IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

MARK L. BEAM and TAMULA L. BEAM,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2179-S
CLOVERLAND FARMS DAIRY, INC., a corporation of the State of Delaware, trading as ROYAL FARMS STORES,	)	
Defendant.	)	

MASTER'S REPORT

Date Submitted: March 15, 2006
Draft Report: April 17, 2006
Final Report: September 6, 2006

Eric C. Howard, Esquire, Wilson, Halbrook & Bayard, Georgetown, Delaware; Attorney for Plaintiffs.

William L. Doerler, Esquire, White and Williams, LLP, Wilmington, Delaware; Attorney for Defendant.

GLASSCOCK, MASTER

In 1980, the defendant, Cloverland Farms Dairy, Inc., opened a small grocery store (the "Royal Farms" Store) of the kind known as a "convenience store" or "dairy market" in the town of Fenwick Island (the "Town"). The store is located directly off of Route 1, Sussex County's main coastal highway. The Royal Farms Store is east of the highway, in an area zoned commercial. A few hundred yards to the east of the Royal Farms Store is the Atlantic Ocean. Between the ocean and the Royal Farms Store is a residential area. In 1996, 16 years after the Royal Farms Store opened, the plaintiffs, Mark and Tamula Beam (the "Beams") bought a residential lot adjacent to the Royal Farms Store immediately to its east, and built a house on that lot. This house is the Beams' year-round residence; it is a three-story structure with outdoor decks at each level. From the upper stories, a view of the ocean is possible. Unfortunately for the Beams, the decks also overlook the flat roof of the single-story Royal Farms Store.

After the Beams moved into their home in 1996, they made numerous complaints to the defendant and to the Town of Fenwick Island about the method of operation of the Royal Farms store and its negative effect upon the Beams. These included the noise caused by late-night deliveries to the store, the placement of the garbage dumpsters and the fact the garbage at times overflowed the dumpsters, the bright lighting of the Royal Farms parking lot and the noise caused

by air conditioning and refrigeration compressors on the Royal Farms property. In the past few years, the defendant has taken a number of steps to remedy these problems. The defendant argues that it has done so as a good corporate citizen and neighbor. The Beams argue that the defendant has acted in the face of, or to forestall, legal actions such as the one before me. It is clear to me that Royal Farms has acted both in an attempt to placate a neighbor and to avoid legal action, and that there is nothing incompatible in those two motives.

While the actions of the defendant have alleviated most of the concerns and complaints of the Beams, one significant problem remains. On the roof of the Royal Farms Store are located the compressors for various air conditioning units and refrigeration units which are required for the operation of the grocery store. The noise of these units, particularly when they are all in operation, can be distinctly heard on the Beams' outdoor decks. The Beams argue that the invasion of their property by this noise amounts to a nuisance, and seek an order of this Court enjoining the nuisance. A trial was held on this issue, and the parties submitted post-trial briefing. This is my report after trial.

A number of changes to the status of the compressor equipment have occurred since the Beam house was erected in 1996. In 1999 the defendant expanded the store and replaced the 19-year-old compressors. Thereafter, in

response to the Beams' noise complaints, the defendant rotated the compressors 180 degrees, so that their noise discharged toward the highway rather than toward the Beams' home, and applied sound-deadening foam to the compressor housings in an attempt to limit the volume of the exhaust noise. The parties differ in their opinions as to whether these changes have resulted in a lessening of the noise experienced by the Beams. In reality, however, that question is largely moot, since the Beams are not seeking damages but rather an injunction to abate the compressor noise as it currently exists. At the parties' invitation, I visited the Beams' home and stood on the second and third story outdoor decks. I was able to experience for myself the compressor noise. Since my visit to the Beam home was on a pleasant, early summer day I assume that both the air conditioning and refrigeration units were running and the noise that I experienced was typical of the maximum noise to which the Beams are subject.

