FSTCV196041009S	:	CONNECTICUT SUPERIOR COURT
THE LUCAS POINT ASSN.	:	JUDICIAL DISTRICT OF STAMFORD/
VS.	:	NORWALK AT STAMFORD
17950 LAKE EST. DR. REALTY LLC	:	August 21, 2023

MEMORANDUM OF DECISION re: CROSS-MOTIONS FOR SUMMARY JUDGMENT (#167.00 and #177.00)

Background

Not infrequently, the court is called upon to adjudicate a dispute between neighbors relating to fences and/or plantings on the boundary separating abutting properties. In some instances, one neighbor cuts down plantings on the abutting property owner's property. In other instances, a neighbor claims that a fence or plantings along the boundary is/are improper, sometimes because of a claimed restriction based on the land records and sometimes invoking the statutes relating to what are commonly known as spite fences (General Statutes §§ 52-480 and 52-570[1]). In some instances, a claim is made that the fence/planting constitutes a private nuisance. In addition to not-unexpected denials, the response often includes a claim that the plaintiff is seeking to enforce the equivalent of a non-existent view-easement. (Many and perhaps most of these cases, at least in this judicial district, seem to involve waterfront properties or properties with a view of the waterfront.[2])

[1] For convenience, the court will refer to these statutes as "spite-fence statutes." (Section 52-480 authorizes an "[i]njunction against malicious erection of structure" and § 52-570 authorizes an "[a]ction for malicious erection of structure.")

[2] it is the court's understanding that many if not most assessors adjust property values for waterfront properties and properties with a water view, treating proximity and/or view as a substantial value-enhancer.
In *Errichetti v. Botoff*, 185 Conn. App. 119, 196 A.3d 1199 (2018), there was a modest variation; there appears to have been a claimed interference with a view of wetlands and

217.00

In this case, the plaintiffs, in varying capacities and to varying degrees, are challenging the defendants' planting of mature trees along the boundary between the properties owned/occupied by the non-Association parties. The Association joins the individual plaintiffs in challenging the trees, on a more limited basis – the claim is that there is a deed restriction prohibiting plantings exceeding 3 feet in height.

The parties have filed cross-motion for summary judgment, the plaintiffs claiming that they are entitled to judgment in their favor as a matter of law on most of their claims. The defendants contend that, as a matter of law, the plaintiff cannot succeed, and therefore have moved for judgment in their favor as a matter of law. With one exception, the parties claim entitlement to judgment on the same issues – essentially, a legal impossibility.

The court must note the lack of symmetry that exists in the motions. The plaintiffs are not all involved in all of the counts of their complaint. The first count, asserting the existence of an enforceable deed restriction, is brought on behalf of the Association and Ms. Elkins. The second through fourth counts, based on the harm allegedly caused by the row of trees, are asserted by both Elkins plaintiffs (but not the Association). The fifth count, asserting easement rights, is asserted solely by Ms. Elkins. The sixth count has been withdrawn (#164.00). The plaintiffs' motion only seeks judgment as to the second through fourth counts.

The defendants, in their motion, do not distinguish as to moving parties, instead asserting that all of the defendants are seeking relief as to all current counts.

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other natural conditions ("The fence does, however, completely obstruct the view from the Errichetti property of the stream and the wetlands on the Botoff property." *Errichetti v. Botoff*, Docket No. FSTCV146022623S, 2017 Conn. Super. LEXIS 231, at *10 (Super. Feb. 2, 2017).)

The issues were extensively briefed by the parties. The court heard argument on the cross motions on June 6, 2023.

Discussion

In loose terms, this court has recognized two "strategies" with respect to motions for summary judgment. One approach is for the moving party to present its case as persuasively as possible, and perhaps somewhat conclusorily, claiming that the opposing party cannot establish the existence of any material issue of fact. An alternate/opposite approach is to present what is claimed to be the strongest version of the adverse party's case, then demonstrating that that "strongest" case in itself is legally insufficient to preclude the moving party from obtaining judgment based on claimed-undisputed facts. The former approach effectively relies upon the perceived strength of the moving party's case; the latter approach effectively relies upon the perceived weakness of the non-moving party's case. In connection with cross-motions, to the extent that they address the same issue(s), each side's affirmative claim is also, in a sense, a defense to the adverse party's corresponding claim.

Before addressing the individual issues in the order presented, the court must note what is perceived to be a significant overstatement of a prior court ruling, if arguably limited to a single word. In denying a portion of a motion to strike claiming that trees cannot come within the scope of the spite-fence statutes, the court concluded the relevant discussion with the following:

> "The issue before the court is not whether the plaintiffs can prove that the trees constitute a malicious structure for purposes of either or both statutes. As framed by these defendants, the issue is whether trees can,

> under circumstances similar to those alleged in the complaint, constitute a malicious structure, and for the foregoing reasons, the court believes that the answer is 'yes'." *Lucas Point Assn. v. 17950 Lake Estates Drive Realty, LLC*, Docket No. FSTCV196041009S, 2020 Conn. Super. LEXIS 750, at *14 (Super. June 29, 2020).

