STATE OF MAINE CUMBERLAND, ss.	BUSINESS AND CONSUMER COURT Location: Portland DKT. NO. BCDWB-RE-2019-14

RANDY SLAGER, Plaintiff/Counterclaim-Defendant, v. LORI L. BELL and JOHN W. SCANNELL, Defendants/Counterclaim-Plaintiffs.	)	**ORDER ON COUNTERCLAIM-DEFENDANT'S MOTION TO DISMISS**

This case revolves around a dispute between neighbors on Ocean Avenue in Kennebunkport (the "Town"). Lori Bell and John Scannell ("Counterclaim-Plaintiffs") filed counterclaims against Randy Slager ("Counterclaim-Defendant") on May 5, 2020.[1] Counterclaim-Defendant responded by filing a motion to dismiss the counterclaims pursuant to Maine Rule of Civil Procedure 12(b)(6). The Court held oral argument on the motion on June 2, 2021. After considering the allegations in the counterclaim, the parties' contentions in briefs and at oral argument, and the law on the various claims, the Court issues this decision.

LEGAL STANDARD

"A motion to dismiss tests the legal sufficiency of the complaint, the material allegations of which must be taken as admitted . . . ." *Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 2019 ME 90, ¶ 16, 209 A.3d 116 (citations omitted). A complaint only needs to consist of a short and plain statement of the claim to provide fair notice of the cause of action. *Johnston v. Me. Energy Recovery Co., Ltd. P'ship*, 2010 ME 52, ¶ 16, 997 A.2d 741. When deciding a motion to

[1] The case was stayed from July 9, 2020, until approximately February 1, 2021, to allow for an administrative process to take its course.

dismiss pursuant to Rule 12(b)(6), the complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 6, 54 A.3d 710 (quotation marks omitted). The Court does not adjudicate facts, "but rather there is an evaluation of the allegations in the complaint in relation to any cause of action that may reasonably be inferred from the complaint." *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830.

While the Court must accept as true all well-pleaded factual allegations in the complaint, it is "not bound to accept the complaint's legal conclusions." *Bowen v. Eastman*, 645 A.2d 5, 6 (Me. 1994) (citing *Robinson v. Washington Cnty.*, 529 A.2d 1357, 1359 (Me. 1987)). "A dismissal is only proper when it appears beyond doubt that [the] plaintiff is entitled to no relief under any set of facts that [it] might prove in support of [its] claim." *Packgen*, 2019 ME 90, ¶ 16, 209 A.3d 116 (alterations in original).

ALLEGATIONS[2]

Counterclaim-Plaintiffs are the owners of 200 Ocean Avenue in the Town while Counterclaim-Defendant is the owner of the neighboring 196 Ocean Avenue. (Countercl. ¶¶ 1-2.) In pertinent part, Counterclaim-Plaintiffs allege that they "have on multiple occasions observed an electronic camera position in the house on the Slager Property pointing directly at" Counterclaim-Plaintiffs' house, including "[o]n at least one occasion . . . at the area of the house . . . that includes the bedroom occupied by Counterclaim-Plaintiffs' teenage daughter." (Countercl. ¶¶ 6-7.) Counterclaim-Plaintiffs contend, "[u]pon information and belief," that the camera has taken pictures of Counterclaim-Plaintiffs, their family, and others on the property. (Countercl. ¶ 8.)

[2] For each counterclaim, Counterclaim-Plaintiffs have alleged Counterclaim-Defendant's intent generally and damages suffered as a result of Counterclaim-Defendant's conduct and actions generally as well. (Countercl. ¶¶ 9, 19, 21, 23-25, 33-34, 37-38.) The Court is not going to quote each of these allegations but instead notes the foregoing citations to the allegations.

Further, Counterclaim-Plaintiffs allege that Counterclaim-Defendant has a generator located almost on the boundary line between the properties, the use and maintenance of which "violates industry safety standards" and is "unreasonably loud and noisy." (Countercl. ¶¶ 12-14, 18.) They assert that they "are reasonably concerned that a generator malfunction could result in a fire that could extend" onto their property. (Countercl. ¶ 15.) These circumstances with the generator "substantially diminish[]" and "unreasonably interfere" with the "use, enjoyment and value of their property." (Countercl. ¶¶ 19-20.) In addition to the camera and generator issues, Counterclaim-Plaintiffs allege that "Counterclaim-Defendant, or his agents acting at his direction, supervision or control, or subject to Counterclaim-Defendant's subsequent ratification, have entered upon the Bell/Scannell Property" without their consent, including placing and maintaining "objects" on Counterclaim-Plaintiffs' property such as "an irrigation water line, a garden, a fence, and gate posts." (Countercl. ¶¶ 23-24.)

