

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEPHEN AND KATHY DARNEY,
Personally and on behalf of K. AND S. D.

Plaintiffs,

v.

DRAGON PRODUCTS COMPANY,
LLC,

Defendant.

CIVIL ACTION

DOCKET No.: 2:08-cv-47

**DEFENDANT DRAGON PRODUCTS COMPANY, LLC'S
PRE-TRIAL MEMORANDUM**

In accordance with Local Rule 16.4, Defendant Dragon Products Company, LLC ("Dragon") files this Pre-Trial Memorandum, in advance of the Final Pretrial Conference scheduled with Magistrate Judge Kravchuk on September 8, 2010.

I. FACTUAL BACKGROUND.

Dragon manufactures cement and operates a cement-manufacturing facility adjacent to Route One in Thomaston, Maine. Cement has been manufactured at the Thomaston facility since 1928. Since the first date of manufacturing, the operators of Dragon's facility have quarried limestone on-site for use in the cement-manufacturing process.

The Darneys purchased their residence at 24 Old County Road, in Thomaston, in March 2002. Their residence was built in 1844 and is located west of Route One in Thomaston. The Darneys allege they have suffered property damage to their real estate and personal property since November 12, 2004, which they attribute to Dragon.

II. PROCEDURAL HISTORY.

Based on the property damage the Darneys allege and attribute to Dragon, they filed a complaint against Dragon on January 30, 2008, in Knox County Superior Court, asserting claims for common law trespass, statutory trespass, nuisance, negligence, and seeking injunctive relief.

Their complaint also originally asserted claims for personal injuries. Dragon removed the lawsuit to this Court on February 13, 2008, based on this Court's diversity jurisdiction.

Because of the procedural history relating to a prior suit filed by the Darneys against Dragon, Dragon moved for summary judgment on the basis of res judicata. This Court denied that motion. After the close of discovery, Dragon filed a motion for partial summary judgment as to the Darneys' claims for nuisance, personal injury and trespass. This Court denied the motion as to the nuisance claim but granted Dragon summary judgment to the extent the Darneys seek to recover for personal injuries. As for the statutory trespass and common law trespass claims, this Court certified to the Maine Supreme Judicial Court sitting as the Law Court (the "Law Court") the question of whether Maine law recognizes trespass claims on the basis of intangible intrusions of dust and vibrations. The Law Court declined to answer the question.

On March 8, 2010, this Court permitted the Darneys to amend their complaint and add a count for strict liability.

III. THE LAWSUIT AND THE DARNEYS' CLAIMS.

The following claims are pending against Dragon: nuisance; common law trespass; statutory trespass; negligence; strict liability; and injunctive relief. None are meritorious.

A. The Darneys Cannot Prevail on Their Trespass Claims.

The Darneys cannot prevail on their trespass claims, which are based on allegations that Dragon has caused dust and vibrations from its Plant operations to invade the Darneys' property. Complaint ¶¶ 35, 40.

1. Maine Law Does Not Recognize Trespass Claims Based on Dust and Vibrations.

This Court previously certified to the Law Court the question of whether Maine law recognizes trespass claims based on intangible intrusions of dust and vibrations. Although the

Law Court declined to answer that question, its decision demonstrates that the current state of Maine law does not recognize such claims.

In its decision, the Law Court noted that the so-called “modern” theory of trespass (which the Darneys were a proponent of) has “not emerged as the majority approach, and that those jurisdictions that have adopted this theory have generally required proof of damage to the invaded property.” *Darney v. Dragon Products Co., LLC*, 2010 ME 39, ¶ 14, 994 A.2d 804. The Law Court noted that such an element of proof is not required to establish a common law trespass under Maine law. *Id.* In other words, the “modern” theory is in contradistinction to current Maine law. The Law Court also noted that those “[c]ourts that have rejected the ‘modern’ theory of trespass have cautioned that the new trespass action, with its engrafted requirement of damages, resembles an action for nuisance.” *Id.* at ¶ 15 (emphasis added). The Law Court’s decision provides no support for this Court to make an “informed prophecy” that the Law Court would likely hold that Maine law recognizes a trespass claim based on intangible intrusions of dust and vibrations. *See* Order on Motion for Partial Summary Judgment (August 9, 2009) at 12. On the contrary, the Law Court’s decision suggests that the Law Court would likely decline to change the elements of trespass under Maine law. Therefore, prior to or at trial Dragon intends to make a motion seeking dismissal of the Darneys’ trespass claims.