On two occasions, however, the plaintiffs affirmatively state that the court had determined that the trees in question did constitute a "tree wall" and structure for purposes of the spite-fence statutes:

> "The Court has already ruled that the line of trees in question, defined as a 'Tree Wall,' constitutes a 'structure' for the purposes of Sections 52-570 and 52-480 of the General Statutes. (Memorandum of Decision, Dkt. Entry No. 109.02.)" (#178.00 at page 1; see, also, similar language at page 10; but see more accurate/complete citation at page 6.)

It is clear that the court went no further in its ruling on the motion to strike than to state that it was *possible* to characterize these trees as a "tree wall" or "structure" but did not state that such was the case, as a matter of law, in this proceeding. (Given the nature of a motion to strike, it might be more accurate to state that the court ruled that it was not impermissible, as a matter of law, to claim that the trees constitute a structure.) The court used the word "can" ("the issue is whether trees can... constitute a malicious structure"); the plaintiffs have converted that statement of legal possibility into an affirmative declaration that the trees in this case "do" constitute a malicious structure (or simply, "constitutes a 'structure'") effectively deleting "can" from the formulation.

Somewhat related, this court's decision on the motion to strike was issued in 2020. Quite recently, the Appellate Court adopted a similar position. In *Freidheim v. McLaughlin*, 217 Conn. App. 767, 799-800, 290 A.3d 801 (2023), the court rejected the contention that "a hedge cannot be a structure under" the

spite-fence statutes (emphasis added; 217 Conn. App. 802). Rejecting "cannot" is essentially equivalent to affirming "can," but neither formulation would seem to remove "actually is" from the realm of status as a case-specific factual issue.[3] (This will be discussed further, in connection with the specific count on which each side is seeking summary judgment.)

I. Defendants' motion

The defendants filed their motion first, and in the absence of any basis to approach the issues in a different order, the court will start with the defendants' motion and discuss the issues the order presented in that motion.

A. Deed restrictions

The issue initially raised by the defendants relates to the claimed existence of a deed restriction, prohibiting the planting and/or maintenance of trees along the boundary between the properties, with the trees as-planted exceeding the claimed limited height by a factor of five or more (as compared to the 3-foot limitation recited in the claimed deed restriction). If there is an actually-applicable runs-with-the-land limitation that is enforceable, there might be a lesser urgency with respect to finding

[3] This is in addition to the substantial procedural issue presented by the plaintiffs' claim that the court has determined that these trees did constitute a structure for purposes of the spite-fence statutes: that issue was never before the court, in connection with the prior decision. In a motion to strike, the moving party is challenging legal sufficiency; the court is asked to do no more than determine whether it is legally possible for a plaintiff to prevail, accepting all factual allegations as true and giving the non-moving party the benefit of all reasonable favorable inferences. By determining that it was not legally impossible for the plaintiffs to prevail, the court made (more importantly, could make) no affirmative determinations as to what facts or conclusions had been or would be established, conclusively or otherwise (absent an admission in the pleadings or other basis for an affirmative determination).

additional grounds upon which the trees might need to be removed (other theories being advanced), but the impropriety of the trees as a matter of land-use restriction might be relevant to the weighing of interests that might be undertaken in evaluating some of those other claims.

Interpretation of a deed is performed under the same standards as applicable to interpretation of a contract.

> "When considering whether an ambiguity exists in a deed, a court does "not decide which party has the better interpretation, only whether there is more than one reasonable interpretation of the ... language at issue. If we conclude that the language allows for more than one reasonable interpretation, the contract is ambiguous and the trial court's decision to render summary judgment, based on the conclusion that the contract is unambiguous, must be reversed and the matter remanded for a trial. Conversely, if the contract is unambiguous, its interpretation and application is a question of law for the court, permitting the court to resolve a [claim concerning the contract] on summary judgment if there is no genuine dispute of material fact." [C]onstruction of deed is governed by same rules of interpretation that apply to written instruments or contracts, with primary goal being to ascertain intention of parties. [W]here a deed is ambiguous the intention of the parties is a decisive question of fact.
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> "Moreover, [t]he determination as to whether language of a contract [or deed] is plain and unambiguous is a question of law subject to plenary review. ... A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity .... Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. [T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. Our Supreme Court has cautioned that [t]he intention of the parties, gathered from their words, is gathered not by

> reading a single clause of the covenant but ... by reading its entire context. It is not always easy to determine what was intended by the parties. The language employed is not the only criterion. The language used therefore must be considered with reference to the situation of the property and the surrounding circumstances in order to ascertain the intention of the parties." (Internal quotation marks and citation, omitted.) *Freidheim*, supra, 217 Conn. App. 782–83.

In a paragraph in their recitation of the chronology of deeds, the defendants both summarize their contentions and mark something of a break-point in the chronology, based on a difference between two deeds recorded on the land records in 1971:

> "This restrictive covenant, which again is not in the LLC's Deed or 40-year chain of title, relates only to Parcel 2, yet Plaintiffs claim that even if enforceable, which it is not, would also relate to Lots 3 and 4. Plaintiffs' claim is made of whole cloth." (#168.00 at page 9.)

The claimed significance of this differentiation among lots is set forth immediately below this quoted language; after the transaction in 1952, the grantee "owned the entirety of what is now commonly called 11 North Crossway, however, they never merged all of the parcels or lots into one tract."

