

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN
AND FOR FLAGLER COUNTY, FLORIDA

Case No.: 2017 CA 000092
Division: Circuit Civil

BRYAN STREETMAN,

Plaintiff,

vs.

PHILIP LOWE and SARAH THOMPSON-LOWE,

Defendants.

FINAL JUDGMENT

THIS CAUSE came before the Court on January 8, 2018 for trial on the Complaint of Plaintiff, BRYAN STREETMAN, filed on February 9, 2017, against Defendants, PHILIP LOWE and SARAH THOMPSON-LOWE (Defendants are herein collectively referred to as the "LOWES"), consisting of a single count against them for Private Nuisance.

Present at the trial and before the Court were the Plaintiff, his attorney, the Defendant's, and their attorney. The Court, having reviewed the file, the evidence presented at trial, and heard the testimony and argument of the parties and witnesses, makes the following findings of fact and conclusions of law:

1. The Court has jurisdiction over the subject matter and the parties.
2. Plaintiff, BRYAN STREETMAN, and Defendants, PHILIP LOWE and SARAH THOMPSON-LOWE, are next door neighbors residing at 25 Collingwood Lane, Palm Coast, Florida and 29 Collingwood Lane, Palm Coast, Florida, respectively.
3. The LOWES were residents at 29 Collingwood Lane, Palm Coast, Florida for several years, and were setting out purple martin gourds on an annual basis by the time

BRYAN STREETMAN purchased and moved into 25 Collingwood Lane, Palm Coast, Florida on or about September 27, 2013.

4. The “purple martin gourds” consist of birdhouses in the shape of hollowed out gourds, hung from crossbeams, from atop an aluminum pole. In the instant case, there were eight purple martin gourds hung from each pole.
5. The LOWES own and erect 3 poles (24 gourds total) on their property each year during the months that the purple martins migrate to the area—beginning late-January and ending around July, each year.
6. PHILIP LOWE also assists his other next door neighbor, Carole Cook, who resides at 31 Collingwood Lane, Palm Coast, Florida, in erecting her purple martin gourds. Ms. Cook owns and erects two (2) such poles each year, with sixteen (16) gourds, on her property.
7. The issue in this case is whether the LOWES’ actions in erecting and maintaining 24 purple martin gourds on their property annually, and in assisting others in their neighborhood in erecting their own independently owned purple martin gourds, constitute an actionable private nuisance against BRYAN STREETMAN and his property.
8. This Court finds that the LOWES’ aforementioned actions constitute a reasonable use of their property. As such, the Court enters its Judgment in favor of the Defendants, and the Plaintiff’s requested relief is hereby **DENIED** in toto.

Legal Standard

9. “Nuisance, in law, for the most part consists in so using one’s property as to injure the land or some incorporeal right of one’s neighbor.” Beckman v. Marshall, 85

So.2d 552, 554 (Fla. 1956), quoting Antonik v. Chamberlain, 78 N.E.2d 752, 758 (Ohio 9th 1947) . “The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is an “appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injury. It must be real and not fanciful or imaginary, or such as results merely in a trifling annoyance, inconvenience, or discomfort.” Id. at 555.

10. As to the LOWES’ use of their property, “[t]he test of the permissible use of one’s own land is not whether the use or the act causes injury to his neighbor’s property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property?” Id.
11. With respect to the extent of the injuries complained of by BRYAN STREETMAN, “The test to be applied is the effect of the condition complained of on ordinary persons with a reasonable disposition in ordinary health and possessing the average and normal sensibilities.” Id.
12. In consideration of this case, the Court considered (1) whether the evidence presented of the LOWES’ actions in erecting purple martin gourds on their property and in assisting their neighbors in erecting their own poles, were reasonable, and (2) whether the effect of those actions on “ordinary persons with a reasonable disposition in ordinary health and possessing the average and normal sensibilities” would amount to “an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injure.”

