SECOND DIVISION
December 4, 2012

No. 1-12-0435
2012 IL App (1st) 120435-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WARREN R. GARLICK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 11 L 003259
	)	
KRISTIN BAILITZ,	)	Honorable
	)	Kathy Flanagan,
Defendant-Appellee,	)	Judge Presiding.
	)	
(Dan Leopold,	)	
	)	
Defendant.)	)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

ORDER

Held: Plaintiff's request for punitive damages for trespass to property was properly stricken and his private nuisance claim was properly dismissed for failure to state a claim.

¶1 Plaintiff Warren R. Garlick sued defendant Kristin Bailitz for trespass to property and private nuisance following a series of incidents in which visitors to defendant's home allegedly parked in plaintiff's driveway without his permission. The circuit court dismissed the portions of the complaint directed at defendant, and we affirm.

¶2 Plaintiff and defendant are neighbors. Plaintiff's house is a single-family residence located in River Forest, Illinois, and in April 2005, defendant bought the house next door. The

houses are relatively close together and are only separated by plaintiff's driveway, which leads from the street to his garage. The location of the driveway is central to the parties' dispute, and the complaint helpfully included the following picture as an exhibit. Plaintiff's house is on the left and defendant's house is on the right:

As can be seen in the photograph, the main entrance to defendant's house is immediately adjacent to plaintiff's driveway.

¶3 The trouble in this case began on the very day that defendant moved in. According to the complaint, sometime in May 2005, plaintiff heard his doorbell ring but did not answer the door. After hearing noises outside, however, plaintiff noticed that some vehicles were parked outside in his driveway where defendant and some other people were unloading items and moving them into defendant's house. Plaintiff was not happy about having his driveway blocked by defendant, but he did not tell her to move her vehicle at the time. Sometime later, plaintiff's wife informed defendant that plaintiff did not want anyone else using his driveway.

¶4 Several months later, plaintiff saw a carpet-cleaning van parked in his driveway. Plaintiff confronted the driver, who told plaintiff that he was waiting for defendant to come to her door. After what the complaint describes as a "vocally angry encounter," the driver moved the vehicle out of the driveway at plaintiff's request.

¶5 Nearly four years passed without incident, but in January 2009, plaintiff noticed another vehicle parked in his driveway, and he saw defendant standing next to the vehicle and talking to the driver. Plaintiff did not ask the vehicle to move, nor did he apparently ever mention the incident to defendant (though the complaint contends that defendant "was aware that [p]laintiff was observing her").

¶6 About nine months later, in September 2009, plaintiff returned home to find another vehicle in his driveway. Plaintiff parked his own vehicle behind the other vehicle and confronted the driver in what the complaint again describes as a "vocally angry encounter." The other driver asked plaintiff to move his vehicle so that the driver could move his car out of the driveway, but plaintiff refused and instead went into his house. Plaintiff later saw that the other driver had left, apparently by maneuvering his vehicle around plaintiff's vehicle. Plaintiff also

confronted defendant about this incident, and she assured plaintiff that she would remind her visitors to park in the street.

¶7 The final incident happened over a year later in December 2010, when plaintiff discovered another carpet-cleaning van parked in his driveway. The van's driver was codefendant Dan Leopold (who is not a party to this appeal). During yet another "vocally angry encounter" with Leopold, defendant intervened and stated that she had directed Leopold to park where he did. After a rather heated argument with Leopold, plaintiff retreated to his home while Leopold moved the van to a parking spot on street.

¶8 Six months later, plaintiff filed this lawsuit against defendant and Leopold, alleging trespass to property and private nuisance, along with a request for an injunction. Notably for purposes of this appeal, the trespass count did not seek compensatory damages but instead asked for $25 in nominal damages and $250,000 in punitive damages. On defendant's motion, the circuit court struck plaintiff's request for punitive damages on the trespass count and dismissed the private nuisance count for failure to state a claim. (Leopold was served but never appeared, and plaintiff eventually won a default judgment of $25 plus costs against him.)

¶9 We review dismissal pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)) *de novo*, "accept[ing] as true all well-pleaded facts in the complaint and all reasonable inferences that may be drawn therefrom. In addition, we construe the allegations of the complaint in the light most favorable to the plaintiff." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47. On appeal, plaintiff has abandoned his request for an injunction and focuses on his claims for trespass and nuisance.

¶ 10 Regarding the trespass count, plaintiff takes issue only with the circuit court's decision to strike his request for punitive damages. We accordingly limit our review to only this question.[1] Plaintiff argues that punitive damages are available for claims that seek only nominal damages, and that therefore the circuit court erred by striking his punitive damages demand in this case. Plaintiff offers no Illinois case law for this assertion, offering only an extensive discussion about irrelevant foreign cases. But even had he supported his argument with relevant precedent, he misses the point. Punitive damages are available for torts committed in Illinois regardless of whether a plaintiff seeks compensatory damages or merely nominal damages (see *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 133 (2008)), but only in limited circumstances. Punitive damages "are not a favorite in the law. No plaintiff has a vested right to punitive damages. Such damages are assessed in the interest of society to punish the defendant and to warn him and others that his acts are offensive to society. [Citation.] Where a wrongful act is accompanied by aggravating circumstances such as wilful, wanton, malicious or oppressive conduct, punitive damages should be allowed." *First National Bank v. Amco Engineering Co.*, 32 Ill. App. 3d 451, 455 (1975); see also *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186 (1978) (punitive damages are available only "when torts are committed with fraud, actual malice, *** or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.").

