COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT DEPARTMENT
CASE NO.

TOWN OF NORTH ATTLEBOROUGH,

Plaintiff,

v.

STEVEN R. BANKERT, DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-HE4, Mortgage Pass-Through Certificates, Series 2006-HE4, and JOHN DOES,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

For more than a decade, a 24-foot "pirate ship" floating structure (the "Float") has plagued the waters of Falls Pond, which waters are owned by Plaintiff Town of North Attleborough (the "Town"). The Float was built by Defendant Steven R. Bankert in defiance of orders issued by the Town's Conservation Commission and has been maintained on Falls Pond since February 7, 2016 in defiance of an order of the District Court Department of the Trial Court. On several occasions over the past decade, and most recently during the summer of 2023, the Float has broken loose of its moorings near real property along Falls Pond previously owned by Bankert and now owned by Defendant Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-HE4, Mortgage Pass-Through Certificates, Series 2006-HE4 ("Deutsche Bank, as Trustee"). Because Bankert has refused to remove the Float from Falls Pond or identify the Float's current owner (as he now claims he ceased to own the Float in early 2020), and because the Float's continued presence poses danger to persons and property, the Town now seeks an

injunctive order authorizing the Town to seize and dispose of the Float, with all expenses borne by the Float's owner(s), pursuant to the Court's general equity powers in this quasi-in-rem action under Gulda v. Second National Bank of Boston, 323 Mass. 100 (1948).

BACKGROUND

Falls Pond is a public body of water located in the Town on real estate owned by the Town. See Affidavit of Shannon Palmer, Conservation Administrator ("Palmer Aff.") ¶ 3. It is subject to the Town Conservation Commission's Rules and Regulations Governing Structures on Falls and Whiting's Ponds. Id.; Complaint, Exs. A-B. Up until at least 2020, Bankert owned the Float, which was moored on Falls Pond at a location adjacent to real property that Bankert then owned located at 42 Pratt Lane, North Attleborough, Massachusetts. Palmer Aff. ¶ 4. The Float is not, in fact, a ship and, indeed, is not a seaworthy vessel. Id. ¶ 5. The Float has no means of propulsion, and the Massachusetts Department of Environmental Protection has refused to let Bankert register the Float as a boat or to issue a hull identification number for the Float. Id.

The Float—for which Bankert did not apply or obtain any permitting—is the subject of a decade-plus-long dispute between the Town and Bankert. See Palmer Aff. ¶¶ 6-7. On July 12, 2012, the Town's Conservation Commission—which has the authority to regulate activity on Falls Pond—issued Bankert a Notice of Violation in which Bankert was ordered to stop work on construction of the Float. Id. ¶ 7; see Complaint, Ex. C. Bankert disregarded the Conservation Commission's Notice of Violation, leading to a hearing before the Conservation Commission in September 2012. See Palmer Aff. ¶ 8. At the hearing, Bankert represented to the Conservation Commission that he would remove the Float by October 31, 2012, but he did not do so. Id. ¶¶ 9-10.

On June 21, 2013, the Town's Conservation Commission issued Bankert a Violation Notice/Cease and Desist, in which the Commission's Conservation Agent informed Bankert that

the Float violated the Commission's Rules and Regulations Governing Structures on Falls and Whiting's Ponds and ordered Bankert to remove the Float from Falls Pond. See Palmer Aff. ¶ 11; Complaint, Ex. D. Bankert did not remove the Float from Falls Pond and the Commonwealth of Massachusetts took out an eight-count criminal complaint against Bankert in 2014, Case No. 1434CR001712. See Palmer Aff. ¶ 12. In January 2016, after the Commonwealth moved to decriminalize each count pursuant to G.L. c. 277, § 70C, and proceeded with a civil bench trial, the District Court Department of the Trial Court found Bankert in violation of the Town's regulations and found that Bankert had refused to comply with the orders of the Town's Conservation Commission. Id. ¶ 13; see Complaint, Ex. E. Although the District Court concluded that it lacked equity jurisdiction to order the removal of the Float, the District Court "notified" Bankert "of his obligation to remove" the Float from Falls Pond and ordered him subject to a fine of $100 per day for each day after February 7, 2016, that Bankert failed to comply. See Complaint, Ex. E at p. 4. Bankert did not remove the Float from Falls Pond by February 7, 2016, notwithstanding the District Court's order. See Palmer Aff. ¶ 14.