At least some deeds in the chain of title up to early 1971 continued to refer, directly or indirectly to a restriction applicable to parcel/tract 2, but not the other parcels/tracts that are the balance of the property known as 11 North Crossway. The defendants indicate that parcel 2 is "where the pool and lawn are" and that only that portion of the premises is subject, even arguably, to the restrictions upon which the plaintiffs rely (seek to enforce).

For purposes of summary judgment, the court cannot accept the defendants almost simultaneous distinction and interchangeability among the terms parcels, lots and tracts, especially in the context of this case.

The defendants contend that there has never been a merger "of the parcels or lots into one tract." Other than deed references to tracts or lots on a map, is there any evidence that anyone treats those tracts/lots/parcels as independent for any purpose? Does the Town Assessor assess each of the four tracts separately? Are the tracts subject to separate tax bills? When improvements have been made to the property, e.g., installation of the swimming pool, was the permitting process done on the basis of parcel/tract 2 as an independent parcel of land, or was the permitting process done on the basis of a proposed improvement for the aggregate property known as 11 North Crossway?

Particularly in connection with a motion for summary judgment, in which context the non-moving party is entitled to the benefit of reasonable inferences, why should the court treat the references in the recent deeds to tracts as described in a map as having <u>any</u> significance for the issues before the court?

If there is a deed in the chain of title subject to consideration for purposes of the Act, in which there is an adequate description of a restriction applicable to at least part of the total property conveyed by the deed, does that suffice to put a potential transferee on notice of the restriction and the deed-basis for the restriction, at least raising a question as to sufficiency under the Act for purposes of the entire property conveyed? This relates back to the question above – if the tracts do not have a legal existence other than for describing the property conveyed, with the tract-references being based on a map, does a reference to a restriction on a tract that is part of a legally-larger lot (including a reference to a deed setting forth the restriction) put a transferee on notice that the restriction might apply to the entire lot?

Having addressed this issue, it does not appear to have any significance in actual resolution of the issues relating to survival of a claimed deed restriction. There do not appear to be any references to restrictions in any of the deeds needing to be considered for purposes of the Marketable Title Act (also known as the Marketable Record Title Act), General Statutes § 47-33b et seq.

What appears to be a more significant and potentially determinative argument of the defendants – spread over several pages – is that the last deed in the chain of title to contain any reference to any restrictions was a January 6, 1971 deed. The defendants contend that even that reference was deficient (see above discussion), but they rely on the fact that the root title for purposes of the Marketable Title Act was a later deed dated March 22, 1971, and that that deed, and all subsequent deeds, made no reference to restrictions sufficient for purposes of the Act – they made no reference to restrictions at all.

The defendants rely on distinctions in language in referring to earlier deeds – pre-root deeds make reference to the conveyed property (or tract/parcel/lot 2) as being "subject to" restrictions, while the root deed and subsequent deeds in their chain of title instead use "reference is hereby made" (or similar) to an earlier deed (or multiple deeds) but without use of the word "restrictions." Is a simple reference to a prior deed (even with recitation of book and page on the land records), without signifying the significance of that reference (or even hinting at it), too general and non-specific such that it is statutorily inadequate?

In their cross-motion, the plaintiffs did not move for summary judgment on the first count of their complaint, seeking declaratory relief as to the existence of restrictions applicable to the defendant; it is not a source of any counter-argument to these contentions of the defendants. The plaintiffs do present their counter-argument in their objection to the defendants' motion (#193.00).

By usage and their choice of language, the plaintiffs effectively equate a reference to a prior deed containing a reference to the restrictions, with a specific reference to the restrictions in such an earlier deed. Effectively, the plaintiffs contend that it is sufficient to make reference to an earlier deed containing restrictions without explicit reference to those restrictions; they contend that the reference to the document itself is sufficient to satisfy the requirements of the Act. By contrast, the defendants contend that there must be an explicit reference to restrictions contained in any referenced deed, for the deed to be considered for purposes of the Act,

The court has reviewed the authorities cited by the plaintiffs. The plaintiffs cite *Johnson v. Sourignamath*, 90 Conn. App. 388, 397 (2005) for the proposition that "[I]n many contexts courts have held that when a recorded instrument in a party's chain of title makes reference to some extrinsic document, the party thereby is charged with constructive or actual notice of the contents of the extrinsic document." That general statement, however, is particularized in the ensuing discussion in the case – the court concluded that statements in deeds, including referenced deeds, must have sufficient particularity as to put the transferee on notice of the nature of the encumbrance or restriction.

The plaintiffs next discuss *McBurney v. Cirillo*, 276 Conn. 782, 809-10, 889 A.2d 759 (2006). *McBurney* involved the particular treatment of a map as opposed to a deed, as a reference in a chain of title. As discussed at pp. 800-01, the reference to a map is the functional equivalent of incorporation of the features of the map into the deed – in particular, features such as easements. (The juxtaposition is perhaps ironic; in *Johnson*, discussed immediately above, the lack of adequate precision as to the deed-based description of the claimed easement was a significant factor in finding that there was no easement.) With respect to the need for a specific reference in the chain of title, the court in *McBurney* explained that there was a different

recording system for maps such that the requirements for an adequate reference to a map were different than for a deed or other document recorded directly on the land records.