Injunctive Relief

The Beams seek injunctive relief here. In fact, the specific relief sought by the Beams is that the defendant be ordered to build a sound-deadening barrier wall or take such other affirmative steps as will eliminate the nuisance. This relief involves the extraordinary remedy of mandatory injunction. In order to be entitled

to a mandatory permanent injunction, the Beams must demonstrate that 1) a property right which they hold is being violated (success on the merits), 2) they will suffer irreparable harm absent the entry of the injunctive relief sought, and 3) the harm to them absent the relief sought outweighs the detriment to the defendant upon entry of the injunction. *E.g.*, Joyland Daycare Center v. Director of Department of Services for Children, Youth and Their Families, Del. Ch. No. 1782, Chandler, V.C. (Jan. 22, 1996)(Mem. Op.) at 2. Because the relief requested turns, in the first instance, upon whether the Beams have demonstrated that a nuisance exists, I turn first to an analysis of whether a nuisance has been demonstrated.

Nuisance

While the Beams' complaint argues that Royal Farms continues to cause both a public and a private nuisance, the evidence at trial was directed toward a theory of private nuisance, and in the Beams' opening post-trial brief it is solely the private nuisance theory which is advanced. Therefore, I will analyze the situation in light of the doctrine of private nuisance.

Delaware recognizes two types of private nuisance. A nuisance *per se* involves an interference with the property rights of another that is intentional; or

such an interference resulting from abnormally hazardous activity on the defendant's property; or such an interference in violation of a statute intended to protect public safety. That doctrine is inapplicable here. If the plaintiffs are to prevail here it must be under the doctrine of nuisance-in-fact. Under that doctrine, a claim of nuisance will lie where a defendant, although acting lawfully on his own property, permits acts or conditions "which become nuisances due to the circumstances or location or manner of operation or performance." Artesian Water Co. v. New Castle County, Del. Ch., C.A. No. 5106, Hartnett, V.C. (Aug. 4, 1983) (Mem. Op.) at 15, *citing* Hylton v. Shaffer's Market, Inc., Del. Supr., 343 A.2d 627, 629 (1975). In such a case, the plaintiff must prove by a preponderance of the evidence that the use made by his neighbor of the neighbor's property constitutes an *unreasonable* invasion of the plaintiff's property rights, recognizing that "the affairs of life … cannot be carried on without mutual sacrifice of comfort." Artesian (Mem. Op.) at 15, *citing* Tipping v. St. Helen's Smelting Co., 116 E.C.L. 608 (1863). This analysis—whether the conditions permitted to emanate from one property upon another are so unreasonable as to constitute nuisance-in-fact—involves a weighing of the facts and of the conflicting interests of the parties involved. Thus (and unlike the doctrine of trespass which involves an actual encroachment upon another's property) "it is the reasonable or proper enjoinment

of a plaintiff's property, and not some unqualified right to uninfringed use, which the doctrine of nuisance attempts to protect." Artesian (Mem. Op.) at 16.

It is clear that the noise generated from the operation of the defendant's grocery store is audible on the plaintiffs' outdoor decks. On my visit to the site, I experienced the noise as a moderately loud buzz or hum. The question, then, is whether, under the facts and taking into account the conflicting interests of the parties, the noise generated is an unreasonable impairment of the Beams' property rights.

There is nothing in the evidence suggesting that it is unusual for a grocery store of the type operated by the defendant to locate its refrigeration and air conditioning compressors on the roof. There is nothing in the record to indicate that this particular equipment is unusually loud for the type of grocery operation which the defendant maintains on its property, and, indeed, the evidence is that the defendant has taken those steps available to it at minimal cost to minimize noise (that is, rotating the compressors so that they discharge away from the plaintiffs' property and applying sound-deadening foam to the shrouds around the equipment). Nonetheless, the Beams argue that the record indicates the defendant's bad faith in this matter. The Beams' sound expert, Mr. Keller, testified that a sound deadening wall could be constructed on the Royal Farms property

