CAUSE NO. DC-15-07640

FC WP BUILDING LLC, Plaintiff, v. HEADINGTON REALTY AND CAPITAL LLC, Defendant.	§ § § § § § § § § §	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 68TH JUDICIAL DISTRICT

DEFENDANT'S SPECIAL EXCEPTIONS TO PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant Headington Realty and Capital LLC ("Headington Realty")[1] files its Special Exceptions to Plaintiff's Original Petition and Request for Declaratory and Injunctive Relief (the "Petition"), as follows:

I.

PRELIMINARY STATEMENT

1. Plaintiff FC WP Building LLC ("Plaintiff") has asserted a groundless nuisance claim against Headington Realty that has no basis under Texas law. Indeed, the legal principles that preclude Plaintiff's nuisance claim have been established law in Texas since 1860! In addition, Plaintiff does not have a good faith argument for the extension, modification, or reversal of that longstanding Texas law. Headington Realty, therefore, respectfully requests that the Court grant its special exceptions and dismiss this lawsuit for failure to state a claim upon which relief can be granted.

---

[1] Plaintiff has named Headington Realty as defendant even though it knows or should know that Headington Realty is not the proper defendant. The filing of this motion is without prejudice to, or waiver of, Headington Realty's defense that it is not the proper defendant. *See* TEX. R. CIV. P. 93(4) (listing certain pleas to be verified, including the existence of "a defect of parties, plaintiff or defendant."). Headington Realty owns Elm at StonePlace Holdings, LLC, which is the owner of the property located at 1615 Main Street that is adjacent to Plaintiff's property and the source of the alleged nuisance. *See* http://www.dallascad.org/AcctDetailCom.aspx?ID=00000100996000000.

II.

PLAINTIFF'S GROUNDLESS ALLEGATIONS

2. In its Petition, Plaintiff sued Headington Realty for allegedly creating a nuisance and interfering with the use and enjoyment of its real property located at 1623 Main Street in downtown Dallas known as the "Wilson Building."[2] That is Plaintiff's only purported claim.[3] In particular, Plaintiff contends that Headington Realty's proposed construction of a five-story building to conduct a retail business adjacent to, but not invading, the Wilson Building will "constitute a nuisance" and that "[a]t least eight apartments in the Wilson Building will be denied almost all access to air, light, and view."[4] Plaintiff erroneously contends that Headington Realty has "a legal duty to avoid interfering with [Plaintiff's] use and enjoyment of the Wilson Building."[5]

3. Plaintiff seeks to "recover market value damages . . . for the permanent damage to the Wilson Building," an injunction that "Headington [Realty] shall not unreasonably interfere with [Plaintiff's] use and enjoyment of the Wilson Building," and declaratory relief that Plaintiff "is entitled to the continued use and enjoyment of the Wilson Building free from the nuisance threatened by Headington [Realty]'s proposed development of property adjacent to the Wilson Building."[6] Based on its request for declaratory relief, Plaintiff also seeks an award of attorneys' fees and costs.[7]

---

[2] *See* Plaintiff's Original Petition and Request for Declaratory and Injunctive Relief ("Petition"), filed July 8, 2015, ¶¶ 13-16; http://www.dallascad.org/AcctDetailCom.aspx?ID=00000100978000000.

[3] *See* Petition, ¶¶ 13-16.

[4] *See id.*, ¶ 13.

[5] *See id.*, ¶ 14.

[6] *See id.*, ¶¶ 14-16, 19.

[7] *See id.*, ¶ 19.

III.

SUMMARY OF ARGUMENT

4. Plaintiff's nuisance claim and requested relief should be denied because they conflict with well-established Texas law for at least five reasons: (i) no legal duty exists under Texas law to provide access to air or light or to refrain from blocking a view and, therefore, the proposed building does not constitute a nuisance as a matter of law; (ii) diminution in property value due to the legal use of neighboring property is not a cognizable injury in Texas; (iii) a nuisance does not exist under Texas law merely because of aesthetical-based complaints, as is the case here; (iv) Plaintiff's inclusion of a redundant request for declaratory relief solely for the purpose of requesting an award of attorneys' fees is improper in Texas; and (v) Plaintiff's requested injunctive relief is not cognizable under Texas law given the nature of the harm alleged in the Petition. Thus, Plaintiff's nuisance claim, including all the relief requested, should be dismissed for failure to state a claim upon which relief can be granted.