The plaintiffs next discuss *Mannweiler v. LaFlamme*, 65 Conn. App. 26 (2001). This decision is consistent with this court's observation above, that the plaintiffs blur the distinction between a generalized reference to a prior deed and a reference to restrictions in a prior deed. The plaintiffs quote a brief excerpt of that decision; the difference between this case and the cited case is made apparent by a lengthier quote, that includes the language quoted by the plaintiffs:

> Here, the plaintiffs' interest in enforcing the restrictions on section E of Hop Brook was not nullified because the warranty deeds containing the covenants and restrictions were specifically described in the defendants' deed to section E. The 1989 deed of conveyance to the defendants states specifically:
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> "'2. Possible conditions and restriction as set forth in two Warranty Deeds from J. H. Whittemore Company to Louis A. Dibble dated September 30, 1927 and July 15, 1930 recorded respectively in Vol. 78, Pages 41 and 642 of the Naugatuck Land Records, and conditions and restrictions as set forth in the deed from J. H. Whittemore Company to Louis A. Dibble dated September 26, 1946 and recorded September 26, 1946 in Vol. 97, page 377 of the Naugatuck Land Records, as supplemented by Warranty Deed between those parties dated September 26, 1946 recorded December 7, 1946 in Vol. 97, Page 493 of the Naugatuck Land Records.' The defendants' own expert conceded that the reference in the defendants' deed to "possible conditions and restriction" is a specific reference." *Mannweiler v. Laflamme*, 65 Conn. App. 26, 33-34, 781 A.2d 497 (2001)

The language in *Mannweiler* sets forth more than merely a generic reference to a prior deed or deeds; it explicitly referred to conditions and restrictions in prior

deeds, with proper reference to where those deeds can be found. The defendants' experts in that case did not concede that a mere reference to prior deeds was sufficient; the indication is that the experts "conceded that the reference in the defendants' deed to 'possible conditions and restriction'" was a sufficiently-specific reference under the Act.

The plaintiffs' reference to *Perry v. Wilson*, No. CV095011888, 2011 WL 1886584, at *6 (Conn. Super. Ct. Apr. 21, 2011) is likewise consistent with the need for at least a mention of restrictions in a reference; as described by the plaintiffs, the relevant deed restriction "was not extinguished where specific reference was made 'to Building restrictions as more particularly set forth in deed from Sidney F. Strongin, et al., Trustees to Nellie Friedland dated 9/4/53, and recorded 9/12/53 in Volume 13, page 2 of the Salem, CT land records'." There is a reference not only to the deed but also the existence of restrictions.

Yet again, the plaintiffs' reference to *Rapoport v. Southfield Point Ass'n*, No. CV020188888, 2004 WL 2222383, at *6 (Conn. Super. Ct. Sept. 2, 2004) is consistent with the need for some level of identification of the burden sought to be imposed based on an earlier deed – as described by the plaintiffs, "reference in deed to '[d]ues and assessments, if any, of the Southfield Point Association,' was sufficiently specific to give plaintiff actual notice of his obligation to pay homeowners' association's dues."

In each of these instances, there is a reference to a specific document on the land records and at least a general reference to what the document supposedly imposes as a burden (restriction, easement, etc.). The prior deed is not mentioned as a generality; there is guidance as to where to find information as to something of likely concern in a title search. Simply referring to a prior deed – literally limited to a bare reference to the prior deed and where it can be found – does not inform the

examiner of the instrument as to the nature of what might be found at the referenced location.[4]

While itself not directly relevant, the defendants note that the plaintiffs' chain of title (and the chain of title of another nearby property owner), does contain appropriate language, identifying the existence of restrictions with a reference to an earlier instrument containing such information – that the current deed is "subject to" provisions in an earlier deed relating to restrictions.

That a diligent title-searcher might check a pre-root deed with nothing more than a "reference is made to" identification in the current deed is not the statutory benchmark. The Act provides for extinguishment of pre-root encumbrances except those that are preserved by a proper (not general) reference. The plaintiffs provide no authority for the proposition that a "reference is made to" identification in the current deed is sufficient under the statute – no legal analysis and no expert testimony that such a general reference is generally deemed to be within the scope of a marketable title review of land records. To the contrary, there is authority indicating that the interest itself must be referenced:

> "Rather, the act, subject to certain exceptions, functions to extinguish those property interests *that once existed*, and would still exist but for the absence from the land records in the affected property's chain of title of a notice specifically reciting the claimed interest." (Internal quotation marks and citation, omitted; emphasis as in cited case.) *Johnson v. Sourignamath*, 90 Conn. App. 388, 402, 877 A.2d 891 (2005).

[4] To a degree, the court's analysis is somewhat oversimplified. Mere repeated assertions in a sequence of deeds of the existence of a burden on property is not enough; as explained in *Village Apartments, LLC v. Ward*, 169 Conn. App. 653, 662, 152 A.3d 76 (2016): "Otherwise, an invalid or nonexistent [burden] could ripen into existence over a period of time through the mere insertion into the land records of language asserting it." (The case itself is discussed, below.)

Not to belabor the point, the Act can and does extinguish rights that had properly been recorded on the land records, if the chain of title considered for purposes of the Act lacks "a notice specifically reciting the claimed interest."