In May 2020, title to Bankert's property at 42 Pratt Lane transferred to Deutsche Bank, as Trustee pursuant to a foreclosure deed registered with the Bristol County North Registry of Deeds at book 25936, page 7. See Palmer Aff. ¶ 15. In the spring of 2023, the Float broke loose from its mooring adjacent to 42 Pratt Lane and began floating around Falls Pond. Id. ¶ 16. This was not the first time that the Float has broken loose of its mooring adjacent to 42 Pratt Lane, as noted in the District Court's January 2016 Decision and Order in Case No. 1434CR001712. Id. ¶ 17; see Complaint, Ex. E, at p. 2; Affidavit of Mark L. Hollowell, Director of Public Works ("Hollowell Aff.") ¶ 3. Moreover, in May 2016, the Float broke loose of its mooring and ran into a high hazard potential classification dam on Falls Pond, as referenced in a May 16, 2016 article

of The Sun Chronicle, and as reflected in the photograph below, which was published in The Sun Chronicle.[1] See Palmer Aff. ¶ 18; Hollowell Aff. ¶ 4.

On June 2, 2023, the Town's Conservation Administrator sent Bankert a letter advising Bankert of the fact that the Float had broken loose and directing Bankert to remove the Float from Falls Pond. See Palmer Aff. ¶ 19; Complaint, Ex. F. According to a message that Bankert submitted to the Conservation Administrator through the Town website on or about June 6, 2023, in "early 2020"—around the time of the foreclosure of Bankert's property at 42 Pratt Lane—Bankert ceased to own the Float. Id. ¶ 20. Bankert also represented that he would forward the Conservation Administrator's June 2, 2023 letter to the purported new owner of the Float. Id. Despite claiming not to own the Float, Bankert also represented (incorrectly) that the Float had been moved approximately two weeks prior and that it was secure. Id. A screenshot of Bankert's message (with his email address redacted) follows:

[1] Available at https://www.thesunchronicle.com/news/local_news/falls-pond-pirate-ship-goes-adrift-lands-at-dam/article_cd958aae-41a2-5355-8b5e-d86c33b0834a.html (last visited Dec. 15, 2023).

Contact Shannon Palmer

Your Name	Steven Bankert
Your Email Address	[redacted]
Subject	Your Letter
Message	I received your letter today, It is dated last Friday and had a deadline of yesterday. I have not owned the pirate ship since early 2020. I will forward the letter to its owner. I disagree that the ship is loose on Falls Pond. It was moved about 2 weeks ago, it is secure and has not moved since. The police were mis-informed and it is posible you were mis-informed too. There in no safety or environmental issue. I had before and will again convey your desire to have the ship removed soon, I had expected it would have been between January and March but that, and other scheduled work, did not happen. Your letter may move things along.
Attachments	*Field not completed.*

Despite repeated requests from the Town, Bankert has refused to identify the purported current owner(s) of the Float. See Palmer Aff. ¶ 21. On July 6, 2023, the Town sent Bankert a last and final order to remove the Float from Falls Pond or identify the current owner(s) of the Float within thirty (30) days. Id. ¶ 22; Complaint, Ex. G. Neither Bankert nor any other unidentified owner removed the Float from Falls Pond by August 7, 2023, as reflected in the picture below, which was taken on August 9, 2023. See Palmer Aff. ¶ 23.