IV.

ARGUMENT AND AUTHORITIES

A. Applicable Legal Standard

5. Although special exceptions are typically filed to force clarification of vague pleadings, they may also be used to determine whether a party has pled a cause of action permitted by law.[8] Special exceptions should "point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to."[9]

---

[8] *See San Benito Bank & Trust Co. v. Landair Travels*, 31 S.W.3d 312, 317 (Tex. App.—Corpus Christi 2000, no pet.).

[9] *See* TEX. R. CIV. P. 91.

6. Therefore, a party may challenge the sufficiency of the pleadings to state a cause of action "by specifically pointing out the defect or reason that the claim is invalid."[10] If the cause of action is not permitted by law, the trial court may properly sustain the special exceptions and dismiss the invalid cause of action.[11]

B. Plaintiff's Nuisance Cause Of Action Must Be Dismissed Because It Conflicts With Well-Established Texas Law.

1. Texas law creates no legal duty to provide access to air or light or to refrain from blocking a view.

7. The construction of a building to conduct a retail business is, of course, a lawful use of property and constitutes neither a nuisance *per se* nor a nuisance in fact under Texas law.[12] Indeed, in Texas, an owner of real estate may, in the absence of governmental building restrictions or regulations, erect a building thereon and on any part thereof.[13] Plaintiff does not allege that any building restrictions or regulations exist that preclude Headington Realty's development of a retail store on its property adjacent to the Wilson Building.[14]

---

[10] *See Mowbray v. Avery*, 76 S.W.3d 663, 677 (Tex. App.—Corpus Christi 2002, pet. denied).

[11] *See Holt v. Reproductive Servs., Inc.*, 946 S.W.2d 602, 604-05 (Tex. App.—Corpus Christi 1997, writ denied); *see also Wayne Duddlesten, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85, 96-97 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("If the plaintiff's suit is not permitted by law, the defendant may file special exceptions and a motion to dismiss.").

[12] *See Maranatha Temple, Inc. v. Enter. Prods. Co.*, 893 S.W.2d 92, 98-99 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (holding that neither the lawful use of property nor the lawful conduct of a business is a nuisance *per se* or a nuisance in fact).

[13] *See Harrison v. Langlinais*, 312 S.W.2d 286, 288 (Tex. Civ. App.—San Antonio 1958, no writ) ("The rule of law in Texas is well established, that the owner of real estate may, in the absence of building restrictions or building regulations against his land, erect a building, wall, fence or other obstruction thereon and on any part thereof, with his sole discretion, and his action in so doing is lawful as one of the incidents of fee simple ownership, notwithstanding it obstructs light, air and vision from his neighbor; notwithstanding it depreciates the value of the neighbor's property, and notwithstanding the motive for erecting the structure. This has been the law, and it has been followed by an unbroken line of authorities since the early case of Klein v. Gehrung."); *Scharlack v. Gulf Oil Corp.*, 368 S.W.2d 705, 706 (Tex. Civ. App.—San Antonio 1963, no writ) ("It is our opinion that the appellants have alleged nothing more than an interference with their view. The English rule of 'ancient lights' was repudiated in this State in the early case of Klein v. Gehrung, 25 Tex.Supp. 232. Under the rule recognized in this State, a building or structure cannot be complained of as a nuisance merely because it obstructs the view of the neighboring property."); *Dallas Land & Loan Co. v. Garrett*, 276 S.W. 471, 474 (Tex. Civ. App.—Dallas 1925, no writ).

[14] *See generally* Petition.

8. In Texas, the right to erect a building on real property is an incident of ownership of such property and is not a nuisance as a matter of law – even if the building will obstruct light, air, and vision from the neighboring property and result in the depreciation of the value of the neighboring property.[15] That legal principle has been the law in Texas since 1860![16] Thus, Texas law does not recognize the nuisance claim set forth in the Petition.