2. The Darneys Cannot Prove Their Common Law Trespass Claim.

The Darneys base their common law trespass claim on allegations that dust and vibrations from Dragon’s operations have invaded their land. The Darneys cannot prove that claim. First, there is no credible evidence that vibrations from Dragon’s blasting operations have “invaded” the Darney property and damaged it. Further, the factual evidence and expert testimony will establish that any damage to the Darney property was caused by something other

than Dragon's blasting. There is also no credible evidence linking dust on the Darney property to Dragon's operations. On the contrary, the factual evidence and expert testimony will establish that dust from the Darneys' property likely originates from somewhere other than Dragon's operations.

3. The Darneys Cannot Prove Their Statutory Trespass Claim.

Similar to their common law trespass claim, the Darneys will be unable to prevail on their statutory trespass claim. The relevant statute, 14 M.R.S.A. § 7551-B, permits no recovery. The Darneys cannot prove Dragon caused damage to any structure on their property. Further, the Darneys cannot prove their property was damaged as the result of any "litter" disposed of on their property by Dragon, as "litter" is defined under the relevant statute, because neither dust nor vibrations fall into the category of "litter." *See* 14 M.R.S.A. § 7551-B, 17 M.R.S.A. § 2263(2).

B. The Darneys Cannot Prove Their Nuisance Claim.

The Darneys' claim for nuisance will also be unsuccessful. They allege they have lost the use and enjoyment of their property due to noise, vibration and dust from Dragon's operations. Complaint ¶¶ 45-46. To prove a nuisance claim a plaintiff must prove substantial and unreasonable interference with the use and enjoyment of their land by showing a reduction in the value of the land because of the defendant's conduct. *Charlton v. Town of Oxford*, 2001 ME 104, ¶ 36 & fn 10, 774 A.2d 366, 377; *see also Darney*, 994 A.2d at 807, 2010 ME 39, ¶ 14 & fn 3. Because the Darneys contend the value of their property has increased since purchase, the Darneys cannot prove their nuisance claim. Further, the Darneys will be unable to prove that the noise, vibration and dust they complain of are from Dragon's operations, as described above.

C. The Darneys' Negligence Claim Will Also Fail.

The Darneys' negligence claim is based on an allegation that Dragon has breached its duty to "take reasonable precautions to prevent migration of noise, vibrations and dust from the Plant onto the Darneys' property," which they allege has caused property damage to their real and personal property. Complaint ¶¶ 52, 55. The Darneys cannot prove this claim because they cannot prove Dragon breached any duty owed to them. Further, as with their other claims, the Darneys cannot prove causation.

D. The Darneys Claim for Injunctive Relief is Not Sustainable.

The Darneys will also be unable to prove their claim for injunctive relief. As pled, the Darneys may only prevail on their claim for injunctive relief if they first prove their trespass, nuisance and negligence claims. *See* Complaint ¶ 57. As described above, the Darneys cannot do so. Even if the Darneys could prove Dragon is committing an ongoing trespass or nuisance, they cannot show they will suffer any irreparable injury in the absence of an injunction and cannot show that any harm to Dragon is outweighed by such irreparable harm. The Darneys are not entitled to any injunctive relief.

E. The Darneys Cannot Prove Their Strict Liability Claim.

Finally, the Darneys' claim for strict liability alleges that Dragon's blasting operations are "an abnormally dangerous activity" which has caused damage to their property. As this Court evaluates whether the Darneys can prove a strict liability, this Court must consider the following factors:

- The degree of risk of some harm to the person, land or chattels of others as a result of Dragon's blasting operations;
- The likelihood for great harm to result from Dragon's blasting operations;
- Dragon's ability to eliminate the risk from its blasting operations by the exercise of reasonable care;

- The appropriateness of Dragon's blasting operations to the place in which it is carried out; and
- The extent to which Dragon's blasting operation is not a matter of common usage.

Dyer v. Maine Drilling & Blasting, Inc., 2009 ME 126, ¶ 29, 984 A.2d 210, 219; Restatement (Second) of Torts § 520. Weighing these factors demonstrates that the Darneys cannot prevail on their strict liability claim.