Finally, Counterclaim-Plaintiffs allege that, around March 22, 2020, Counterclaim-Defendant filed a notice of *lis pendens* in the York County Registry of Deeds – therefore making a statement that he had a claim to title or other legal property interest – regarding litigation that did not concern title to their property. (Countercl. ¶¶ 27-28, 32.) Because title was not at issue in the litigation for which the *lis pendens* was filed, Counterclaim-Plaintiffs contend Counterclaim-Defendant's statement otherwise was false and disparaged Counterclaim-Plaintiffs' title to their property. (Countercl. ¶¶ 28-30, 32.) By filing this *lis pendens*, Counterclaim-Plaintiffs allege that Counterclaim-Defendant acted with an ulterior motive by using legal process in a manner that was improper in the regular conduct of litigation. (Countercl. ¶¶ 36-37.)

DISCUSSION

Counterclaim-Defendant moves to dismiss each of the counterclaims on various bases. The

Court addresses each in turn.

1. Invasion of privacy (Count I).

The tort of invasion of privacy protects several interests from being invaded. As is relevant to the counterclaim, "intrusion upon the plaintiff's physical and mental solitude or seclusion" is one manner in which a defendant can commit the tort of invasion of privacy. *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 795 (Me. 1976). In order to survive a motion to dismiss a claim of invasion of privacy by intrusion upon seclusion, a plaintiff must allege facts regarding four elements: "an (1) intentional, (2) physical intrusion (3) upon premises occupied privately by a plaintiff for purposes of seclusion, and (4) the intrusion must be highly offensive to a reasonable person." *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 16, 48 A.3d 774. "[T]he defendant must *intend* as the result of his conduct that there be an intrusion upon another's solitude or seclusion." *Id.* ¶ 19 (emphasis in original) (quotation marks omitted). Counterclaim-Defendant moves to dismiss the invasion of privacy claim because he contends the counterclaims do not contain adequate allegations of the first and second elements, i.e., intent or physical intrusion.

Regarding the intent element, Counterclaim-Defendant argues that there are no allegations pertaining to his intent in owning the camera.[3] The Court is not convinced. First, allegations regarding a tortfeasor's intent can be stated generally. M.R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally."). Counterclaim-Plaintiffs averred so generally. (Countercl. ¶ 9.) Counterclaim-Defendant's intent can also be

[3] Counterclaim-Defendant terms it a "security" camera and spends much of his argument on the intent issue justifying his use and placement of the camera. While he may ultimately succeed in establishing these as undisputed facts on summary judgment or otherwise convincing a factfinder of their truth, the counterclaim only terms it an "electronic" camera and does not contain any allegations regarding Counterclaim-Defendant's offered justification. Because this is a motion to dismiss for failure to state a claim, the Court is limited to the allegations in the counterclaim and any facts that may reasonably be drawn from those. *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830.

reasonably inferred from the allegations that the camera has been pointed directly at Counterclaim-Plaintiffs' daughter's bedroom as well as the allegations that the camera has captured images of Counterclaim-Plaintiffs, their family members, and their invitees. *Cf. Nadeau v. Frydrych*, 2014 ME 154, ¶ 8, 108 A.3d 1254.

The allegation that Counterclaim-Defendant has captured images of Counterclaim-Plaintiffs, their family, and their invitees bleeds into Counterclaim-Defendant's argument on the physical intrusion element.[4] The Law Court has explained that an intrusion upon seclusion must involve an "actual invasion of something secret, secluded or private pertaining to the plaintiff." *Nelson v. Me. Times*, 373 A.2d 1221, 1223 (Me. 1977) (quotation marks omitted). As Counterclaim-Plaintiffs highlight, the Restatement section upon which the tort is based notes that an intrusion upon seclusion "may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires." Restatement (Second) of Torts § 652B cmt. b. "[A] complaint should minimally allege a physical intrusion upon premises occupied privately by a plaintiff for purposes of seclusion." *Nelson*, 373 A.2d at 1223. By alleging that Counterclaim-Defendant has pointed the camera at least once at Counterclaim-Plaintiff's daughter's bedroom and has also captured images with the camera, Counterclaim-Plaintiffs have effectively alleged that Counterclaim-Defendant's camera's image-capturing technology has invaded the physical space of Counterclaim-Plaintiffs' seclusion and privacy in their home. This

