respect whether the defendant is a "keeper" under § 22-35 and cannot conclude, as a matter of law, that the defendant owed no statutory duty to the plaintiff.

***3** The defendant next argues that it did not have a common-law duty to protect the plaintiff from Salinas' dog. In order to recover damages for injuries caused by a dog bite based on common-law negligence, a plaintiff must prove that the dog had vicious propensities and that the defendant had knowledge or the means of knowledge of such propensities. See *Basney v. Klema,* 2 Conn.Cir .Ct. 538, 544, 203 A.2d 95 (1964). Indeed, "liability of a landlord for damages resulting from a defective condition in an area over which the landlord exercises control generally depends upon proof that the landlord received either actual or constructive notice of the condition prior to the time of the plaintiff's injuries." *Stokes v. Lyddy, supra,* 75 Conn.App. at 261. In support of its argument, the defendant submits that it "did not consider the dog a vicious animal." (Stinson Aff. "Exhibit A.") The plaintiff, however, submitted proof of at least two prior attacks by Salinas' dog occurring on the defendant's premises. According to the affidavit of Michele Langlois (plaintiff's "Exhibit 22"), Salinas' dog attacked her in May of 1998 and that she notified the "Pastor" and "every member of the Board of Directors" by letter. In addition, on August 22, 1998, Steve Richardson, a cable installer was also attacked by Salinas' dog. (Plaintiff's "Exhibit 18.") Thus, issues of material fact exist concerning the defendant's knowledge of the dog's vicious propensities.

Turning to the nuisance claim in count three,[2] the defendant argues that any nuisance created by the dog's behavior did not interfere with a right common to the general public. A common-law claim of nuisance consists of four necessary elements: "(1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages." (Internal quotation marks omitted.) *Elliot v. Waterbury,* 245 Conn. 385, 420, 715 A.2d 27 (1998). In addition to these four elements, in order to state a claim for private nuisance, the plaintiff must show that her injuries are related to some ownership in land. See *Webel*

v. Yale University, 125 Conn. 515, 525 (1939). In this case, the plaintiff has failed to allege a cause of action for private nuisance because the plaintiff has not alleged any ownership interest of land.

In order to maintain an action for public nuisance, the plaintiff must prove the four core elements noted above and the additional element that the nuisance interferes with a right common to the general public. *Elliot v. Waterbury, supra,* 245 Conn. at 421. Nuisances become public when "they violate public rights, and produce a common injury, and where they constitute an obstruction to public rights, that is, the rights enjoyed by citizens as part of the public" (internal quotation marks omitted). *Couture v. Board of Education,* 6 Conn.App. 309, 314-15, 505 A.2d 432 (1986). "One who enters the premises at the express and implied invitation of a tenant does not come upon them in the exercise of any public right, but is there by reason of right extended by the tenant; and if injured, the visitor to the premises cannot base his right to recover on the existence of a public nuisance." See *Webel v. Yale University, supra,* 125 Conn. at 524-25.

***4** Here, despite viewing the evidence in a light most favorable to the plaintiff, the court concludes that the plaintiff failed to show that any issues of material fact exist related to count three and has not supported its conclusory argument that all of the elements of nuisance have been satisfied. The plaintiff alleges that she was injured on private property, thus the alleged public nuisance could not affect rights common to the general public. In addition, the plaintiff alleged that she was on the premises as an invitee. (See Revised Complaint, Count Three, ¶ 3.) Therefore, the plaintiff has not, as a matter of law, stated a claim for public nuisance.

Finally, the defendant argues that count four, which alleges a violation of General Statutes § 22-363, does not provide the plaintiff 'with a civil remedy.[3] General Statutes § 22-363 provides that "[n]o person shall own or harbor a dog or dogs which is or are a nuisance by reason of ... excessive barking ... Violation of any provision of this section shall be an infraction for the first offense and such person shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both for each subsequent offense ..." According to § 22-328 the Commission of Agriculture is charged with enforcing the provisions of § 22-363. General Statutes § 22-328. The court concludes that § 22-363 does not provide the plaintiff with a private civil remedy.

For the foregoing reasons, defendant's motion for summary judgment is denied with respect to counts one and two, and granted with respect to counts thee and four.

All Citations

Not Reported in A.2d, 2004 WL 423189

Footnotes

1 § 22-357 states "Damage to person or property. If any dog does any damage to either the body or property of any person, the owner or keeper, or, if the owner or keeper is a minor, the parent or guardian of such minor, shall be liable for such damage, except when such damage has been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog. If a minor, on whose behalf an action under this section is brought, was under seven years of age at the time the damage was done, it shall be presumed that such minor was not committing a trespass or other tort, or teasing, tormenting or abusing such dog, and the burden of proof thereof shall be upon the defendant in such action."

2 The plaintiff's revised complaint fails to distinguish which type of nuisance her claim is based. "There are two types of nuisance: public and private." *Couture v. Board of Education,* 6 Conn.App. 309, 314, 505 A.2d 432 (1986). Prosser notes, "[t]he two have almost nothing in common, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names." Prosser & Keeton on the Law of Torts 618 (5th ed.1984). The court also notes that the plaintiff's memorandum in opposition inadequately briefed the issues concerning her nuisance claim.

3 The court notes that the defendant failed to brief any issue related to count four.

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