Recently, in *Village Apartments, LLC v. Ward*, 169 Conn. App. 653, 658-59, 152 A.3d 76 (2016), the court rejected the similar contention that there was sufficient notice for a diligent title searcher ("Additionally, the plaintiff argues that reference to the right-of-way in the deeds puts a reasonable title searcher on notice of the existence of an easement...."). Instead, the court observed that "Section 47-33d therefore requires either a specific reference in the muniments to easements, use restrictions, or other interests or a general reference to such interests accompanied by a specific identification of a recorded title transaction creating the easement." (Id. at 661.) The plaintiffs do not explain how they claim to satisfy either prong.

Based on the record before it, the defendants are entitled to judgment, as a matter of law, with respect to the lack of an enforceable restriction relating to height of boundary foliage in their title.

B. Spite structures

The defendants argue that the trees they planted cannot be a spite structure based on a number of general considerations – trees routinely are planted for screening and aesthetics. Trees are prevalent in the neighborhood. The defendants had their own particularized need for privacy. The plaintiffs themselves planted similar trees on the opposite side of their property (boundary with another neighbor).

The defendants argue:

> "The focus therefore for this Court as a matter of law, is whether planting trees for purposes of privacy and aesthetics is (a) 'useless' to the Sedleys and (b) 'in a manner not justified by (their) ownership and forbidden by law.' Restated, the Plaintiffs are asking this Court to rule as a matter of law, that every group of trees planted in Connecticut for purposes of privacy, screening and beauty, including the 16 Arborvitaes the Elkins planted along the 5 North Crossway border, is violative of 52-570 and 52-480. Clearly that would lead to an absurd result." (#168.00 at page 26.)

Recognizing that this passage is set forth in support of the defendants' motion for summary judgment, the first sentence is a distortion of the issue presented by the defendants' motion – it might be an appropriate statement in opposition to a motion for summary judgment asserted by the plaintiffs as to their right to summary judgment, but not in this context. Rather, for purposes of this motion, the first sentence should be framed in the negative – can this court, as a matter of law, state that the claimed planting for purposes of privacy and aesthetics was not useless and not in a manner not justified or otherwise forbidden by law.

The defendants do not explain how this court can rule in their favor, as a matter of law, given the existence of at least some level of factual dispute (including testimony quoted by the plaintiffs and permissible inferences that could be drawn). Every litigated case has a claim by the installer of the claimed spite-structure that the structure serves a legitimate purpose. Not infrequently, there is a history of a poor inter-neighbor relationship (or deteriorating relationship) preceding the installation of the claimed spite structure. The court cannot weigh evidence, and cannot draw inferences favorable to the moving party (as opposed to drawing inferences favorable to the non-moving party) in connection with a motion for summary judgment.

The third sentence properly characterizes the second sentence as absurd – but suggesting that the second sentence is a plausible restatement of the issue before

the court is perhaps more accurately described as what is absurd. Again, this is the defendants' motion. Even if this discussion were in the context of a claim asserted by the plaintiffs, the plaintiffs' claims cannot reasonably be "restated" as "the Plaintiffs are asking this Court to rule as a matter of law, that every group of trees planted in Connecticut for purposes of privacy, screening and beauty" is a spite structure.[5]

Presumably recognizing that this court already determined that the planting of mature trees can/could constitute a spite structure, the defendants spend a number of pages discussing a trial court decision to the contrary. "The seminal and leading case in this area is the Superior Court decision in *Dalton v. Bua*, 822 A.2d 392, 393, 47 Conn. Supp. 645, 645 (2003)." (The defendants also cite another trial court decision that "cited *Dalton* as authority for the conclusion that as a matter of law trees and hedges are not "structures" under Connecticut law" (*Altomari v. Hall*, 2009 WL 1662860, at *2 (Conn. Super., 2009)).)

This court previously determined that *Dalton* did not control this case, and as noted earlier, the Appellate Court in *Freidheim*, similarly recognized that it is possible for a planting of trees to come within the scope of the spite-fence statutes. This court distinguished *Dalton*; more importantly, so did the Appellate Court in *Freidheim*.[6] In a discussion spanning a number of pages – and including a discussion of a case that

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[5] Earlier, the court noted the inappropriate recharacterization by the plaintiffs of the court's earlier determination that a planting of mature trees can/could be a spite structure as a determination that this planting was a spite structure, was improper. The statements made by the plaintiffs of that nature were made in the plaintiffs' brief in support of their motion for summary judgment – which was filed after the defendants had filed their motion. If the plaintiffs' improper framing of the court's ruling on the motion to strike had preceded the defendants' filing of their motion for summary judgment, the absurd reframing of the issue might have been (if oxymoronically) somewhat justified.

[6] In *Freidheim*, the Appellate Court noted (217 Conn. App. 800, n.11) that this court previously had distinguished *Dalton*, and identified another trial court that had distinguished the case (*Patrell v. Gaudio,* Superior Court, judicial district of New London, Docket No. CV-95-012873-S (December 15, 2010) (51 Conn. L. Rptr. 163, 2010 Conn. Super. LEXIS 3269)).

had been decided in the U.S. District Court for Connecticut – the Appellate Court emphasized the "erection" or "built-up" requirement for a structure (217 Conn. App. 799-802); natural growth of existing plants/trees is not within the scope of the statutes but that is not the situation presented here.