Factual Findings and Legal Analysis

13. BRYAN STREETMAN, at the time he purchased 25 Collingwood Lane, Palm Coast, Florida, in 2013, knew he was purchasing a home in a coastal community, with an unenclosed fresh water pool, on a canal waterfront, within close proximity to the ocean, marsh land, and several nature preserves.
14. The Plaintiff and Defendants have unfortunately had an antagonistic relationship, and have called Palm Coast Code Enforcement on each other on numerous occasions. The LOWES complained to Code Enforcement regarding STREETMAN's actions in broadcasting predatory bird sounds as well as projecting laser beams from his home (both intended to dissuade purple martins from nesting in the area). STREETMAN was thereupon instructed by Code Enforcement to cease those activities. In contrast, when STREETMAN complained to Code Enforcement regarding the very purple martin gourds at issue, it took no action against the LOWES.
15. Plaintiff conceded at trial that, aside from the LOWES' 24 gourds, there are 32 additional, similar purple martin gourds on neighboring properties, all in such close proximity as to be plainly visible from Plaintiff's backyard. Notwithstanding the existence of these additional gourds, STREETMAN has not sued any other neighbor in this action—only the LOWES. The LOWES have responded by filing an affirmative defense of failure to include indispensable parties. The Court agrees that the failure to include those close, similarly acting neighbors in this suit render STREETMAN's claims of dubious value.
16. At trial, STREETMAN testified that the annual presence of purple martins contributed to his lack of sleep and overall stress; however, he also conceded that he

could produce no medical or mental health records which would support these allegations. He further testified he was extremely concerned that purple martins defecating on his property would pass communicable diseases, including the Zika Virus, onto himself and guests in his home. However, he also testified that he had neither done any research nor investigation into what diseases or mites, if any, could be communicated between purple martins and humans.

17. STREETMAN also entered several videos into evidence at trial, taken by himself, which showed birds flying in the vicinity of his home, around his pool, over the canal, as well as perched on the gourd poles at the LOWES' home. He also contrasted those videos with one of his dock in the fall, when no birds were present. The videos of the birds did not appear to show anything out of the ordinary, and certainly nothing the Court would deem out of sorts for this coastal community.

18. Heather Brough, STREETMAN's significant other, testified in support of Mr. STREETMAN. While the Court found Ms. Brough's testimony concerning Mr. STREETMAN's stress and trouble sleeping while the purple martins were present to be credible, the Court does not find that the annoyance, inconvenience, or discomfort described reaches the Nuisance threshold.

19. Plaintiff also produced Alan Lowe at trial (no relation to Defendants), whose Mother sold Mr. STREETMAN's home to him. Alan Lowe ultimately testified that his mother enjoyed the purple martins, and had previously had gourds herself at 25 Collingwood Lane prior to selling the home to Mr. STREETMAN.

20. Plaintiff offered Lori Clark, a realtor, as an expert witness. Ultimately, Ms. Clark was only qualified to offer her opinion as to the present fair market value of 25

Collingwood Lane, which neither benefited nor prejudiced Plaintiff's case. Further evidence showed STREETMAN was neither offering his property for sale, nor rent, rendering any potential damages analysis purely speculative, and not awardable.

21. In support of the LOWES' case, the Defendants entered into evidence a petition, dated May 1, 2017, signed by twenty (20) neighbors who live in close proximity to the instant parties. That petition was signed by those individuals to "acknowledge that the birds are not bothersome to us." Five of those petitioners appeared at trial, testified, and were found to be credible by the Court, including:

- a. Carole Cook: who lives immediately to the east of the Defendants. Ms. Cook owns two purple martin gourd poles herself (16 gourds total), and looks forward to the martins migrating to the area each year.
- b. Robert Humphrey: who testified that he finds the purple martins pleasant, and that he, himself, owns a purple martin gourd pole. His property is across the canal from the parties.
- c. Justine Guisberg: who testified that she does not find the purple martins to be objectionable. She lives a few houses to the east of the parties, and spends approximately 30 afternoons a year fishing on her dock with her children during the period the purple martins are in the vicinity.
- d. Burton Head: who lives diagonally across the canal from the parties. He did not find the purple martins objectionable.
- e. Sandra Barrett: who lives diagonally across the canal from the parties. She did not find the purple martins objectionable.