[4] Counterclaim-Defendant contends the Court should not give any "weight" to the upon-information-and-belief allegations of images being captured. The Court notes that under the arguably stricter federal pleading standard, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007), upon-information-and-belief pleading is not fatal to a complaint, particularly when "facts alleged 'upon information and belief' . . . are peculiarly within the possession and control of the defendant . . . ." *Lexington Ins. Co. v. Johnson Controls Fire Prot. Ltd. P'ship*, 347 F. Supp. 3d 61, 64 n.1 (D. Mass. 2018). Facts regarding the capturing of images from the camera would be "peculiarly within the possession and control of" Counterclaim-Defendant. The allegation is sufficient at this stage.

is enough to withstand the motion to dismiss on this claim.

2. Nuisance (Count II).

A claim for private nuisance under common law requires allegations of the following:

> (1) the defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use, with intent meaning only that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to follow; (2) there was some interference of the kind intended; (3) the interference was substantial such that it caused a reduction in the value of the land; and (4) the interference was of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.

Johnston, 2010 ME 52, ¶ 15, 997 A.2d 741 (alteration and quotation marks omitted). "The essence of a private nuisance is an interference with the use and enjoyment of land." *Town of Stonington v. Galilean Gospel Temple*, 1999 ME 2, ¶ 15, 722 A.2d 1269 (quotation marks omitted).

Going beyond each specific element, Counterclaim-Plaintiffs' argument essentially is that the Court permitted Counterclaim-Defendant's similarly pled nuisance claim to survive a motion to dismiss which means Counterclaim-Plaintiffs' should also survive. (Opp. Mot. Dismiss 7.) Despite this, there is a key difference between the nuisance claims: Counterclaim-Defendant's allegations of safety concerns (which went to the interference and the possible resulting harm) were supported by an engineering report citing to specific building codes that were supposedly violated. As the Court emphasized in its prior Order, the incorporated expert report was key to Counterclaim-Defendant's (in that Order, the Plaintiff) nuisance claim: "the Plaintiff has adequately pleaded facts in the Amended Complaint (along with findings made in David Price's report) supporting the three necessary elements of nuisance: intentional acts; interference in use or enjoyment of the land; and harm that is substantial, unreasonable, and not speculative." (Order Mot. Dismiss (Mar. 6, 2020).) In contrast, Counterclaim-Plaintiffs have only alleged in a

conclusory fashion that the "maintenance and use of the generator in its present location violates industry safety standards." (Countercl. ¶ 14.) The Court concludes that this conclusory allegation is not sufficient to support an alleged interference that causes substantial harm for a nuisance claim. *Cf. Meridian Med. Sys., LLC v. Epix Therapeutics, Inc.*, 2021 ME 24, ¶ 3, 250 A.3d 122 (quotation marks omitted) ("The complaint must describe the essence of the claim and allege facts sufficient to demonstrate that the complaining party has been injured in a way that entitles him or her to relief."). The allegation that the generator is loud and noisy simply does not meet the element of the interference being "of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land." *Johnston*, 2010 ME 52, ¶ 15, 997 A.2d 741 (quotation marks omitted). The motion is granted regarding the nuisance claim.

3. Trespass (Count III).

"A person is liable for common law trespass irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other, or causes a thing or a third person to do so." *Medeika v. Watts*, 2008 ME 163, ¶ 5, 957 A.2d 980 (quotation marks omitted). Counterclaim-Defendant contends Counterclaim-Plaintiffs have not sufficiently alleged the necessary intent.

"The minimum intent necessary for the tort of trespass to land is simply acting for the purpose of being on the land or knowing to a substantial certainty that one's act will result in physical presence on the land." *Gibson v. Farm Family Mut. Ins. Co.*, 673 A.2d 1350, 1353 (Me. 1996) (quotation marks omitted). As Counterclaim-Plaintiffs have alleged that Counterclaim-Defendant or those acting at his direction have placed and maintained items on Counterclaim-Plaintiffs' property such as "an irrigation water line, a garden, a fence, and gate posts," it is reasonable to infer that Counterclaim-Defendant or those acting at his direction intentionally acted

for the purposes of placing and maintaining those items. *See Saunders*, 2006 ME 94, ¶ 8, 902 A.2d 830. The motion to dismiss is denied regarding the trespass claim.

4. Slander of title (Count IV).

To support a claim for slander of title, a complaint must contain allegations that "(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages." *Colquhoun v. Webber*, 684 A.2d 405, 409 (Me. 1996). As noted in the allegations section above, the slander of title claim is based on Counterclaim-Defendant's filing of the *lis pendens* in the York County Registry of Deeds. Counterclaim-Defendant argues for dismissal of this claim on the basis that the filing of the *lis pendens* is afforded absolute privilege, the *lis pendens* does not assert a claim to title in Counterclaim-Plaintiffs' property, and the facts alleged do not support a cause of action for slander of title.

In order to analyze this claim, it is first necessary to note that a *lis pendens* is required in an "action in which the title to real estate is involved . . . ."[5] 14 M.R.S. § 4455. The absolute privilege permits a

> party to a private litigation . . . to publish slanderous material concerning the title of another in the institution of . . . a judicial proceeding in which he participates, if the matter has some relation to the proceeding. The privilege is absolute and protects a party to a private litigation . . . from liability . . . irrespective of his purpose in publishing the defamatory matter, of his belief in its truth or even his knowledge of its falsity.

Raymond v. Lyden, 1999 ME 59, ¶ 6, 728 A.2d 124 (footnote, citation, and quotation marks omitted); *see also OfficeMax Inc. v. Sousa*, 773 F. Supp. 2d 190, 237 (D. Me. 2011) ("This

[5] The Court concluded as much when it granted Counterclaim-Plaintiffs' motion to cancel the *lis pendens* and noted that "title for the real estate is not at issue in this case." (Order re: *Lis Pendens* 1 (Apr. 28, 2020).)

privilege attaches to otherwise defamatory third-party communications preliminary to or during litigation only as long as the 'remarks are pertinent to the judicial proceeding' and not 'unnecessary or unreasonable.'"); *cf. Ringier Am. v. Enviro-Technics*, 673 N.E.2d 444, 447 (Ill. App. 1996) ("[N]early every jurisdiction to consider the question has extended the absolute privilege accorded statements made in the course of litigation to include the filing and/or recording of a *lis pendens* notice, provided the underlying litigation makes allegations affecting some ownership interest in the subject property.").

As the quotations make apparent, there may be specific facts bearing on whether the privilege applies because the allegedly slanderous material must bear "some relation to the proceeding" and not be "unnecessary or unreasonable." Counterclaim-Plaintiffs have alleged that the litigation does not concern title to their property, which at least generates an inference that the filing was "unnecessary" at this stage of the case where the Court must accept the well-pleaded allegations as true and view the complaint in the light most favorable to the Counterclaim-Plaintiffs. (Countercl. ¶ 32.) While the Law Court has upheld the application of the privilege to a slander of title claim at the motion to dismiss stage, *Raymond*, 1999 ME 59, ¶ 6, 728 A.2d 124, the Court believes that determination is better left for a different procedural stage in the context of this case.[6] *Cf. Rubinstein v. Keshet Inter Vivos Tr.*, No. 17-61019-Civ, 2019 U.S. Dist. LEXIS

[6] Counterclaim-Defendant makes passing reference in his reply brief to the *lis pendens* being conditionally privileged. Determinations regarding conditional privilege tend to be analyzed at summary judgment. *See, e.g.*, *Waugh v. Genesis Healthcare LLC*, 2019 ME 179, ¶ 18, 222 A.3d 1063; *Lester v. Powers*, 596 A.2d 65, 72 (Me. 1991); *Gautschi v. Maisel*, 565 A.2d 1009, 1011-12 (Me. 1989). The Court does not have before it the factual record necessary to make such a determination.

On a separate note, Justice Lipez's decision cited to in the briefs was a case where title was actually at issue in the litigation referenced by the *lis pendens*. The party filing the *lis pendens* was seeking specific performance of a purchase and sale agreement for real estate (i.e., title to real estate was undeniably at issue). *Street & Co. v. Carr*, No. CV-91-1537, 1992 Me. Super. LEXIS 173, at *1-2 (July 15, 1992). It is distinguishable on those facts.

35963, at *10 (S.D. Fla. Mar. 5, 2019) (citation and quotation marks omitted) ("[A]n intentional, wrongful filing of a notice of lis pendens will support an action for slander of title . . . . This means that — if Plaintiffs intentionally filed a wrongful lis pendens — that conduct could fall outside the scope of the litigation privilege."); *Carrozza v. Voccola*, 90 A.3d 142, 155 (R.I. 2014) (quoting 53 Corpus Juris Secundum *Libel and Slander; Injurious Falsehood* § 313 at 410 (2005)) ("[A] cause of action for slander of title may arise when a false, sham, or frivolous lis pendens is filed . . . ."); *Warren v. Bank of Marion*, 618 F. Supp. 317, 325 (W.D. Va. 1985) ("[T]he filing of a notice of lis pendens is more appropriately characterized as a qualifiedly privileged occasion.").