The court appreciates that the decision in *Freidheim* was issued after the defendants had filed their motion and supporting brief – but it had been decided a few months prior to argument. The defendants may not have been aware of the then-recent decision, but it clearly supports this court's prior analysis (notwithstanding *Dalton*) and independently (and controllingly) precludes the conclusive rejection sought by the defendants – that the planting of mature trees cannot, as a matter of law, constitute a spite structure.

The defendants have not established how or why, given the facts of this case, such a characterization would be impossible, as a matter of law (based on the absence of any material issues of fact, including intent).

C. Private Nuisance

The defendants challenge the claim of private nuisance. They cite the Connecticut Supreme Court for the foundational proposition that there is no common law right to a view easement in Connecticut; *Mayer v. Historic District Commission of the Town of Groton*, 325 Conn 765 (2017). (The court is using the term in a broad and non-technical sense – a claimed enforceable right of unimpeded view.) Many cases involving claims of spite structures are claimed by the defendants to be indirect efforts to circumvent this principle. A claim of private nuisance can be a potential alternate avenue. That a theory of liability may be an attempt to obtain a result not directly available is not unique nor a basis for rejecting the effort; the issue is the

propriety of the alternate effort on the merits of that claim. (Is that not what creative lawyers often do – assert claims that might achieve an otherwise-unattainable goal?)

Although the factual and legal details are sparse, in *Doyen v. Sapia*, CV 980084983S, 1999 Conn. Super. LEXIS 1591 (Super. June 16, 1999), there appears to have been a nuisance claim that involved claimed harm in the nature of an impaired view of the Connecticut River; the court denied summary judgment, concluding that the nuisance claim presented issues of fact.

Presenting something of an inverse situation – and procedurally distinct because it was a review of an award of a prejudgment remedy – in *Kinsale, LLC v. Tombari*, 95 Conn. App. 472, 474, 897 A.2d 646, 647 (2006), the claim was that a neighbor had deposited junk cars and other debris on its property, effectively creating an eyesore that was characterized as a private nuisance. Over a dissent, the Appellate Court concluded that there was a sufficient basis for an attachment of the defendant's property, based at least in part on the nuisance claim. Perceived malice was a factor – and ill-will/malice is claimed here as well.

The defendants cite numerous cases from Connecticut and various other jurisdictions relating to trees as potential nuisances. The cases have little if any bearing on the issues before the court; the only common feature is that the cases all contain the word "trees" and "nuisance" within the same sentence or paragraph.

The defendants cite cases from Connecticut to the effect that trees along highways generally are not nuisances (*Muratori v. Stiles & Reynolds Brick Co.*, 128 Conn. 674, 676–77 (1942) and *Wadsworth v. Town of Middletown*, 94 Conn. 435 (1920) – supplemented by a similar case from 1841 (*Burnham v. Hotchkiss*, 14 Conn.

311, 319–320 (1841)). This case does not implicate the public policy along highways[7] (e.g., encouraging shade) but rather the respective rights and obligations of abutting property owners.

Most of the cases cited by the defendants relate to overhanging branches; the court need not distinguish them other than to note that difference. The defendants cite *Shuck v. Borough of Ligonier*, 343 Pa. 265, 269 (Pa. 1941) for the proposition that "[s]hade trees in the city streets are regarded with favor, and do not constitute a nuisance" – but that is a quotation from a treatise, and the holding of the case was that it was within the discretion of municipal officials to determine that a tree was a nuisance or otherwise needed to be removed.

The defendants cite *Chandler v. Larson*, 500 N.E.2d 584, 587, 102 Ill. Dec. 691, 694, 148 Ill.App.3d 1032, 1036 (Ill. App. 1 Dist.,1986) for the proposition that

> "[w]When a person moves to a wooded suburban area he should know that he is going to a place where nature abounds; where trees add to the pleasure of suburban life; and where the shade of trees, leaves, overreaching branches, roots, squirrels, birds, insects and the countless species of nature tend to disregard property lines.... We conclude that equity should not lend its jurisdiction to the control or abatement of natural forces as though they were nuisances."

This citation is inapposite on a number of levels. The quoted passage is, itself, a quotation from an earlier case relating to bug infestation arising from the planting of

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[7] The court notes that in recent years, the State has been cutting down trees in proximity to I-95 and the Parkways, seemingly a consequence of accidents caused by falling trees and tree limbs (in turn, often (usually?) as a result of storms); see, e.g., *Horan v. State*, Docket No. HHDCV146049960S, 2015 Conn. Super. LEXIS 589 (Super. Mar. 17, 2015); *Toomey v. State,* No. CV-91-0057183S, 1994 Conn. Super. LEXIS 539 (Super. Feb. 17, 1994). The issue is not squarely before this court, but there is reason to doubt whether the unqualified language of the cited cases would be deemed applicable today.

trees. The cited case relates to the natural growth of trees, over time, and specifically, tree roots – a distinction similar to the one drawn by courts with respect to spite structures (natural growth versus intentional conduct). Although the case itself appears to have been one asserting negligence rather than nuisance, the end result was that the appellate tribunal reversed the dismissal of the case, finding the claim being asserted to be legally sufficient.

