STATE OF MAINE CUMBERLAND, ss.	BUSINESS AND CONSUMER COURT Location: Portland DKT. NO. BCDWB-RE-2019-14
RANDY SLAGER, Plaintiff/Counterclaim-Defendant, v. LORI L. BELL and JOHN W. SCANNELL, Defendants/Counterclaim-Plaintiffs.	**ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This case involves a dispute between neighbors in Kennebunkport (the "Town") over the construction of a retaining wall on Defendants Lori Bell and John Scannell's property close to the boundary line between the properties. Defendants move for summary judgment on Plaintiff Randy Slager's nuisance claim contained in his amended complaint on the basis that the claim is barred by claim preclusion, issue preclusion, and a failure to exhaust administrative remedies.[1] Plaintiff filed a Rule 56(f) motion to conduct additional discovery to respond to Defendants' motion. The Court denied the Rule 56(f) because Plaintiff failed to explain "how the emergent facts, if adduced, will influence" whether his nuisance claim is barred by preclusion or a failure to exhaust administrative remedies. *Bay View Bank, N.A. v. Highland Golf Mortgagees Realty Tr.*, 2002 ME 178, ¶ 22, 814 A.2d 449. Following this, the Court held oral argument on August 10, 2021. After reviewing the parties' legal memoranda, the statements of material fact and supporting record material, and considering the parties' oral arguments, the Court issues the following decision.

[1] Plaintiff's amended complaint also contains a claim for trespass that survived Defendants' motion to dismiss. (*See* Order on Mot. Dismiss (Mar. 9, 2020).) Defendants' motion for summary judgment does not address the trespass claim.

LEGAL STANDARD

Summary judgment is granted to a moving party where "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). "A material fact is one that can affect the outcome of the case, and there is a genuine issue when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774 (quotation marks omitted). When reviewing the record on a motion for summary judgment, a court views the facts in the light most favorable to the non-moving party. *See Cormier v. Genesis Healthcare LLC*, 2015 ME 161, ¶ 7, 129 A.3d 944. "Any doubt on this score will be resolved against the movant, and the opposing party will be given the benefit of any inferences which might reasonably be drawn from the evidence." 3 Harvey, *Maine Civil Practice* § 56:5 at 240 (3d, 2011 ed.).

SUMMARY JUDGMENT RECORD

Though the parties' Rule 56(h) filings contain many qualifications and objections, the key historical facts underlying this case are not truly in dispute.[2] The following is a recitation of those facts.

On December 4, 2018, the Town issued a permit to Defendants to construct the retaining

[2] The Court overrules many of the objections to the relevance of the history of the case. Such facts are relevant to the res judicata and exhaustion of remedies issues raised by Defendants in their motion. The Court also overrules objections asserting a violation of the one-fact-per-statement rule because it does not intend to decide this motion on such purely technical grounds. However, it is not overlooking more substantive noncompliance with Rule 56(h). In many instances, without record citations denied portions of statements "to the extent they are inconsistent with" whatever document was at issue in the statement. It is the parties' obligation to provide specific record citations to enable the Court to identify the ostensible inconsistencies: "The opposing statement shall admit, deny or qualify the facts asserted by reference to each numbered paragraph of the moving party's statement of material facts and *unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule*." M.R. Civ. P. 56(h)(2) (emphasis added); *see also id.* 56(h)(4) ("Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted."). To the extent the parties' statements of material fact veer toward argument or editorialization, the Court has attempted to exclude such characterizations because Rule 56(h) statements are not intended for such purposes.

walls at issue in this case. On August 1, 2019, 240 days after the permit was issued, Plaintiff appealed to the Town's Zoning Board of Appeals (the "ZBA"). Plaintiff contended that the permit was improperly issued because the retaining wall Defendants had built along the parties' shared boundary line, and the patio atop the wall that Defendants planned to build, constituted an impermissible "structure" within the fifteen-foot setback. Plaintiff argued that "[t]he walls of Ms. Bell's patio are not reinforced with rebar nor engineered to be anything other than a fence with air on both sides," and that he had "safety concerns about the structural sufficiency of Ms. Bell's patio and the height of her patio walls." Thus, Plaintiff argued, the Town had violated its own Ordinance by issuing the permit and Defendants had violated the permit. Plaintiff further contended "that the work on the subject property has created a safety problem for Mr. Slager's residence . . . ." Acknowledging that his appeal was untimely and that he needed "good cause" to avoid his appeal being dismissed as such, Plaintiff contended that the safety concerns "should give the Board good cause to hear Mr. Slager's appeal on the merits."