As of the date of the Town's Complaint, Bankert has not identified the current owner(s) of the Float. See Palmer Aff. ¶ 24; Affidavit of Christopher Sweet, Treasurer/Collector ("Sweet Aff.") ¶ 5. Bankert also has not paid the Town any portion of the $100-per day fine assessed by the District Court for Bankert's failure to remove the Float from Falls Pond by February 7, 2016. See Sweet Aff. ¶¶ 3-4. As reflected in the picture below, which was taken on November 13, 2023, the Float remains on Falls Pond. See Palmer Aff. ¶ 25.

The Float's presence on Falls Pond poses a significant safety issue, especially when it is not moored. See Hollowell Aff. ¶ 5. The Float presents a danger to the Town's first responders in the event of an emergency on or near Falls Pond. Id. ¶ 6. The Float also presents a danger to the Town's residents that use Falls Pond for recreation and/or live on property adjacent to Falls Pond. Id. ¶ 7. If the Float breaks loose again and penetrates the dam on Falls Pond, there is a significant likelihood that the Float will cause damage to person or property. Id. ¶ 8.

ARGUMENT

I. STANDARD OF REVIEW

When requesting preliminary injunctive relief between private parties, the moving party

must demonstrate: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm without injunctive relief; and (3) that the anticipated harm to the moving party outweighs the harm the opposing party will suffer if enjoined. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). However, the standard for injunctive relief differs where, as here, the party requesting injunctive relief is a governmental entity.

The Supreme Judicial Court has held that, where a municipal party is requesting injunctive relief, irreparable harm and balancing of equities are not elements of the analysis. Rather, in such circumstances, the determination is whether: (1) the moving party has shown a likelihood of success on the merits; and (2) the moving party's requested relief "promotes the public interest, or, alternatively, will not adversely affect the public." LeClair v. Town of Norwell, 430 Mass. 328, 331-32 (1999), citing Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984); Edwards v. Boston, 408 Mass. 643, 646-47 (1990) (noting that the issue of irreparable harm is not a required element for injunctive relief). In this case, the Town meets both requirements.[2]

II. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

There is a clear and unequivocal public interest in granting the injunctive relief requested by the Town. Risk of harm to the public interest is an appropriate factor to be considered by a Court when determining whether a preliminary injunction should issue in favor of a municipality. Brookline v. Goldstein, 388 Mass. 443, 447 (1983). Here, allowing the Float to remain on Falls Pond, with no identified owner taking responsibility for the Float, would harm the public interest in several respects.

As explained in the Town Conservation Administrator's affidavit, the presence of the Float

[2] The Court may enter the injunctive relief sought by the Town without the need for a jury trial. See, e.g., Town of Hull v. Kansky, 92 Mass. App. Ct. 1128, at *1 (Feb. 21, 2018) (Rule 1:28 decision) (recognizing that equitable action to restrain a public nuisance can proceed as a bench trial).

on Falls Pond has been the subject of dispute for over a decade. See Palmer Aff. ¶¶ 7-25. The Float has broken loose of its moorings several times and, at least once, struck a high hazard potential classification dam that the Town's Department of Public Works maintains along with the Conservation Commission. Id. ¶¶ 16-19; Hollowell Aff. ¶¶ 3-4. The presence of the Float, with no one apparently taking responsibility for it, poses a safety concern in and of itself given the recreational uses of Falls Pond and the fact that a number of residences exist on property adjacent to Falls Pond. See Hollowell Aff. ¶¶ 5-7. Simply put, it could cause significant injury to a Town resident or first responder if it breaks loose again and travels freely along the waters of Falls Pond. Id. And, should it strike the dam on Falls Pond, it could penetrate the dam and cause injury to person or property, including without limitation environmental damage and disruption of lifeline facilities. Id. ¶ 8.

