

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: January 13, 2009
Decided: January 27, 2009

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1200 Pennsylvania Avenue
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John P. Bare
341 Skyline Orchard Drive
Hockessin, DE 19707

Re: *Casale, et al. v. Bare, et al.*
Civil Action No. 4261-CC

Dear Counsel and Mr. Bare:

I. INTRODUCTION

I have reviewed and considered the papers filed by plaintiffs Anthony and Kimberly Casale on December 30, 2008, in support of their motion to expedite this proceeding and their motion for a temporary restraining order, along with the letters submitted in opposition by defendant John Bare. For the reasons set forth below, I decline to issue a temporary restraining order. I also deny Casales' motion for expedited proceedings.

II. BACKGROUND

This action concerns a neighborly dispute between two owners of adjoining lots. Plaintiffs bring this action seeking a temporary restraining order to enjoin Bare from maintaining an electrified fence constructed on his property. The Casales own and reside at Lot No. 26 in the Skyline Orchard subdivision. Kimberly Casale has owned the property since November 1999. Bare owns and resides at Lot No. 15 in the Skyline Orchard subdivision. He has owned his property since March 1997.

Since its construction, the Skyline Orchard subdivision has been subject to various deed restrictions and property covenants as set forth by the original developers and modified over time by the neighborhood's home owners association, Skyline Orchard Association ("SOA").

The Casales live in their home with four children, ranging in age from one to five years. The Casales' property slopes down toward the Casale-Bare property line. The children often play in the yard and the Casales fear that the children could hurt themselves on Bare's fence.

In 2005, Bare installed an electrified fence entirely on his property and in the vicinity of plaintiffs' property, but located several yards away from the actual property line. Between the fence and the Casales' property are vegetation and bushes. Bare describes the fence as a "portable electronic device" ("PED") because the fence is easily portable and a non-permanent structure. Bare installed the fence to deter deer from entering and pillaging his property. Bare maintains that the fence does not create a dangerous situation for the Casales' children because the electric shock is extremely mild and only flows through the fence about .01% of the time.

The Casales have repeatedly asked Bare to move his fence away from the property line so that it is less of a danger to their children. The Casales have also requested the SOA to remove the fence because it violates the neighborhood's restrictive code. Both have declined to remove the fence. On January 6, 2009, the Executive Committee of the SOA issued a written opinion that it would not object to PED installations because PED's were not subject to SOA deed restrictions and that Bare's fence is not in violation of the deed restrictions.

III. ANALYSIS

A. *Temporary Restraining Order*

To issue a temporary restraining order, the Court generally considers three factors: “the imminence and significance of plaintiffs claim of irreparable injury; the probable merits of plaintiffs claim; and the risks to defendant in the event a restraining order were issued and it ultimately was determined that the restraining order was improvidently issued.”¹

Plaintiffs will probably not prevail on the merits of their claim that Bare violated his deed restrictions because Bare’s fence is not contrary to the SOA’s written opinion that PED’s are acceptable under its restrictive covenants. Furthermore, I also believe that it is unlikely that Bare’s fence constitutes a nuisance. A nuisance is “anything from which results harm, inconvenience or damage, or which materially interferes with the enjoyment of rights and property.”² Contrary to plaintiffs’ allegations, it appears that the threatened risk of harm is *de minimis*. The fence is located at a considerable distance from the Casales’ property and it appears that a significant amount of vegetation separates the fence from the actual property line. In addition, the fence itself produces only a minor electric shock which only cycles periodically through the wire. I am unconvinced that Bare’s fence poses any harm to the Casales or their children. At this stage, however, I need only reach this conclusion on a provisional basis.

B. *Motion for Expedited Proceedings*

To grant a motion for expedited proceedings, the Court must find some imminent circumstance demanding immediate action.³ Additionally, plaintiffs must show a “sufficient possibility of a threatened irreparable harm.”⁴ As stated above, plaintiffs have failed to show how they will suffer irreparable harm from a fence that poses little to no danger, especially to

¹*Kahn v. McCarthy*, C.A. No. 4054, 2008 WL 4482704, at *2 (Del. Ch. Sept. 24, 2008) (quoting *Newman v. Warren*, 684 A.2d 1239, 1244 (Del. Ch. 1996)).

²*Leitstein v. Hirt*, C.A. No. 1469, 2006 WL 2986999, at *2 (Del. Ch. Oct. 12, 2006).

³*See Greenfield v. Caporella*, 1986 WL 13977, at *2, (Del. Ch. Dec. 3, 1986).

⁴*Mark Prods., Ltd. v. Stuffit of Long Island*, C.A. No. 18982, 2002 WL 244861, at *1 (Del. Ch. Feb. 4, 2002) (quoting *Giammargo v. Snapple Beverage Corp.*, C.A. No. 13845, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994)).

children who are well supervised and prevented from trespassing onto neighboring property. Plaintiffs have also failed to demonstrate the exigency of this present situation. Bare erected his fence over three years ago. If plaintiffs were facing any imminent danger they would not have waited three years to file this complaint. I therefore reject the claim that imminent circumstances exist in this case that demand an expedited review.

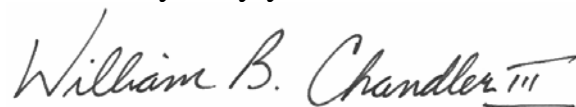
Defendant has moved to dismiss all claims in this action under Rule 12(b)(6). Plaintiffs shall respond to the motion within fourteen days from this date.

IV. CONCLUSION

For the foregoing reasons, the plaintiffs' motion for a temporary restraining order is DENIED; the plaintiffs' motion for expedition is also DENIED on the terms described herein. Both sides will bear their respective costs.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and includes a horizontal line at the end.

William B. Chandler III

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