STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 256-10-11 Oscv

Green Mountain Power Corporation
Plaintiff

v.

Donald and Shirley Nelson
Defendants

ORDER RE: DEFENDANTS' MOTION FOR TEMPORARY RESTRAINING ORDER

This trespass claim is before the court on Defendants' October 31, 2011 ex parte motion for a temporary restraining order. Defendants claim that a blast conducted by Plaintiff on October 28 caused debris particles and a piece of a blasting mat to fall on Defendants' property. Defendants seek to bar Plaintiff from conducting further blasting within 1,000 feet of Defendants' property line until Plaintiff adopts a new blasting plan.

In support of their motion for a TRO, Defendants have submitted the affidavits of R. Fred Scholz and Margot Kempers, who claim to have been on the Nelsons' land in the vicinity of the boundary line with Plaintiff's property during the October 28 blast. They state that some small particles, smaller than pea size, fell on the Defendants' property after the blast as well as a fragment of rubber blasting mat and possibly some chunks of stone. Plaintiff admits that a piece of blasting mat landed on Defendants' property, but deny that anything else was cast onto their property. Assuming the affidavits are accurate, the evidence presented by Defendants is insufficient to support a temporary restraining order.

Courts consider four factors in determining whether to issue a preliminary injunction: (1) the threat of irreparable harm to the plaintiff; (2) the potential harm to the other parties; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *In re J.G.*, 160 Vt. 250, 255 n.2 (1993); see also *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2948. The most important factor is irreparable harm. *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002); V.R.C.P. 65(a).

Here, Defendants have not shown that they will suffer irreparable harm absent injunctive relief. "Because of the often drastic effects of the temporary injunction, the power to issue it must be used sparingly, and only upon a showing of irreparable damage during the pendency of the action . . . ." *State v. Glens Falls Ins. Co.*, 134 Vt. 443, 450 (1976). "To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages

cannot provide adequate compensation." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (citations omitted). Defendants have not shown that more particles are likely to fall on their property. Moreover, Defendants have not shown the court that money damages cannot provide adequate compensation in the event that GMP is trespassing by casting particles on their land. See *Welch v. Lague*, 141 Vt. 644, 647 (1982) (holding that it was appropriate to award money damages based on the reasonable rental value of the property in a trespass case).

In addition, Defendants have failed to show that they are likely to succeed on the merits of their trespass claim. In order to get injunctive relief, Defendants must present a prima facie case of trespass. *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011) (citing 11A Wright, Miller & Kane, supra, § 2948.3). A person who intentionally enters or remains upon land in the possession of another without a privilege to do so is subject to liability for trespass. *Harris v. Charbonneau*, 165 Vt. 433, 437 (1996). A person may be held liable for trespass if he or she performs an act, knowing with substantial certainty that it will result in entry of foreign matter onto another's land. *In re MTBE Prod. Liability Litig.*, 379 F.Supp.2d 348, 441 (S.D.N.Y. 2005) (citing Restatement (Second) of Torts § 158 cmt. I). Here, Defendants have not alleged that Plaintiff intended for particles to enter Defendants' land or that Plaintiff knew it was substantially certain that particles would enter Defendants' land. Thus, Defendants have failed to show the element of intent, which is required to establish a prima facie case for trespass that would support injunctive relief.

Defendants appear to conflate trespass with strict liability. Under Vermont law, blasting is considered to be an extrahazardous activity, such that the person carrying on the blasting is strictly liable for harm resulting to other persons, land, or chattel. *Malloy v. Lane Constr. Corp.*, 123 Vt. 500, 503 (1963). Under a strict liability theory, Defendants must show that they suffered actual damages, not merely an interference with technical possession. D. Dobbs, The Law of Torts § 51, at 100 (2001). Defendants have not shown how Plaintiff's blasting has actually harmed persons, land, or chattel in this case. Therefore they have also not set forth a prima facie case for strict liability.

Defendants have failed to demonstrate that the circumstances in this case warrant the issuance of a temporary restraining order. Therefore, their motion is DENIED.

Dated at North Hero, Vermont this 1st day of November, 2011.

Martin A. Maley
Superior Court Judge
Orleans Unit