Moreover, prior efforts to remove the Float have been unsuccessful. For example, Bankert disregarded the Town Conservation Commission's violation notices and enforcement efforts in the immediate aftermath of the construction of the Float, even falsely representing to the Commission that he would remove the Float (he did not). See Palmer Aff. ¶¶ 7-12. This, in turn, resulted in District Court proceedings that led to an order that Bankert be fined $100 each day after February 7, 2016, that the Float remained on Falls Pond, which Bankert also disregarded. See id. ¶¶ 12-13; see also Complaint, Ex. E. The only reason the District Court did not expressly order the Float removed was because it lacked the equitable powers to do so. More than seven years later, Bankert has failed to pay the fine (which now totals $287,300 as of December 20, 2023), remove the Float from Falls Pond, or identify its current owner(s) after claiming he no longer owns the Float. See Palmer Aff. ¶¶ 14-25; Sweet Aff. ¶¶ 4-5; Hollowell Aff. ¶¶ 3-4. In light of the Float's continued presence on Falls Pond, the Town now turns to this Court and its equitable powers as a last resort

in its decade-plus effort to police the waters of Falls Pond.

Given that the issuance of the requested injunction is in the public interest, the Court should allow the Town's motion.

III. THE TOWN IS LIKELY TO SUCCEED ON THE MERITS

The Town has a strong likelihood of success on the merits of its claims for equitable relief against the Float in the nature of quasi-in-rem. Such relief is designed to determine the ownership of personal property and seek judicial authorization, through the Court's general equity powers, to seize and dispose of such property. See Gulda, 323 Mass. at 104-105 ("The injunction against the bank was a sufficient seizure of the property to give jurisdiction to determine the rights of claimants in this specific property."). That is exactly what the Town seeks here, as a way of resolving the decade-long ordeal caused by the Float.

Such relief is entirely appropriate here because the Float's continued presence on Town property is public a nuisance. It is well established that "property may not be used to maintain a public nuisance" and, as such, governmental bodies "may destroy private property without compensation if necessary to abate such a nuisance." Evans v. Mayer Tree Serv., Inc., 89 Mass. App. Ct. 137, 147-148 & n.20 (2016). A nuisance becomes public "when it interferes with the exercise of a public right by directly encroaching on public property." Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court, 448 Mass. 15, 34 (2006), quoting Connerty v. Metropolitan Dist. Comm'n, 398 Mass. 140, 148 (1986). Obstruction of public property, such as a public way—or here, a public body of water and a public dam—constitutes a public nuisance that the Town may seek to enjoin without having to wait until it has incurred repair expenses or liability to others. Id. ("the question is whether the activity itself is so unreasonable that it must be stopped"); see Stop & Shop Cos. v. Fisher, 387 Mass. 889, 894 (1983); Town of Dartmouth v. Silva, 325 Mass. 401, 404-405 (1950). When the Float breaks loose of its moorings and, in particular, when it strikes

the Falls Pond dam, it obstructs public property and creates significant risk of damaging the Town's property or the property of the abutters of Falls Pond, or worse, causing personal injury. The Town "should not be required to wait until it has incurred … expense or liability before it can have a remedy" against the nuisance caused by the Float. Town of Dartmouth, supra.

Even if the Float's presence on Falls Pond does not rise to the level of public nuisance (which it does), the Float is trespassing on Town property. See Rattigan v. Wile, 445 Mass. 850, 856 n.13 (2006) (noting that trespass is "actionable regardless of whether the conduct is reasonable or the harm measurable"). The "erection of a permanent structure" on property belonging to another is a continuing trespass that "continues as long as the offending structure remains." Porter v. Clarendon Nat'l Ins. Co., 76 Mass. App. Ct. 655, 659 (2010). Injunctive relief is an appropriate remedy for a continuing trespass. See Amaral v. Cuppels, 64 Mass. App. Ct. 85, 91 (2005) ("the regular and frequent nonpermissive propulsion of physical objects onto an adjacent property constitutes a continuing trespass"). Here, there can be no dispute that the Float has been trespassing on Town property, namely Falls Pond, for over a decade and continues to do so to this day. See Palmer Aff. ¶¶ 3-25.