IV. PROPOSED STIPULATIONS.

Dragon does not propose any stipulations.

V. WITNESSES DRAGON INTENDS TO CALL AT TRIAL.

Dragon intends to call the following witnesses at trial:

1. **Mike Brooks**, 246 Arboretum Park Dr., Warren, ME 04864-4284.
2. **Diane Brooks**, 246 Arboretum Park Dr., Warren, ME 04864-4284.
3. **Michael W. Martunas**, c/o Dragon Products Company, LLC, 38 Preble Street, P.O. Box 1521, Portland, ME 04104.
4. **Michael A. Kuhns**, 35 Desert Pond Road, Mount Vernon, ME 04352.
5. **Ann Thayer**, New England Organics, 135 Presumpscot Street, Unit #1, Portland, ME 04103-5225.
6. **Terrence L. Veysey**, 8 Spar Lane, Portland, ME 04102-1627.
7. **Bill Stambaugh, as successor to Steve Gartshore**, c/o Dragon Products Company, LLC, 38 Preble Street, P.O. Box 1521, Portland, ME 04104.
8. **Jennifer Colburn**, c/o Dragon Products Company, LLC, 38 Preble Street, P.O. Box 1521, Portland, ME 04104.
9. **Thornton Batty**, c/o Dragon Products Company, LLC, 38 Preble Street, P.O. Box 1521, Portland, ME 04104.
10. **Eric R. Greiner**, c/o Dragon Products Company, LLC, 38 Preble Street, P.O. Box 1521, Portland, ME 04104.
11. **Ray DeGrass**, c/o Dragon Products Company, LLC, 38 Preble Street, P.O. Box 1521, Portland, ME 04104.
12. **John Sevee**, Sevee & Maher Engineers, Inc., 4 Blanchard Road, P.O. Box 85A, Cumberland Center, ME 04021.
13. **James F. Smith, Jr., Ph.D.**, 60 Oak Street, Buxton, ME 04093.
14. **Mark Stebbins**, Maine Department of Environmental Protection, Bureau of Land and Water Quality, Mining Coordinator, 312 Canco Road, Portland, ME 04103.

15. **Roy Rike**, Maine Department of Environmental Protection, Bureau of Air Quality - Compliance Section, 17 State House Station, Augusta, ME 04333-0017.
16. **Russell E. Keenan, Ph.D.**, Integral Consulting, Inc., 45 Exchange Street, Ste. 200, Portland, ME 04101.
17. **Patrick Gwinn**, Integral Consulting, Inc., 45 Exchange Street, Ste. 200, Portland, ME 04101.
18. **Andrew F. McKown, P.E.**, McKown Associates, LLC, 39 Dodge Street, #296, Beverly, MA 01915.
19. **William L. Flanders, P.E.**, 42 West Ridge Road, West Gardiner, ME 04345.

Dragon reserves the right to call additional witnesses on reasonable notice to Plaintiffs. This list does not include witnesses that may be called for impeachment or rebuttal.

VI. DOCUMENTS AND THINGS DRAGON INTENDS TO OFFER AT TRIAL.

Dragon intends to offer the following documents and things as exhibits at trial:

1. Documents relating to Dragon's blasting operations at its Thomaston facility;
2. Documents relating to blast monitoring;
3. Documents related to cement kiln dust, clinker, and quarry dust;
4. Documents regarding the production of cement at Dragon's Thomaston facility;
5. Documents relating to Dragon's air license for its Thomaston facility;
6. Documents relating to Dragon's air emissions at its Thomaston facility;
7. Documents relating to air monitoring at Dragon's Thomaston facility;
8. Documents relating to the closure and reclamation of the cement kiln dust and clinker stockpiles at Dragon's facility in Thomaston;
9. Documents relating to sound levels at Dragon's facility in Thomaston;
10. Analyses of dust samples taken from the Darneys' property;
11. Documents relating to the Darneys' purchase of their property; and
12. Deposition exhibits.

Dragon reserves the right to add additional exhibits on reasonable notice to the Plaintiffs.

DATED: September 1, 2010

/s/ Eric J. Wycoff

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2010, I caused a copy of Defendant Dragon Products Company, LLC's Pre-Trial Memorandum, to be filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record.

Dated: September 1, 2010

/s/ Eric J. Wycoff

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