On September 24, 2019, the ZBA held a hearing on Plaintiff's appeal. Plaintiff brought an architect to the hearing to argue on his behalf about the ostensible safety issues with the walls. On October 1, 2019, the ZBA dismissed Plaintiff's appeal as untimely and lacking in "good cause" for the untimeliness and concluded that the ostensible safety issues Plaintiff raised were outside the ZBA's jurisdiction. Plaintiff did not appeal to the Maine Superior Court from the ZBA's denial of his appeal.

On July 17, 2019, the Town's Assistant Code Enforcement Officer ("CEO") wrote to Defendants regarding suspension of their permit. The Assistant CEO asserted differences between work as done and as permitted, including that "Wall section A11 was not constructed as per submitted plan," and that "Wall section A2 and A1 do not match submitted engineered drawing

dimensions." The Assistant CEO identified these issues as implicating Article 11.5(A)(3) of the Ordinance, which states: "A permit may be suspended or revoked, if: . . . (3) "[t]he continuation of the work authorized is endangering or may endanger the safety or general welfare of the community during the construction or work for which the permit was issued." The Assistant CEO stated that "[c]orrective actions will be . . .[v]erification by licensed professional engineer confirming wall sections A1 and A2 match submitted drawings [and] Wall section A11 needs to be reviewed structurally for potential failure due to the amount of uneven back fill."

On August 19, 2019, Plaintiff, through counsel, wrote to the Town's CEO expressing "grave concerns" and "substantial safety concerns" about the walls and demanding that the Town commission "3rd party destructive forensic structural evaluation" to address the "danger" posed by the walls. On August 22, the CEO notified Defendants that they had satisfactorily addressed the issues in the July 17 letter, except that the Town requested "an extensive review of the structural integrity and ability to continually support the current and proposed backfill on wall section A11 . . . by a licensed structural engineer." The suspension of work related to that wall remained in effect. On the same day, Plaintiff's counsel wrote to the CEO again, reiterating his "safety concerns" among other things.

On September 11, Plaintiff's counsel wrote to the CEO again. He reiterated that "Ms. Bell's elevated patio and wall section A11 pose an imminent threat to Mr. Slager's home and his family." He contended that the wall was not properly built and lacked structural support to keep it from collapsing and contended that it was a nuisance. He also directed the CEO's attention to 17 M.R.S.A. § 2851, *et seq.*, Maine's "dangerous building" statute. On September 24, 2019, in response to the CEO's August 22 letter, two licensed engineers reported that Wall A11 was in excellent condition with no signs of instability or distress and had been in place for approximately

seven months; its footing was pinned to ledge; its foundation bore on ledge; and that it appeared to be adequately constructed. The letters from the engineers were forwarded to the CEO and Plaintiff's counsel.

On or about October 31, 2019, Plaintiff filed his original Complaint in this case. Plaintiff alleged that he was concerned that Wall A11 (the "raised patio's retaining walls") was not built properly and that he was afraid it would collapse. Plaintiff alleged that he "reported his safety concerns to the Town," and that in late June 2019, he "again contacted the Town's code enforcement office to voice his concerns that Defendants' construction of a raised patio put his home in jeopardy given the proximity of the raised patio and lack of any plans and other documents supporting the raised patio's structural sufficiency." Plaintiff referenced and described the Town's July 17, 2019 correspondence described above, alleging that "[t]he corrective actions which were ordered by the Town to be taken by Defendants are to assure that the raised patio and retaining walls are safely constructed." Plaintiff also referenced and described the August 22, 2019 correspondence referenced above, as well as Plaintiff's ZBA appeal. Plaintiff alleged that his use and enjoyment of his property, and the value of that property, have been diminished by what "appears" to Plaintiff to be a safety threat based on "potentially" defective construction. His fears are based on his post-construction visual observations of Defendants' retaining walls, "to the extent possible," as well as the fact that he has not seen engineering documentation satisfying him that Wall Section A11 is safe.

On December 3, 2019, following additional correspondence, the CEO determined that Defendants had satisfied his concerns regarding Wall A11 (and all other matters) and informed Defendants that they could proceed with their work. Plaintiff was not provided a copy of the Town CEO's December 3, 2019 email but instead learned of it when his counsel visited the CEO's office

to examine the Town's file regarding Defendants' permits. A few weeks later, Plaintiff's counsel mailed the CEO a cover letter enclosing a report prepared by licensed structural engineer David Price of Price Structural Engineers, Inc. (the "Price Report"). Then, on or about December 23, 2019, Plaintiff filed his amended complaint in this Court. The amended complaint repeated the allegations in the original complaint and attached a copy of the Price Report, describing it as "a report of his findings and conclusions with respect to the safety and construction [sic] Defendants' raised patio and retaining walls." The Price Report alleged building code violations and structural safety concerns regarding the retaining walls and was referenced as a basis for alleging that "the raised patio and retaining walls . . . [are] unsafe."