Finally, the Float's presence on Falls Pond violates the Town Conservation Commission's Pond and Beach Rules and Regulations. Those Rules and Regulations prohibit anyone from constructing "any structure(s)" on Falls Pond without a permit issued by the Commission. See Complaint, Ex. A, § 3.1; Ex. B., § 3.1. But Bankert did not obtain any permit to construct the Float. See Palmer Aff. ¶ 6. And, as noted above, he has disregarded the efforts of the Town, the Commonwealth of Massachusetts, and the District Court to enforce the Rules and Regulations.

Critically, the ownership of the Float is unknown to the Town, so proceeding quasi-in-rem under Gulda is the appropriate process for the Town to exercise its authority to abate the nuisance

and trespass caused by the Float. Although Bankert built the Float and moored it adjacent to his property at 42 Pratt Lane for years, ownership of that real property transferred to Deutsche Bank, as Trustee in May 2020 pursuant to a foreclosure deed. See Palmer Aff. ¶¶ 4, 6, 15; Hollowell Aff. ¶ 3. And when the Town's Conservation Administrator sent Bankert a letter in June 2023 advising him that the Float had broken loose again, Bankert responded that he ceased to own the Float in "early 2020"—around the time of the foreclosure of 42 Pratt Lane. See Palmer Aff. ¶ 20. Bankert, however, has refused to identify the current owner(s) of the Float. Id. ¶ 20-21, 24; see Sweet Aff. ¶ 5. As such, the Town is entitled to relief quasi-in-rem under Gulda in order to seize and dispose of personal property in the form of the Float.

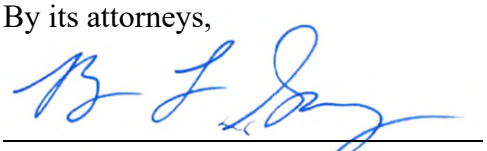
CONCLUSION

For the foregoing reasons, the Court should allow the Town's motion and issue the requested injunctive relief.

Respectfully submitted,

TOWN OF NORTH ATTLEBOROUGH

By its attorneys,



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Appendix

92 Mass.App.Ct. 1128
Unpublished Disposition

Appeals Court of Massachusetts.

TOWN OF HULL
v.
Gail R. KANSKY.

16–P–1689
|
Entered: February 21, 2018

By the Court (Sullivan, Neyman & Lemire, JJ.[1])

[1] The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** In August, 2012, the plaintiff, town of Hull, filed an action in Housing Court seeking to permanently enjoin the defendant, Gail R. Kansky, from excessively feeding birds at her residential property. The two-count complaint alleged that Kansky's bird feeding violated provisions of the State sanitary code and town by-law, and created and maintained a public nuisance. After a two-day bench trial the judge entered a permanent injunction, enjoining Kansky and family members from feeding wild birds or fowl from her premises using any bird feeder or similar device or by hand. Kansky appeals from the judgment. The only question now before us is whether the trial judge properly denied Kansky's jury trial demand. We affirm.

Article 15 of the Massachusetts Declaration of Rights provides a right to a jury trial "[i]n all controversies concerning property, and in all suits between two or more persons." The present matter—an action in equity by a municipality to enjoin a public nuisance—does not involve a suit between two or more persons within the meaning of art. 15. Compare Commonwealth v. Mongardi, 26 Mass. App. Ct. 5, 8 (1988) (motor vehicle infraction). Likewise, and despite Kansky's assertion that the order entered infringes on her right to "feed[ ] and enjoy[ ] wildlife," this matter does not involve a controversy concerning "property" within the meaning of art. 15. See and compare Attorney Gen. v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, 363 (1882) (allegation that draining of pond would "create a public nuisance" brought the case "within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances"); Chase v. Proprietors of Revere House, 232 Mass. 88, 99 (1919) (house of prostitution; "The jurisdiction of a court of equity over nuisances had been recognized and established before the adoption of our Constitution, and the remedy being purely equitable, ... the motion for a jury trial [was] denied rightly"); Commonwealth v. Ferreri, 30 Mass. App. Ct. 966, 968 (1991) (where order entered compelling defendant to "forthwith" remove his dogs from his property, defendant had no jury trial right). Cf. Krasnecky v. Meffen, 56 Mass. App. Ct. 418, 423 (2002) (in "the absence of statutory authority," owner may not recover money damages on "loss of consortium claims related to the death of the sheep").

