COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1220

SAMUEL BOURNE[1]

vs.

ROY E. GARDNER[2] & another.[3]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Samuel Bourne, brought suit against the defendants alleging slander of title (count I) and negligence (count II), and seeking to quiet title to the property at issue (count III) and to enjoin a nuisance (count IV). After concluding that either governmental immunity or defects in the allegations precluded the plaintiff from being successful on any of the four claims, a judge of the Superior Court granted summary judgment in favor of the defendants. We vacate in part.

Discussion. Pursuant to the Massachusetts Torts Claims Act (MTCA), public officials and public employers are immune from suits for damages arising out of intentional torts. G. L.

[1] Individually and as trustee of the Lot 31 Realty Trust.
[2] Individually and as chairman of the planning board of East Bridgewater.
[3] Town of East Bridgewater.

c. 258, § 10. See, e.g., Spring v. Geriatric Auth. of Holyoke, 394 Mass. 274, 285 (1985) ("public employers retain their immunity from suits arising from intentional torts"); Howcroft v. Peabody, 51 Mass. App. Ct. 573, 596 (2001) (dismissing intentional tort claims against public officials due to MTCA immunity). Likewise, a conditional privilege protects public officials from being liable for intentional tort claims arising out of statements made while performing official duties. Mulgrew v. Taunton, 410 Mass. 631, 635 (1991). These privileges and immunities, however, do not extend to actions seeking to enjoin a public employer or its officers from continuing to perpetrate an ongoing harm. See Lane v. Commonwealth, 401 Mass. 549, 552 (1988).

The motion judge concluded that the plaintiff's request for an "injunction to restrain nuisance" lacked merit. When the plaintiff's request is viewed under the guise of a common-law nuisance claim, the judge's conclusion is sound.[4] See Doe v. New

[4] Similarly, we see no error in the judge's conclusion that the plaintiff could not sustain a quiet title action. The defendants have made no claim to the plaintiff's property. See G. L. c. 240, § 6 (quiet title action requires possibility that defendants "claim or may claim by purchase, descent or otherwise, some right, title, interest or estate in the land which is the subject of the action and that their claim depends upon the construction of a written instrument or cannot be met by the plaintiffs without the production of evidence"). Moreover, "[i]t is well established that building or zoning laws are not encumbrances or defects affecting title to property." Somerset Sav. Bank v. Chicago Title Ins. Co., 420 Mass. 422, 428

Bedford Hous. Auth., 417 Mass. 273, 288 (1994) ("The private nuisance standard . . . requires two different parcels of property: one on which the nuisance condition exists, and another whose occupants are burdened by the nuisance"). When dealing with pro se litigants, however, we must recognize that certain terms of art also carry a commonly understood meaning.

In his complaint, the plaintiff defined nuisance as it is commonly understood, as "something that annoys -- a wearing on the nerves by a persistent unpleasantness." We therefore do not construe the plaintiff's request for injunction as limited to a common-law nuisance claim. Cf. Ajemian v. Yahoo!, Inc., 478 Mass. 169, 176 (2017) ("When Congress uses a common-law term, we must assume, absent a contrary indication, that it intends the common-law meaning" [emphasis added]). Rather, it is clear the plaintiff is annoyed by a document in his chain of title that, if true, lowers the value of his property. It is apparent, therefore, that while inexpertly pleaded, the plaintiff essentially seeks, through his request for "injunction to restrain nuisance," a court order requiring the defendants to withdraw the challenged document. Cf. Commonwealth v. Geagan, 339 Mass. 487, 495 (1959) ("the substance and not the name of a pleading controls").

(1995). As such, the judge correctly concluded that the plaintiff had no basis for a quiet title action.

Neither the MTCA nor any governmental privilege or immunity precludes the possibility that the plaintiff could successfully obtain the injunction sought. See Lane, 401 Mass. at 552 ("We can think of no basis for recognizing some form of governmental immunity that would prevent issuance of an injunction against an ongoing wrong committed systematically and intentionally by a governmental agency for the continuing benefit of the Commonwealth"). At a minimum, the defendants' decision to record a letter alleging various violations, without any official hearing or determination as to whether such violations existed, was unconventional. If the plaintiff is correct that the allegations contained in the letter are false, then basic fairness requires that he have some recourse to remove these purported false assertions from his chain of title. See Demoulas v. Demoulas, 428 Mass. 555, 580 (1998) ("Equitable remedies are flexible tools to be applied with the focus on fairness and justice"). Whether such injunctive relief is appropriate on this complaint, however, requires a determination in the first instance as to the validity of the violations alleged in the letter.[5] The answer to that questions requires a factual determination, which we cannot make on appeal. Director of the Div. of Employment Sec. v. Mattapoisett, 392 Mass. 858,

[5] Underlying this determination is necessarily a determination of whether the lots in question had merged.

862 n.5 (1984), quoting Tardiff, petitioner, 328 Mass. 265, 267 (1952) ("The duty of weighing evidence and of finding facts . . . in an action at law is not an appropriate function of [an appellate] court . . . "). Rather, they must be addressed by the trial court in the first instance on remand.

Conclusion. So much of the judgment as dismissed count IV of the complaint is vacated, and the matter is remanded for further proceedings consistent with this memorandum and order. In all other respects, the judgment is affirmed.

So ordered.

By the Court (Rubin, Maldonado & Shin, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: August 26, 2020.

[6] The panelists are listed in order of seniority.