9. Moreover, Plaintiff does not allege that, notwithstanding such well-established Texas law, it has a good faith argument for the extension, modification, or reversal of that longstanding law in Texas.[17] Nor could Plaintiff make such a good faith argument under the circumstances.[18] Indeed, Texas adheres to the clear, virtually unanimous principle across the country that an obstructed view or blocked access to air and light is not an actionable nuisance.[19] Accordingly, Plaintiff cannot state a viable nuisance claim under Texas law.

---

[15] *See Harrison*, 312 S.W.2d at 288; *Johnson v. Dallas Power & Light Co.*, 271 S.W.2d 443, 444 (Tex. Civ. App.—Dallas 1954, no writ) (holding that there is no clearer rule in Texas than that if there is no private nuisance, there is no recovery of damages for diminution in value of property by reason of lawful use of such property); *see also Scharlack*, 368 S.W.2d at 706; *Dallas Land & Loan Co.*, 276 S.W. at 474 ("Matters that annoy by being disagreeable, unsightly, and undesirable are not nuisances simply because they may to some extent affect the value of the property. These are some of the natural and necessary incidents of life in a city or town, compactly built and inhabited. Those who reside or own property in such a city or settlement must rest content, so far as the law is concerned, notwithstanding they may be subjected to many such annoyances and discomforts.").

[16] *See Harrison*, 312 S.W.2d at 288; *Scharlack*, 368 S.W.2d at 706; *Dallas Land & Loan Co.*, 276 S.W. at 474; *Klein v. Gehrung*, 25 Tex. 232, 242-44 (Tex. 1860).

[17] *See generally* Petition.

[18] *See Stites v. Gillum*, 872 S.W.2d 786, 792, 794 (Tex. App.—Fort Worth 1994, writ denied) ("We hold that at the time Stites filed the counter-petition, there was no viable cause of action for interference with familial relationship as applied to the factual situation of this case, and that the pleadings filed by him were not seeking a good faith extension of existing law. . . . [W]e find the trial court did not abuse its discretion in determining the action to be groundless."); *Borbon v. Rodriguez*, 2010 Tex. App. LEXIS 5394, at *21-22 (Tex. App.—Houston [1st Dist.] 2010, no pet.) ("Because the Family Code prohibited the trial court from entering an order that was inconsistent with its prior decree, the motion to clarify had no arguable basis in law and was not 'a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.'").

[19] *See, e.g.*, 1 AM JUR 2D *Adjoining Landowners* §§ 93, 102 (2d ed. 2015) ("Generally, a landowner does not have a right of access to air, light, and view over adjoining property . . . . [A] landowner generally may, by erecting a building or other structure on his or her own land, obstruct, or deprive the adjoining owner of, the light, air, and view which he or she had before such building or other structure was erected, without subjecting the landowner to legal liability."); *Sowers v. Forest Hills Subdiv.*, 294 P.3d 427, 431 (Nev. 2013) ("[W]e have consistently held that a landowner does not have a right to light, air, or view."); *Hefazi v. Stiglitz*, 862 A.2d 901, 911

2. Diminution in property value based on the legal use of neighboring property is not a cognizable injury in Texas.

10. The Wilson Building is built upon the margin of its lot and, as a matter of law, was done with the knowledge that the adjoining landowner has the same right.[20] Thus, no nuisance claim exists in Texas merely for the alleged diminution in property value of the Wilson Building resulting from Headington Realty's lawful use of its adjacent property.[21] Accordingly, Plaintiff cannot state a nuisance claim upon which relief can be granted under Texas law.

3. Nuisance claims cannot be based on aesthetical-based complaints in Texas.

11. Texas courts have never found a nuisance to exist merely because of aesthetical-based complaints.[22] That is because a nuisance generally requires an invasion of property by