¶ 11 The key to the analysis for punitive damages in this case is determining whether the facts as alleged in the complaint allege a trespass by defendant that was "wanton, malicious or oppressive." For instance, we found that punitive damages were available for trespass in *First National Bank* because the defendant in that case deliberately entered the plaintiff's property and

[1] Nowhere in his brief does plaintiff raise the issue of whether the rest of the count, which included a request for nominal damages for the alleged trespasses, should have been dismissed. That issue is therefore forfeit and we do not reach it. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

harvested a number of trees. See *First National Bank*, 32 Ill. App. 3d at 455. Similarly, we found punitive damages to be available in *Rodrian v. Seiber*, 194 Ill. App. 3d 504, 509-10 (1990), where the defendant repeatedly and deliberately crossed onto the plaintiff's land over a period of two months in order to construct a road on his own property, in the process bulldozing a number of trees and a portion of the landscape on plaintiff's property.

¶ 12 Unlike those cases, there are no allegations in the complaint that could possibly support a finding that defendant's conduct here was wanton, malicious, or oppressive. Plaintiff complains about five trespassory incidents that occurred over a span of six years. Of those, only one (the first) directly involved defendant or her vehicle, and the complaint concedes that plaintiff did not ask defendant to remove her vehicle from the driveway and only later complained to defendant about it. Three of the remaining four incidents involved the driveway being blocked by vehicles that were neither driven by nor otherwise under the control of defendant. Plaintiff contends in his brief that defendant was nonetheless responsible for those alleged trespasses because she had some unspecified duty to keep visitors away from defendant's driveway, but plaintiff offers no citation in support of vicarious liability for trespass under such circumstances. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 13 The only incident that could conceivably support plaintiff's position is the last one, which involved Leopold. The complaint alleges that defendant specifically told Leopold to park in plaintiff's driveway, meaning that defendant could potentially be vicariously liable for Leopold's alleged trespass. See *Dietz v. Illinois Bell Telephone Co.*, 154 Ill. App. 3d 554, 559 (1987) ("One can be liable in trespass for an intrusion by a thing or third person if he acts with knowledge that his conduct will, to a substantial degree of certainty, result in the intrusion."). Potential vicarious liability for trespass does not, however, automatically translate into potential

liability for punitive damages. The complaint alleges that although defendant directed Leopold to park in the driveway, Leopold moved the vehicle immediately after plaintiff asked him to. Moreover, there is no indication anywhere in the complaint that plaintiff's access to his garage was impeded, and the complaint concedes that plaintiff suffered nothing more than nominal damages from the alleged trespass. Unlike the repeated and destructive trespasses at issue in *First National Bank* and *Rodrian*, the two trespasses that could be attributed to defendant in this case were fleeting, cursory, and *de minimus*. There are no facts in the complaint that could possibly support a finding that defendant's conduct was so egregious that punitive damages would be appropriate. The circuit court was correct to strike plaintiff's request for punitive damages on the trespass count against defendant.

¶ 14 Turning to the nuisance count, this count was pled in the alternative to the trespass count and relies on essentially the same facts. But it also suffers from many of the same infirmities that we mentioned above, particularly the lack of involvement by defendant in three of the five incidents. Although plaintiff contends that defendant can be vicariously liable for nuisance committed by third parties, the only Illinois case that he offers for this proposition is factually inapposite. See *Statler v. Catalano*, 167 Ill. App. 3d 397 (1988) (joint tenants liable as joint tortfeasors for nuisance).

¶ 15 But even if we assume for the sake of argument that defendant could be responsible for the actions of the people who actually parked in plaintiff's driveway, the fatal flaw in this count is that it simply fails to establish that the parked cars were a nuisance. "A private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land. The invasion must be: substantial, either intentional or negligent, and unreasonable." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 204 (1997). Although both trespass and nuisance are invasions

of an individual's property interests, the torts are different: "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. *** A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." (Internal quotation marks omitted.) *Id.* Still, claims for nuisance and trespass are not mutually exclusive, and in fact both claims can be based on the same invasive act. See Restatement (Second) of Torts § 821D, Comment *e*.

¶ 16 As the supreme court has repeatedly explained, however, a nuisance is "something that is offensive, physically, to the senses and by such offensiveness makes life uncomfortable." (Internal citations omitted.) *In re Chicago Flood Litigation*, 176 Ill. 2d at 205. Plaintiff does not devote much of his brief to this requirement, arguing only that the sight of someone else's vehicle in his driveway qualifies as physically offensive to the sense of sight. Yet "[t]he standard for determining if particular conduct constitutes a nuisance is the conduct's effect on a *reasonable* person," ((emphasis added) *id.* at 204) not its effect on someone who is hypersensitive or easily annoyed (see Restatement (Second) of Torts § 821F, Comment *d*). The incidents that plaintiff complains of occurred only sporadically and over a period of six years, were fleeting, and ended as soon as plaintiff made his displeasure known. Even if plaintiff were to prove all of the facts as alleged in the complaint, we can think of no reasonable person who would find the sight of a vehicle parked in his driveway for a few minutes to be so physically offensive that it "makes life uncomfortable." An infrequent, undamaging invasion of such inoffensive character and limited duration is so insubstantial that it simply is not a nuisance. The circuit court was correct to dismiss this count as well.

¶ 17 Affirmed.