On December 27, 2019, Plaintiff appealed the CEO's December 3 lifting of the stop-work order to the ZBA, contending that the CEO had failed to provide required certifications for his December 3 action under section 11.5.C of the Ordinance. On January 15, 2020, the CEO acknowledged the appeal and noted that he intended to review both sides' engineering reports and produce a formal position in writing on whether the suspension of Defendants' permits should be lifted. On January 23, 2020, Defendants' engineer, Thad Gabryszewski, P.E., S.E., responded to the Price Report, noting that it did not change his previously-expressed opinion. Mr. Gabryszewski stated that Wall A11 continued to show no signs of distress following further freeze-thaw cycles and cited a number of sources in opposition the Price Report's assertion that the wall was not built on ledge.

On January 31, 2020, the CEO requested additional information, advised the parties that he had retained an independent engineer, and stated that he would issue a decision on whether the suspension of work under the permits would remain in effect no later than February 28, 2020. On February 5, 2020, Mr. Gabryszewski responded, noting that "[t]hree engineering firms have

offered sound Opinions that counter the speculations of the Price Report and conclude that the walls are sound." Mr. Gabryszewski noted further that "[t]he Opinions are based on calculations, observations of in-progress construction, and evidence of performance." Mr. Gabryszewski then went on to compile and summarize in detail the bases for the engineers' opinions, addressing the CEO's concerns and concluding that: (1) walls A1 and A2 were designed to resist soil pressure by their weight and size and that their weight and size as built were consistent with their design; (2) wall A11 has been retaining soil for over a year through one and a half winters, showing no signs of distress despite numerous frosts, that it is pinned to ledge, that it bears on ledge and is protected from frost heaves, and is sufficiently reinforced to resist Code-required loads. Mr. Gabryszewski explained further that three test holes had been dug that very day at the base of the wall, and that "[a]ll three found ledge, and found the wall's foundation bears on ledge."

Mr. Price responded further on February 19, 2020, effectively contending that because all conceivable doubt as to the safety of the walls had not been removed, the walls should be taken apart and inspected. Mr. Gabryszewski replied on February 27, 2020, asserting that there were no reasonable grounds to believe that the retaining walls presented any safety threats in the short or long term and summarizing the evidence that wall A11 bears on ledge.

On February 28, 2020, Plaintiff's counsel sent an email to the CEO providing a copy of a draft letter from Mr. Price responding to Mr. Gabryszewski's February 27 letter. Also on February 28, 2020, the CEO wrote to Defendants, copying Plaintiff's counsel, and noting his receipt of, among other items, the August 19, 2019 letter from Plaintiff's counsel (which attached a letter from an architect); the September 24, 2019 McCullough and Gabryszewski letters; the December 17, 2019 Price Report; the February 5, 2020 Gabryszewski letter; and the February 19, 2020 Price letter. The CEO addressed each of the suspended items of work under the permit and, as to each,

STANDARD OF REVIEW

A motion to dismiss tests the legal sufficiency of a Complaint, but the Court must view the evidence in each claim "in the light most favorable to determine whether it sets forth a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *McCormack v. Crane,* 2012 ME 20, par. 5, 37. Because Maine is a notice pleading state, only a short, plain statement of a claim must be made sufficient to provide the defendant with fair notice of the cause of action. *Town of Stonington v. Galilean Gospel Temple,* 1999 ME 2, par. 14.

Count I: Nuisance

In order to prevail on a claim for common law nuisance, the Plaintiff must show that: 1) the defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use; 2) there was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that enjoyment may not have been anticipated or intended; 3) the interference that resulted and the physical harm, if any, from that interference proved to be substantial…the substantial interference required is to satisfy the need for a showing that the land is reduced in value because of the defendant's conduct; and 4) the interference that came about under such circumstances was of a such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land. *Charlton v. Oxford,* 2001 ME 104, par. 366. The Defendants argue that Plaintiff has failed to adequately plead any set of facts that even in the light most favorable to Plaintiff would establish any of these elements.

With respect to the element of intent, as Plaintiff points out the Law Court in *Charlton* has indicated that what must be established is intent to create the condition which interferes with

Plaintiff's enjoyment of the land. *Id.* par. 37. The Amended Complaint alleges that Defendants intended to build and did build the raised patio and retaining walls that Plaintiff claims constitute the nuisance, so that element has been sufficiently pled. In addition, with respect to the interference element, the Amended Complaint alleges that the patio and walls sit on the Plaintiff's boundary line in violation of the Defendants' building permit. It could be arguably inferred from these allegations that Defendants interference was intentional.