22. Dr. Jerome Jackson, Ph.D. also testified in support of the Defendants. Dr. Jackson is

an expert in ornithology and zoology, who has extensive knowledge of purple martins, their behaviors, habits, as well as popularity. Dr. Jackson testified credibly that, should the Court grant the relief requested by STREETMAN, that this would likely do little to nothing to improve STREETMAN's complained of situation—primarily because the area of STREETMAN's home is an ideal habitat for these birds. Furthermore, as to STREETMAN's complaint, that many of the purported purple martins peck and scratch in his grass, Dr. Jackson testified that those birds are likely being misidentified as purple martins, as martins almost never land to feed because they are “aerial feeders.” Furthermore, Dr. Jackson testified that no diseases or mites are communicable between purple martins and humans. Finally, Dr. Jackson testified to the general popularity of purple martins—that numerous cities around the country even advertise themselves to be “The Purple Martin Capital” of their respective states. This Court found Dr. Jackson to be credible, knowledgeable and persuasive.

Upon consideration of all the admitted evidence and the testimony of witnesses, the Court finds that the activities of the LOWES, in erecting 24 purple martin gourds on their property, and PHILIP LOWE, assisting his neighbors in erecting their own, individually owned gourd poles, are not unreasonable.

In its consideration, the Court gives great weight to the the evidence and testimony presented by disinterested neighbors, all of whom live in close proximity to the parties, and who take no issue whatsoever with the LOWES' purple martin related activities, nor with the annual presence of purple martins in their neighborhood.

Furthermore, the Court finds that the “injuries” complained of by STREETMAN are not

actionable. As held by the Florida Supreme Court in the case Beckman v. Marshall, 85 So.2d 552 (Fla. 1956), “There are many acts with the owner of land may lawfully do, although it brings annoyance, discomfort, or injury to his neighbor, which are *damnum absque injuria*.” The reason for this is also well-stated in the Beckman case:

All systems of jurisprudence recognize the requirement of compromises in the social state. Members of society must submit to annoyances consequent upon the reasonable use of property... People who live in organized communities must of necessity suffer some damage, inconvenience and annoyance from their neighbors. For these annoyances, inconveniences and damages, they are generally compensated by the advantages incident to living in a civilized state.

The issue this Court must decide is whether the activities of the LOWES, in erecting 24 purple martin gourds on their property, and assisting their neighbors in erecting their own, separately owned gourds, constitute an actionable nuisance. Based on the foregoing, the Court finds that they do not.

In conclusion, while the Court fully understands the seriousness of the issues before it, and the contentious nature of the litigation, it finds it appropriate to end with a “Purple Martin” poem by Carl Sandburg that is slightly modified:

Purple Martins

“If we were such and so, the same as these,
maybe we too would be slingers and sliders,
tumbling half over in the water mirrors,
tumbling half over at the horse heads of the sun,
tumbling our purple numbers.

Twirl on, you and your satin blue.
Be water birds, be air birds.
Be these purple tumblers you are.

Dip and get away
From loops into slip-knots,
Write your own ciphers and figure eights.
It is your wooded island here in Palm Coast.
Everybody knows this belongs to you.

Five fat geese
Eat grass on a sod bank
And never count your slinging ciphers,
your sliding figure eights.

A man sitting on a dock,
Slouches his feet and casts his line,
And looks at you and your loops and slip-knots,
And looks at you and your sheaths of satin blue,
And slouches again and casts his line,
And mumbles: It is an idle and a doctrinaire exploit.

Go on tumbling half over in the water mirrors.
Go on tumbling half over at the horse heads of the sun.
Be water birds, be air birds.
Be these purple tumblers you are.”

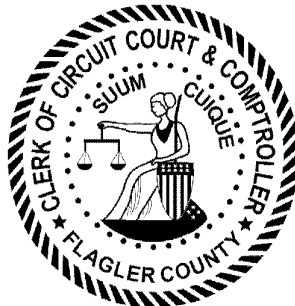
By Carl Sandburg


Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. As to Plaintiff, BRYAN STREETMAN's Count I for nuisance, requesting monetary damages and injunctive relief, the Court finds in favor of the Defendants, PHILIP LOWE and SARAH THOMPSON-LOWE.
2. The Court reserves jurisdiction to hear timely filed motions and enter further orders consistent with post-judgment proceedings, such as awardable costs.

DONE AND ORDERED in chambers, Bunnell, Flagler County, Florida, on this 23rd

day of January, 2018.





HON. SCOTT C. DUPONT
CIRCUIT COURT JUDGE

Copies Furnished:

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