UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

BRADYVILLE FARMS,
a Michigan co-partnership,

Debtor.
_____/

Case No. SG 95-80749
Chapter 12

GARY L. JONSECK and JOEY E. JONSECK,
d/b/a BRADYVILLE FARMS, a Michigan
co-partnership,

Plaintiffs,

v.

GREAT LAKES ENERGY COOPERATIVE,
a Michigan non-profit corporation,

Defendant.
_____/

Adversary Proceeding
No. 98-88439

NOT FOR PUBLICATION

This matter comes before the Court upon Great Lakes Energy Cooperative's Motion for Summary Judgment. This Court has jurisdiction under 28 U.S.C. §1334(b); this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(O).

On July 30, 1998, the Jonsecks filed suit against Great Lakes Energy Cooperative (Defendant)

alleging that Defendant improperly installed electrical equipment which produced stray voltage damaging their dairy cows. As a result, the Debtor ceased operation of the dairy farm and sold their cattle.

In their complaint, the Jonsecks advance several theories as the basis of their claim including negligence, trespass to both real and personal property, breach of contract and nuisance.

On November 1, 2000, Defendant filed a Motion for Summary Judgment arguing that each count should be dismissed individually and that the complaint as a whole should be dismissed because it violated the applicable statute of limitations. In an Order filed by this Court on May 2, 2001, the portion of the Motion for Summary Judgment regarding the statute of limitations was denied. We now address the balance of Defendant's Motion.

Summary Judgment

Summary Judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056. The summary judgment rule requires that the disputed facts be material, that is, facts which are defined by substantive law and are necessary to apply the law. The rule also requires that the dispute be genuine, that is if a reasonable jury could return a judgment for the nonmoving party. First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 88 S.Ct. 1575 (1968). "Only disputes over the facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The court must draw all inferences in a light most favorable to the nonmoving party (in this case the Jonsecks), but the court may grant summary judgment when "the record taken as a whole could

not lead a rational trier of fact to find for the nonmoving party." Agristor Financial Corp. v. Van Sickle, 967 F.2d 233, 236 (6th Cir. 1992) (quoting Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986)).

The Trespass and Nuisance Claims

At the outset, we recognize that claims of trespass and nuisance are difficult to distinguish and include overlapping concepts. The essential difference however, has been stated as: "Trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it." Adams v. Cleveland-Cliffs Iron Co., 237 Mich. App. 51, 602 N.W.2d 215 (1999); Hadfield v. Oakland County Drain Commissioner, 430 Mich. 139, 151, 422 N.W.2d 205 (1988).

The Debtor has conceded that under Adams, 237 Mich. App. at 68, 602 N.W.2d at 223, recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object on to the land over which the Debtor has a right of exclusive possession. Stray voltage is an intangible irritant and therefore, can not constitute trespass. In light of these concessions, we grant the Defendant's Motion as to the trespass count.

Defendant argues that a claim of nuisance should also fail because a nuisance requires a continuing wrong, or, in other words, continuing tortious acts, not continual harmful effects from an original completed act. Consequently, because the Debtors have alleged the continuous harmful effects of improperly installed electrical equipment, their nuisance claim must fail.

The Debtor claims that the nuisance is a result of the continued operation of improper equipment

placed in close proximity to their farm and the failure of the Defendant to properly monitor, maintain and control the Defendant's neutral conductor. Upon being advised of the possible existence of the stray voltage and having promised to investigate and remediate the situation, the Defendant did nothing. Consequently, this is not a case of continuous harmful effects from an original completed act but rather continuous tortious acts.

In order to prevail under a nuisance count, a possessor of land must prove significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of the property. Cloverleaf Car Co. v. Phillips Petroleum Co., 213 Mich. App.186, 193, 540 N.W.2d 297 (1995).

Liability for nuisance may be imposed where (1) the defendant has created the nuisance, (2) the defendant owned or controlled the property from which the nuisance arose, or (3) the defendant employed another to do work that he knew was likely to create a nuisance. Continental Paper & Supply Co., Inc. v. Detroit, 451 Mich. 162, 545 N.W.2d 657 (1996). Here, the Debtors allege sufficient facts that the Defendant created and is responsible for the nuisance. Accordingly, summary judgment on the nuisance count is not appropriate at this time.

In addition, the damages recoverable under a continuing nuisance claim generally depend upon whether the interference with the plaintiff's property is permanent or temporary. See Phelps v. Detroit, 120 Mich. 447, 451-55, 79 N.W. 640 (1899).

> If injuries from a nuisance are of a permanent character and go to the entire value of the estate, there can be but one action, and all damages – past, present, and future– are recoverable therein; in such a case, one recovery is a grant or license to continue the nuisance, and there can be no second recovery for its continuance . . .Where the injury from the alleged nuisance is temporary in its nature, or is of a continuing or recurring character, the damages are ordinarily regarded as continuing,

> and one recovery against the wrongdoer is not a bar to successive actions for damages thereafter accruing from the same wrong. In such a case, every day's continuance is a new nuisance . . . That is, where a nuisance is temporary, damages to property affected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated.

58 Am. Jur. 2d, Nuisances, §§273-275, pp. 875-878.

In addition, the Debtor must prove "all damages which may be awarded only to the extent the [D]efendant's conduct was unreasonable according to a public policy assessment of its overall value." Adams, 237 Mich. App. at 67; 602 N.W.2d at 222-223.

Here, a question of fact exists as to whether the alleged nuisance involving the Debtor's dairy herd was temporary, and therefore abatable by reasonable curative or remedial action, or whether it was permanent in nature, and therefore nonabatable. Where, as here, a question of fact exists regarding the temporary or permanent nature of the nuisance, we cannot grant summary judgment.

Breach of Contract

The Debtor alleges that a contract was created when the Defendant agreed, in writing, to install a Rustrac Ranger onto the facilities on Debtor's farm. This equipment would determine whether a stray voltage problem existed and from where it was coming. When the Defendant failed to install the Rustrac Ranger, it breached the contract.

Defendant argues that there was no contract and even if there was, in order for a breach of contract claim to prevail against a public utility, the doctrine of primary jurisdiction must be applied.

Without making a determination as to the application of the primary jurisdiction doctrine, we turn to Weissert v. City of Escanaba, 298 Mich. 139, 299 N.W. 139 (1941):

> [I]t is well established that the liability of electric light and power companies for damages for personal injuries either to the public or to their patrons, is governed, not by the principles of insurance or safety, nor of contracts, but, as in the case of personal injuries generally, by the simple rules of negligence . . .

Consequently, we find that the source of the alleged liability sounds in tort, or more specifically negligence. The breach of contract count is redundant. Therefore, in the interest of judicial economy, the parsimony of the parties and because no prejudice would inure to the Debtor, we find that any allegations found in the negligence and nuisance counts are simply restated in the breach of contract count. Consequently, we grant the Defendant's Motion for Summary Judgment as to that count.

Dated: June 19, 2001

Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge