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DEPUTY CLERK OF COURT

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOSEPHA B. ADA, CALISTRO C.)	Civil Action No. 93-644
ADA, MARTIN B. ADA and JIN)	
JI TANSEY AND RUSSELL H. TANSEY)	
)	
Plaintiff,)	
)	
v.)	DECISION AND ORDER
)	GRANTING DEFENDANTS'
J.J. ENTERPRISES, INC., and)	MOTION TO DISMISS
YOUNG CHANG KIM)	
)	
Defendant.)	

The Defendants, J.J. Enterprises and Young Chang Kim, move to dismiss the amended complaint of the Plaintiffs, Joseph B. and Calistro C. Ada (hereinafter the Adas), and Ji and Russell H. Tansey (hereinafter the Tanseys) pursuant to Commonwealth Rules of Civil Procedure 12(b).

I. FACTS AND PROCEDURAL BACKGROUND

All the pertinent facts, the procedural history, and the standard of review of this case have been set out in this Court's *Order to Parties to Submit Supplemental Memorandum of Law* issued on August 11, 1993. In said Order, the Court held that the

1 Plaintiffs could not invoke the doctrine of waste in an effort to
2 protect their leasehold interest in Lot No. 011 H 28, located in
3 Chalan Kanoa (hereinafter Chalan Kanoa property). In addition,
4 the Court ordered both parties to submit supplemental briefs on
5 the issues listed below.

6
7 **II. ISSUES**

8 (1) Whether the Plaintiffs' complaint contains allegations
9 on every material point necessary to show the existence of a
10 landlord-tenant relationship.

11 (2) Whether any legal theory would render the Defendants
12 liable to the Tanseys on the grounds that the Defendants allegedly
13 destroyed the barracks, and thus injured the Tansey's leasehold
14 interest.

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16 **III. ANALYSIS**

17 **A. Existence of a Landlord-Tenant Relationship**

18 The requirements of a landlord-tenant relationship are: (1)
19 a space with a fixed location for the duration of the lease; (2)
20 a transfer of the present right to possession of the leased
21 property; (3) legal capacity and authority to enter into landlord-
22 tenant relationship; (4) a lease for a fixed period of time.
23 *Hefner v. Napoleon*, Civil Action No. 92-007, slip op. at 6-7 (Dec.
24 9, 1993) (citing RESTATEMENT (SECOND) OF PROPERTY §§ 1.1-1.4 (1993)).
25 The Plaintiffs allege a fixed location for the duration of their
26 lease, *Plaintiffs' First Amended Complaint*, at ¶ 2, a transfer of
27 exclusive possession and control of the Chalan Kanoa property to
28 the tenant on October 1, 1992, *Id.* at ¶ 14, legal capacity and

1 authority to enter into contract, *Id.* at ¶ 2, and a five year
2 "leasehold agreement" executed on September 11, 1992 . *Id.* at ¶ 4.
3 Therefore, the plaintiffs' first amended complaint has
4 successfully alleged the existence of a landlord-tenant
5 relationship commencing from the date of transfer of exclusive
6 possession, October 1, 1992.

7
8 **B. Private Nuisance**

9 The Plaintiffs claim that their complaint states a cause of
10 action for private nuisance.^{1/} A private nuisance is a
11 nontrespassory invasion of another's interest in the private use
12 and enjoyment of land. RESTATEMENT (SECOND) OF TORTS, § 821D (1993)
13 (hereinafter the TORTS). A plaintiff must allege the following
14 facts in order to state a cause of action for private nuisance:

15 1) the plaintiff is a possessor of the land or has
16 ownership of possessory or nonpossessory estates in
17 land; 2) the defendant is the legal cause of a
18 nontrespassory invasion of the plaintiff's interest in
19 the private use and enjoyment of land; and, 3) such
20 invasion is intentional and unreasonable or
21 unintentional and otherwise actionable under theories of
22 negligent or reckless conduct.

23 RESTATEMENT, at §§ 821-822.

24 The Plaintiffs allege a possessory leasehold interest in the
25 Chalan Kanoa property as of September 11, 1992, and possession of
26 the property on October 1, 1992. According to *Klassen v. Central*
27 *Kan. Coop. Cream Ass'n*, 165 P.2d 601, 607 (Kan. 1946), a lessee is
28 entitled to recover damages for a nuisance which affects his
enjoyment of the leased premises if he enters the leasehold

^{1/} In their Supplemental Memorandum of Law, the Plaintiffs also claim a negligence theory of relief exists but freely admit that the First Amended Complaint fails to allege negligence.

1 agreement prior to the existence of the nuisance. *Id.* Thus, the
2 Plaintiffs have successfully alleged the first requirement by
3 claiming a leasehold interest in the Chalan Kanoa property which
4 commenced September 11, 1992, several days prior to the
5 destruction of the barracks.

6 Next, the Plaintiffs must allege that the Defendants are the
7 legal cause of a nontrespassory invasion of the Plaintiff's
8 interest in the private use and enjoyment of the Chalan Kanoa
9 property. See RESTATEMENT at § 821D. On its face, the complaint
10 appears to satisfy this requirement by alleging that the
11 Defendants ordered the destruction of the barracks located on the
12 Chalan Kanoa property while the Defendants still had possession of
13 the property.