In the preceding paragraph, the court noted that the quoted passage came from an earlier case. That earlier case, in turn, cites to a treatise (if a rather old one), aptly identifying the persistent distinction needing to be made:

> "In order to create a *legal* nuisance, *the act of man* must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense.
>
> ". . .
>
> "Thus it will be seen that a nuisance cannot arise from the neglect of one to remove that which exists or arises from purely natural causes. But, when the result is traceable to artificial causes, or where the hand of man has, in any essential measure, contributed thereto, the person committing the wrongful act cannot excuse himself from liability upon the ground that natural causes conspired with his act to produce the ill results." *Merriam v. McConnell*, 31 Ill. App. 2d 241, 246, 175 N.E.2d 293 (1961).

The nuisance claim is not a claim of violation of a view easement. A nuisance claim requires balancing of harm and utility, and consideration of reasonableness; violation of a view easement would require only an interference with the view (as defined in whatever instrument created the right). This is not a case of overhanging branches, or leaves and fruit dropping from an overhanging limb. In a very crude

sense, this is in the nature of a spite-structure claim but without any statute, with a balancing of harm to the plaintiffs and utility to the defendants.

The issue for the court is not the likelihood that the plaintiffs will prevail; the defendants have not established that there are no material issues of fact and that they are entitled to judgment as a matter of law.

D. Easement

The defendants argue that the claim of interference with easement rights are insubstantial – they are de minimis and the defendants have undertaken corrective action (providing a key to a locked gate, thereby allowing access).

The defendants do not explain how a determination that a violation of easement rights is de minimis is anything other than an exercise in weighing evidence (how serious was the violation). Further, that they have provided a key – and the plaintiffs contend that the key was provided years into this litigation and a de minimis time prior to the filling of the defendants' motion – nothing prevents them from changing the lock or its keying. If the defendants acknowledge that there is an obligation to allow access – access that previously had been denied – that is not a basis for granting judgment in favor of the defendants; it would seem to be closer to an admission that judgment should be entered in favor of the plaintiffs (but not quite). (Somewhat more practically as well as technically, providing a key is not equivalent to a commitment, recognizing the binding existence of the easement.)

II. Plaintiffs' motion

Almost necessarily, any discussion of the plaintiffs' claims must take into account the extent to which the defendants' motion covered the same or similar ground. Therefore, to the extent that the plaintiffs are claiming the opposite of what the defendants claimed in their motion, the defendants' objection effectively is at least a partial response to the plaintiffs' motion.

A. Spite structure

At the outset, the court must repeat its earlier observation: the plaintiffs improperly have attempted to convert a determination that the planted trees might constitute a structure into a determination that the trees planted by the defendants do constitute a structure. Unless a pleading is admitted, the pleading itself has no evidentiary weight; a legally-sufficient count of a complaint is not an admission.

Until early this year, there was no identified appellate authority as to whether a row of planted trees could be considered a spite structure; there were conflicting trial court decisions on this point (with this court having ruled, in this case, that it was a possibility). There is now appellate authority, elevating the authority for the theoretical ability to claim that a row of trees constitutes a structure.

The plaintiffs claim that they are entitled to judgment, as a matter of law, but there is the ever-present gap between a determination that a planting of trees, in circumstances such as present in this case, "can ... constitute a malicious structure" and a determination that the planting in this case does constitute a malicious structure. The plaintiffs do not explain how the court can bypass all of the factual issues implicated by a claim that a more-traditional structure (especially, a fence) is a spite structure. (A fence can be a spite structure, but not every fence is a spite structure.)

None of the cases cited by the plaintiffs are identified as allowing a determination that a structure – even a more common structure such as a fence – is a spite structure as a matter of law in the context of a motion for summary judgment. Absent an extreme (and unlikely) situation such as where a defendant admits that the sole reason for erection of a structure was to annoy a neighbor, motive and utility are necessarily issues of fact. The cases and passages set forth on page 9 of the plaintiffs' brief all relate to factual determinations, discussing the extent to which a factfinder would draw inferences from the evidence presented. Summary judgment requires establishment of entitlement to judgment as a matter of law; it cannot involve making a decision ("[d]eciding whether a structure has been erected maliciously does not involve a journey deep into the defendant's heart"); it cannot involve making a determination ("[w]hether a structure was maliciously erected is to be determined rather by its character, location and use than by an inquiry into the actual motive in the mind of the party erecting it"); and it cannot involve drawing inferences (("the intent to injure by the erection of the structure is an intention which must be discovered mainly from the fact that the structure does impair the value of adjacent land and injure the owner in its use, from the absence of the reasonable possibility of any real advantage, whether of profit, protection, or pleasure in the use of the land, and from the character, location, and surroundings of the structure itself") (citations omitted).

The plaintiffs cite evidence supporting their position, but also identify contrary evidence that they ask the court to reject. Mr. Sedley testified that the trees were installed for privacy and aesthetics, but because his answer was not deemed sufficiently candid or otherwise satisfactory (discussion at pp. 11-12), and because he admitted to the existence of problems with the plaintiff-neighbors, the plaintiffs effectively are arguing that his responses should be disregarded. That he testified not to having symmetrical privacy concerns – less of a concern about neighbors on the

other side of the property – is somehow perceived as undermining the legitimacy of the need for privacy between the parties to this action, as a matter of law. The plaintiffs may be identifying highly persuasive arguments – but they are arguments that can only be made to a factfinder, and the court, at this stage, is not acting as a factfinder. To the contrary, the court is prohibited from making any factual determinations (other than that a fact is not in dispute).