Nor are we convinced that there exists an "analogous civil proceeding[ ] ... at common law which required a jury trial." Mongardi, 26 Mass. App. Ct. at 8. On the contrary, as the foregoing authorities demonstrate, it has long been understood that "an injunction against the future maintenance of a public nuisance may properly be entered without the involvement of a jury." Commonwealth v. United Food Corp., 374 Mass. 765, 778 (1978). Compare Parker v. Simpson, 180 Mass. 334, 355 (1902) (master ordered defendant in estate proceedings to pay money damages; despite contested factual questions matter was "[b]oth as to subject matter and the remedy sought ... well within chancery jurisdiction" and defendant had no absolute right to a jury trial). The present matter, as noted, is in essence an action by a municipality to prospectively enjoin a public nuisance. As such, and notwithstanding that contested issues existed below as to whether Kansky's acts in fact created a public nuisance, this matter is a proceeding well within equity jurisdiction as it

existed when the Commonwealth adopted its Constitution and that, therefore, may be resolved "without the involvement of a jury." United Food Corp., 374 Mass. at 778.

***2** The authorities cited by Kansky are not to the contrary.[2] Unlike in the matters cited, the town here made no demand for money damages or such other relief as might have been available at common law, and no such remedy entered. Nor can we conclude on the record provided that the judge's considered decision to reject Kansky's jury trial demand was so idiosyncratic, arbitrary, or capricious as to constitute an abuse of discretion. See G. L. c. 185C, § 21, inserted by St. 1978, c. 478, § 92 ("All cases in the housing court department ... shall be heard and determined by a justice ... sitting without jury, except that in all cases where a jury trial is required by the constitution of the commonwealth or of the United States and the defendant has not waived his rights to a trial by jury, the cause shall be forthwith tried ... before a jury" [emphases supplied]).

2 See Brayton v. Fall River, 113 Mass. 218, 230 (1873) (private action at law for money damages arising from defendant's acts that reduced water depth at plaintiff's wharf, rendering plaintiff's use of wharf difficult or impossible); Sawyer v. State Bd. of Health, 125 Mass. 182, 189, 192 (1878) (statute provided for jury review on appeal of order imposing conditions on assignment of slaughterhouse); Powers v. Raymond, 137 Mass. 483, 486 (1884) (debt collection matter; "The rights sought to be determined and enforced are essentially legal"); Carleton v. Rugg, 149 Mass. 550, 557–558 (1889) (court did not decide whether property owners had jury trial right in action by private persons to abate alleged nuisance from illegal sale of alcohol where operative facts admitted); Dalis v. Buyer Advertising, Inc., 418 Mass. 220, 222 (1994) (article 15 guarantees jury trial in "all ... cases and controversies ... unless the case was one in which a court of equity in either England or Massachusetts would have exercised jurisdiction in 1780" [emphasis supplied]); New Bedford Hous. Authy. v. Olan, 435 Mass. 364, 371 (2001) ("the right to trial by jury generally does not extend" to actions in equity).

To the extent made, we need not consider Kansky's "takings" argument; the record before us fails to demonstrate she raised it below. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006). To the extent we have not specifically commented on Kansky's remaining arguments, we have considered them and have found them to be without merit.

Judgment affirmed.

All Citations

92 Mass.App.Ct. 1128, 102 N.E.3d 1032 (Table), 2018 WL 988300

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