Defendants' primary argument regarding Count I[2] is that Plaintiff has failed to allege that he was harmed in any substantial way. Indeed, Defendants claim that all that Plaintiff has done is express fear or concern about loss of enjoyment or value in the property, without more. This not only means, according to Defendants, that Plaintiff has failed to adequately plead actual harm, but that Count I should be dismissed as not being ripe. The Court has reviewed the report of Plaintiff's expert, David Price, which is an Exhibit to Plaintiff's Amended Complaint. The report states that the construction was done in violation of building codes, that the retaining walls were not "bearing on ledge" - meaning they are subject to "frost heaves and overturning" and hence unsafe. Par. 36, 37 to Amended Complaint. In addition, the Amended Complaint cites to the report's finding that the retaining walls are unstable and were constructed without full-width capstones or through-stones which present safety concerns. *Id.* par. 38.

In the light most favorable to Plaintiff, which is how the Court must view the allegations, the Plaintiff has adequately pleaded facts in the Amended Complaint (along with findings made

[2] Defendants also ask the Court to consider documents that were not part of the Amended Complaint, causing Plaintiff to ask the Court to treat the motion to dismiss as one for Summary Judgment. Plaintiffs are correct that official public documents, documents central to a plaintiff's claim or referred to in the complaint can be considered by the Court on a Rule 12(b)(6) motion to dismiss without the Court holding a defendant to the requirements of Rule 56. See, *Greif v. Independent Fabrication,* 2019 ME 142, par. 4. While Exh.A, B and C to the motion are either public documents or are arguably central to Plaintiffs' claim, the Court reject consideration of Exh. D which is a photograph that purports to be a "better copy" of a photograph included in the expert report appended to Plaintiffs' complaint. However, the Court does not find Exhibits A-C to be pertinent to the standard that the Court must apply in deciding this motion, as more fully explained in fn. 3. Below.

in David Price's report) the three necessary elements of Nuisance: intentional acts; interference in use or enjoyment of the land; and harm that is substantial, unreasonable, and not speculative. The Court will therefore deny the motion with respect to Count I. [3]

Count II: Trespass

Defendants argue that Count II should be dismissed as it refers only to Defendants' "contractors" when describing the conduct that Plaintiff alleges constitutes trespass. Defendants accurately describes the language in the Amended Complaint, and they are correct that under Maine law there is no vicarious liability for an employer for torts committed by an independent contractor who is not an "agent" of the employer. *Bonk v. McPherson,* 605 A.2d 74, 78 (1992). However, as Defendants acknowledge, an employer can be held liable for tortious acts of independent contractors depending on the facts of the case and the nature of the relationship between the contractor and the entity or person who engages the contractor. In *Bonk,* the Law Court also stated that "In certain circumstances, a party can be held liable for the trespass of an otherwise independent contractor if the trespass was authorized as part of the contract, or was the natural result of the work contracted to be done." *Eaton v. European & N. Am. Ry. Co.,* 59 Me. 520, 526 (1872).

The Court agrees with Defendants that Plaintiffs have not been particular or specific as to their theory of how the Defendants "contractors" were acting as agents under applicable Maine law. However, as Plaintiffs point out, the Law Court in *Bonk* had the benefit of a full evidentiary

[3] Defendants also argue that the Plaintiff has brought this claim for common law nuisance "to avoid his own failure to seek administrative remedies" through proceedings in his municipality. [Defendants' Motion, pg. 15]. The Court is not certain how this argument is to be analyzed given the confines of how the Court in this Rule 12(b)(6) motion is obligated to analyze the pleadings and allegations in the light most favorable to Plaintiff.

record that had been presented to a jury in coming to its conclusion that the contractor was not an agent. The standard here compels the Court to decide whether Plaintiffs have set forth "elements of a cause of action or allege(s) facts that would enable the plaintiff to relief pursuant to some legal theory." *McCormick v. Crane*, 2012 ME 20, par. 5.

Plaintiffs have alleged just enough facts to withstand this motion at this stage. Depending on factual development, Defendants' legal challenge to Count II can be brought again at a later stage.

The entry will be: Defendants' Motion to Dismiss is GRANTED as to Count III but is DENIED as to Counts I and II. The Clerk may note this Order on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

__3/6/2020_____ **_____/S_____**

DATE **M. Michaela Murphy**

Justice, Business and Consumer Court

RANDY SLAGER
Plaintiff(s)
v.

LORI L. BELL and
JOHN W. SCANNELL
Defendant(s)

Randy Slager

Alan R. Atkins, Esq.
Fulton Rice, Esq.
100 Commercial St, Suite 305
Portland, ME 04101

Lori L. Bell
John W. Scannell

Daniel L. Rosenthal, Esq.
16 Middle Street, Unit 501
Portland, ME 04101