Perhaps unintentionally, the plaintiffs make that point on page 14, after extensive discussion of testimony:

> "Notwithstanding Defendants' testimony, the law is clear that the Court need not 'journey deep into [their] heart[s]' ... to divine Defendants' intent in installing the Tree Wall. Geiger, 170 Conn. App. At 487. Rather, Defendants' malicious and injurious intent can simply be inferred from the character, nature, and location of the Tree Wall itself, which is not reasonably subject to differing interpretations or dispute." (#178.00 at page 14).

The plaintiffs admittedly are asking the court to draw an inference ("can simply be inferred") from the evidence, coupled with a claim that it would not be reasonable to draw the inference they claim is appropriate. Other than because they say so, no explanation is given as to why it would be unreasonable – the ever-present refrain, as a matter of law -- to accept the defendants' contention that the trees were planted for purposes of privacy and aesthetics. More accurately, since this argument is presented in connection with the plaintiffs' motion seeking an affirmative determination of impropriety, no explanation is given as to why the court is required, as a matter of law, to reject the defendants' contention that the trees were planted for purposes of privacy and aesthetics and instead determine that there was an improper motivation.

The plaintiffs have not established entitlement to judgment on the counts relying on the spite-structure statutes.

B. Nuisance

Perhaps not as extreme, again the plaintiffs start with the court's ruling on the motion to strike, rejecting the defendants' claim that it is legally impossible to prevail on a claim such as asserted by the plaintiffs, and use that as a starting point for claiming entitlement to judgment as a matter of law.

The plaintiffs implicitly recognize that the unreasonableness of the defendants' conduct is a factual issue ("[t]he unreasonableness of Defendants' interference is properly weighed by considering the totality of the circumstances" (page 18 of #178.00)), but then conclusorily state that there are no material issues of fact. No explanation is given as to why the plaintiffs' determination that "[t]he location and size of the parties' respective properties, as well as the close proximity of the parties' respective houses, is particularly unsuitable for such an enormous and objectionable installation as the Tree Wall" (#178.00 at page 18). Why is the court bound by the plaintiffs' evaluation that "[a]ny legitimate purpose that the Tree Wall could have for providing Defendants with privacy could be accomplished by far less intrusive means"? That there may have been less intrusive means – from the plaintiffs' perspective – to accomplish the goals sought by the defendants, does not require a factfinder to determine that the conduct of the defendants was unreasonable, as a matter of law.

The plaintiffs may be correct in assessing the weight of the evidence (or not), but they have not identified any basis on which this court could conclude that there was a nuisance as a matter of law. That the plaintiffs wish to view the evidence in a

manner most favorable to their position is their right; the court, however, is required to view the evidence in a manner most favorable to the non-moving party. The plaintiffs' repeated statements that the only reasonable interpretation of the evidence is the one advanced by the plaintiffs is not the proper standard for the court.

Conclusion

It is essentially a tautology that if there are cross-motions for summary judgment on a given claim, at least one side must be wrong. It is possible (and often the case) that neither party can establish a right to judgment as a matter of law, based on the claimed absence of any material issue of fact, but both sides cannot be entitled to judgment on the same issue (unless it is an issue on which there is no disagreement, which would negate characterization as an "issue").

In this case, while the court does not assign any weight to the observation, the most obvious candidate for summary judgment for the plaintiffs would have been the existence of an enforceable deed restriction in the defendants' chain of title. The Act is intended to avoid uncertainty and intended to simplify the process of establishment of marketable title, including elimination of concerns about historic encumbrances that do not satisfy the statutory requirements. Although the plaintiffs have asserted the claim, they are on the defensive with respect to articulating a basis for this claim to survive the defendants' motion.

While perhaps not eliminating all possible issues, the Act eliminates encumbrances that are not preserved in accordance with the statutory provisions. General Statutes § 47-33f provides a mechanism for "[a]ny person claiming an interest of any kind in land [to] preserve and keep effective that interest" by taking certain steps – there is no suggestion that anyone took steps to preserve what may

have been a valid restriction, prior to the root deed. (There does not appear to be any dispute as to the root deed for the defendants.)

The plaintiffs have not established the existence of a material issue of fact relating to the claimed applicability of a restriction as to the height of border foliage, under the defendants' title to their property. They have not established a legal issue question as to whether the defendants are entitled to judgment, as a matter of law, relating to the viability of the claimed restriction.

As to all of the other issues in this case for which the parties have sought summary judgment, the parties have overstated the claimed-conclusive quality of the facts and the claimed quality of their legal entitlement to judgment as a matter of law. If a factfinder were to accept all of the evidence and testimony presented by the non-moving parties as to each motion, and if the factfinder were not to accept any of the evidence and testimony presented by the moving parties, could that factfinder possibly (reasonably) find that the moving parties had not proven their case? In other words, viewing the evidence in a light most favorable to the non-moving parties, the moving parties cannot establish entitlement to judgment as a matter of law based on the absence of any material issue of fact.

Accordingly, the defendants' motion for summary judgment as to the first count of the plaintiffs' operative complaint is granted. As to all of the remaining claims of the plaintiffs, the cross-motions for summary judgment are denied.

POVODATOR, JTR.

Decision entered in accordance with the foregoing. Notice sent to all counsel of record on August 21, 2023.