As it pertains to Counterclaim-Defendant's argument that the *lis pendens* does not assert a claim to title in Counterclaim-Plaintiffs' property, the Court disagrees. By recording a *lis pendens* pursuant to 14 M.R.S. § 4455, which is required in an "action in which the title to real estate is involved," in a case in which title to Counterclaim-Plaintiffs' real estate is not involved, Counterclaim-Defendant effectively told anyone who looked at the Registry that he was involved in litigation over title to Counterclaim-Plaintiffs' real estate. (Countercl. ¶¶ 27-28, 30-32.) Counterclaim-Plaintiffs have otherwise alleged the necessary elements for a claim of slander of title. (Countercl. ¶¶ 27-34.) The motion is denied regarding the slander of title claim.

5. Abuse of process (Count V).

Finally, as it pertains to Counterclaim-Plaintiffs' abuse of process claim, Counterclaim-Defendant raises the issue of the absolute privilege discussed above. The Court incorporates its prior discussion about the privilege in this section and declines to rule on that basis at this stage of the case on this claim as well. Counterclaim-Defendant also argues that the filing of a *lis pendens* is not "process" as that term is used in the context of an abuse of process claim. "[A] claim for abuse of process[involves] (1) the use of process in a manner improper in the regular conduct of

the proceeding, and (2) the existence of an ulterior motive." *Advanced Constr. Corp. v. Pilecki*, 2006 ME 84, ¶ 23, 901 A.2d 189 (quotation marks omitted). Thus, a preliminary issue must be determined regarding whether the filing of a *lis pendens* constitutes "process."

The parties have not directed the Court to any Law Court decisions that are specifically on point. In short, the Court agrees with Counterclaim-Defendant that the filing of a *lis pendens* is not legal "process." "Notice of *lis pendens* commences no action, commands no act, and confers no obligation of appearance. . . . [N]otice of *lis pendens* alone creates no lien or claim on the property. A notice of lis pendens is not process; it is merely notice of process." *Brass Ring, Inc. v. Johnson*, Nos. 12-1496, 12-1532, 2013 W. Va. LEXIS 1240, at *13-14 (Nov. 8, 2013). *Pilecki* is distinguishable on the basis that it involved the filing of a lien, not a notice of *lis pendens*. 2006 ME 84, ¶¶ 23-24, 901 A.2d 189 ("[F]iling a lien statement containing 'material misstatements of fact' could constitute abuse of process."). Therefore, Counterclaim-Plaintiffs' abuse of process claim must be dismissed as a matter of law.

The Court is aware there are varying statements across jurisdictions about whether a *lis pendens* notice can be "process" in the context of an abuse of process claim. *Compare Angoon v. Hodel*, 836 F.2d 1245, 1248 (9th Cir. 1988) ("Because *lis pendens* is not 'process,' its filing does not trigger an action for abuse of process."), *and Cent. Radio Co. v. Warwick Builders, L.L.C.*, No. CL20-8580, 2021 Va. Cir. LEXIS 142, at *6 (Cir. Ct. June 28, 2021) ("I do not agree that a *lis pendens* is 'process.'"), *with Pond Place Partners, Inc. v. Poole*, 567 S.E.2d 881, 893, 897 (S.C. Ct. App. 2002) ("The majority of cases from other jurisdictions that have dealt with the question have held that such filing [of a lis pendens] enjoys the absolute privilege that is accorded to judicial proceedings. . . . The jurisdictions are in agreement that the proper action against a maliciously filed lis pendens is under abuse of process or malicious prosecution."), *and Superior Constr., Inc.*

v. Linnerooth, 712 P.2d 1378, 1382 (N.M. 1986) ("[A]lthough slander of title may not provide a remedy to persons in the Linnerooths' position who have been wronged by a filing of a notice of lis pendens, such wrongful filing may support an action for abuse of process."). Accordingly, the Court accepts the reasoning of those courts that conclude the filing of a *lis pendens* is not "process," and grants the motion regarding the abuse of process claim.

The entry is:

1. Counterclaim-Defendant Randy Slager's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** as it pertains to Counts II (nuisance) and V (abuse of process). The motion is **DENIED** as it pertains to Counts I (invasion of privacy), III (trespass), and IV (slander of title).
2. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: 7/15/2021

Hon. M. Michaela Murphy
Justice, Maine Superior Court