which would lessen (but not eliminate) the noise of the compressors as heard on the Beams' decks.[1] They note that the defendant had sought a permit from the town to build a sound-deadening parapet wall and had sought bids on this project, only to nix the project when it learned that the contemplated wall would cost $40,000 to erect. Royal Farms strongly disputes that the project was shelved because of price alone, and points out that it had no assurance that the wall contemplated would reduce compressor noise to a level acceptable to the Beams. Even assuming, however, that cost was the sole factor motivating Royal Farms to abandon the parapet wall project, that does not to me indicate bad faith. Over the course of the several years between the time the Beams moved onto their property and the time this suit was filed, the defendant took a number of steps to try to placate the Beams. As I have said earlier, I assume that these steps were taken in part to maintain good community and neighborly relations, and in part to avoid the cost of a law suit and potential liability. The fact that Cloverland investigated erection of a parapet wall and then rejected it as too costly does not, to me, amount to an admission that a nuisance existed, or constitute bad faith in addressing the alleged nuisance.

[1] The Beams do not seek to enjoin Cloverland to stop operating compressors on the Royal Farms property, and implicitly recognize that such operation is indispensable to maintain a grocery on the site.

The Beams have a beautiful home with a number of unique amenities, including a view of the Atlantic Ocean. There are other characteristics of the Beams' lot which are not so positive, however. It is on the boundary between a commercial and residential area. It is a small lot, meaning that construction must necessarily closely abut that transitional line. The adjoining commercial lot is, and was at the time the Beams' house was constructed, occupied by a convenience-store-type grocery, with all the late hours, noise, lights and traffic incumbent in such an operation. Finally, the Beam lot is separated by only one lot from, and overlooks, a busy commercial highway. All of these attributes were known by the Beams when they bought their property and surely affected the market value of that lot.

Having visited the Beams' home and stood on the outdoor decks, I find that the noise from the Royal Farms compressors is loud and annoying. The decks, while not unusable, would certainly be a more pleasant and relaxing place in silence than they are at present. I note, however, that the Royal Farms Store is being operated in a commercial zone adjacent to a busy commercial highway, and that nothing in the record indicates that its method of operation is anything other than typical for the operation of a "convenience" grocery. That is, the annoyance and loss of function experienced by the Beams is that which one must anticipate in

purchasing a lot and constructing a residence adjacent to a commercial site. I do not find that the actions of Royal Farms in maintaining its compressor units, oriented as they are to direct sound toward the highway and operating in support of a business which is typical of the commercial strip in which it is located, to be unreasonable. Similarly, while it is clear that if the Beams had the legal right to silence their neighbor it would enhance the value and utility of their property, and while the sound on their decks is clearly an annoyance and no doubt limits the utility of those outdoor decks, I do not find the noise experienced by the Beams to be unreasonable under these circumstances. Because of this finding, I need not proceed to the other prongs of the mandatory injunction analysis.[2]

Conclusion

While I sympathize with the Beams, their choice of a building lot next to a commercial zone occupied by a grocery store made the foreseeable and reasonable detriments associated with such a location a feature of the property that they chose. At trial, the Beams argued that the diminution in their property value substantially

[2] Clearly, if the Beams had established a nuisance, they would also have established irreparable harm, in that any substantial interference with a property right works a harm in a manner not readily amenable to money damages.

outweighs the costs of ameliorating the buzzing of the compressors.[3] If that is the case, surely there is a market solution to the Beams' problem, if not a legal one. I encourage the parties to work together to make such a solution possible.

/s/ *Sam Glasscock, III*
Master in Chancery

efiled.

[3] In their exceptions to the draft version of this report, the Beams argued that the alleged differential between the diminution of their property value caused by the compressor noise (greater) and the cost of abating the noise (lesser) demonstrated that the noise amounted to a nuisance. The fundamental problem with this assertion is that such a differential, although asserted by the Beams, was not demonstrated by the evidence. Even if it had been, the differential, although relevant, would not of itself demonstrate a nuisance-in-fact.