14 However, after reviewing the Restatement and several cases
15 citing it, the Court is not convinced that the acts about which
16 Plaintiffs complain actually fit within the Restatement's meaning
17 of the phrase "nontrespassory invasion." The Restatement does not
18 address whether a nontrespassory invasion (within the context of
19 the tort of private nuisance) could result from a departing
20 tenant's actions invading the use and enjoyment of an arriving
21 tenant, and thereby, originate from the plaintiff's property.
22 Neither the Plaintiffs nor this Court has had any success locating
23 a private nuisance decision involving the unique situation
24 presented in this case. Thus, the Plaintiffs ask this Court to
25 expand the definition of nontrespassory invasion to apply to the
26 situation where the interference with property use arises from the
27 actions of an owner of an earlier property interest in the same
28 land. Such a holding would stretch the scope of private nuisance

1 law in the Commonwealth wider than any other jurisdiction in the
2 United States political family.

3 Traditionally, the theory of private nuisance was designed to
4 remedy invasions of the plaintiff's land which resulted from
5 conduct wholly performed on adjoining or nearby land of the
6 defendant. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS
7 § 86, at 617 (5th ed. 1984) (hereinafter KEETON). In modern case
8 law, application of the private nuisance theory has invariably
9 been limited to situations where the defendant's actions on his
10 own property has simultaneously interfered with a neighboring
11 landowner's interest in the use and enjoyment of land. See
12 *Sandifer Motors, Inc. v. City of Roeland Park*, 628 P.2d 239 (Kan.
13 App. 1981) (defendant's dump adjacent to plaintiff's property held
14 to be nuisance); *Bolin v. Cessna Aircraft Co.*, 759 F.Supp. 692 (D.
15 Kan. 1991) (property owner from nearby community could recover
16 under nuisance theory for leakage of trichloroethylene from
17 defendant's manufacturing plant); *Klassen*, 165 P.2d at 603
18 (plaintiff recovered under nuisance theory for pollution caused by
19 defendant's nearby creamery); *Branch v. Western Petroleum, Inc.*,
20 657 P.2d 267 (Utah 1982) (property owners of land damaged by
21 flooding from defendant's adjoining land recover under nuisance
22 theory).

23 Without exception, courts awarding damages under a private
24 nuisance theory do not contemplate a fact pattern involving a
25 nontrespassory invasion allegedly originating from the same land
26 in which the plaintiff claims to have a property interest. In
27 *Culwell v. Abbott Construction Co. Inc.*, 506 P.2d 1191, 1195 (Kan.
28 1973, the court described a nuisance as follows:

1 "A nuisance is an annoyance, and any use of property by
2 one which gives offense or endangers life or health,
3 [...] or obstructs the reasonable and comfortable use
and enjoyment of the property of another may be said to
be a nuisance."

4 *Culwell*, (citing *Allen v. City of Ogden*, 499 P.2d 527 (Kan. 1972)
5 (emphasis added). The definition employed by the Kansas Supreme
6 Court articulates a limitation on the theory of private nuisance
7 with which private nuisance case law silently concurs. Namely,
8 nuisances upsetting a plaintiff's property interests must
9 originate on another property owners property.

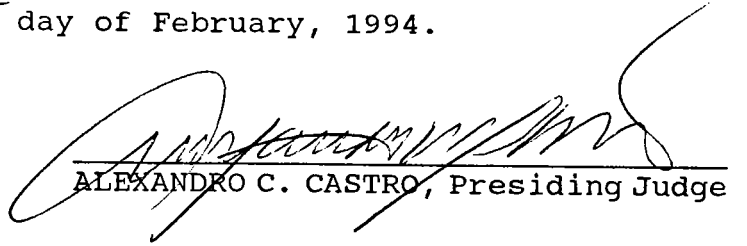
10 Turning to the case at bar, the Plaintiffs claim that the
11 Defendant's alleged destruction of the barracks amounted to a
12 nontrespassory interference with the Plaintiff's use and enjoyment
13 of the Chalan Kanoa Property. This reasoning appears to work
14 because at the time the Defendants allegedly caused the nuisance,
15 they still had possession of the Chalan Kanoa property and thus,
16 were on the property in a nontrespassory capacity. However, in
17 light of traditional private nuisance theory, see KEETON at 617,
18 and modern case law's reluctance to part from this theory, see
19 *Culwell* at 1195, the Court holds that a "nontrespassory invasion"
20 within the context of the law of private nuisance neither
21 contemplates nor includes invasions originating on the land
22 alleged to have been invaded. Such invasions must originate on
23 adjacent or nearby property. Therefore, the Plaintiff's complaint
24 fails to allege a nontrespassory invasion and thereby fails to
25 make a statement for a private nuisance claim showing that the
26 plaintiff is entitled to relief.

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IV. CONCLUSION

For the foregoing reasons, the Defendant's motion to dismiss is GRANTED without prejudice.

So ORDERED this 14 day of February, 1994.


ALEXANDRO C. CASTRO, Presiding Judge