---

(D.C. 2004) ("One may obstruct his neighbor's windows at any time and no action can be maintained for obstructing a view.") (internal quotations, punctuation, and citations omitted); *Kruger v. Shramek*, 565 N.W.2d 742, 747 (Neb. Ct. App. 1997) ("[T]here is a clear majority rule in other jurisdictions. The general rule is that a lawful building or structure cannot be complained of as a private nuisance merely because it obstructs the view of neighboring property."); *Kucera v. Lizza*, 69 Cal. Rptr. 2d 582, 589-90 (Cal. Ct. App. 1997) ("Since California law does not recognize the doctrine of ancient lights or a landowner's 'natural right to air, light or an unobstructed view', a landowner cannot have obstructions enjoined as a private nuisance . . . .") (internal citations omitted); *44 Plaza, Inc. v. Gray-Pac Land Co.*, 845 S.W.2d 576, 578 (Mo. Ct. App. 1992) ("[A] landowner's otherwise lawful acts in blocking the view of another's property do not give rise to a cause of action for nuisance. . . . The common law rule is that, absent a statute or contract to the contrary, the obstruction of a landowner's view is not actionable."); *8,960 Square Feet v. Alaska, Dep't of Transp. & Pub. Facilities*, 806 P.2d 843, 845-46 (Alaska 1991) ("[A] property owner has no right to an unobstructed line of vision to his property from anywhere off of his property, absent an easement of some sort."); *Collinson v. John L. Scott, Inc.*, 778 P.2d 534, 537 (Wash. Ct. App. 1989) ("The general rule appears to be that a building or structure cannot be complained of as a nuisance merely because it obstructs the view of neighboring property. That rule finds its genesis in the repudiation of the English doctrine of ancient lights.") (internal citations omitted); *Fontainebleau Hotel Corp. v Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) ("[T]he English doctrine of 'ancient lights' has been unanimously repudiated in this country.").

[20] *See Boys Town, Inc. v. Garrett*, 283 S.W.2d 416, 421 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.) ("Everyone who builds upon the margin of his lot, in a town or city, does so with a knowledge that the adjoining proprietor has the same right . . . .") (citing *Klein v. Gehrung*).

[21] *See Johnson*, 271 S.W.2d at 444 ("no clearer rule" in Texas that, absent a nuisance, the lawful use of one's property does not permit another to recover damages for the resulting diminution in value of their property); *Dallas Land & Loan Co.*, 276 S.W. at 474 (annoyances are not nuisances – even if they affect the value of property).

[22] *See Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 509 (Tex. App.—Eastland 2008, pet. denied) ("Texas courts have not found a nuisance merely because of aesthetical-based complaints.").

light, sound, odor, or foreign substance.[23] Here, however, Plaintiff does not allege such an invasion of the Wilson Building.[24] Rather, Plaintiff alleges only that "[a]t least eight apartments in the Wilson Building *will be denied* almost all access to air, light, and view,"[25] and that "the described nuisance . . . *will block* almost entirely the air, light, and view available to a number of rental apartments and thereby, permanently damage the Wilson Building."[26] Accordingly, Plaintiff does not and cannot state an actionable nuisance claim against Headington Realty.

4. Plaintiff is not entitled to its requested non-monetary relief under Texas law.

a. Plaintiff is not entitled to declaratory relief.

12. Texas precludes a request for declaratory relief that is merely redundant of other causes of action for which attorneys' fees are unavailable.[27] Plaintiff's request for declaratory relief is based on the same allegations underlying its requests for monetary and injunctive relief.[28] Accordingly, Plaintiff cannot state a claim for declaratory relief under Texas law.

---

[23] *See id.* ("[S]uccessful nuisance actions typically involve an invasion of a plaintiff's property by light, sound, odor, or foreign substance."); *id.* at 512 ("Texas caselaw recognizes few restrictions on the lawful use of property. If Plaintiffs have the right to bring a nuisance action because a neighbor's lawful activity substantially interferes with their view, they have, in effect, the right to zone the surrounding property. . . . Texas caselaw . . . limit[s] a nuisance action when the challenged activity is lawful to instances in which the activity results in some invasion of the plaintiff's property and by not allowing recovery for emotional reaction alone."); *Maranatha Temple, Inc.*, 893 S.W.2d at 98-99 (same).

[24] *See generally* Petition.

[25] *See id.*, ¶ 13 (emphasis added).

[26] *See id.*, ¶ 16 (emphasis added).

[27] *See Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624 (Tex. 2011); *Wells Fargo Bank, N.A. v. Robinson*, 391 S.W.3d 590, 594–95 (Tex. App.—Dallas 2012, no pet.); *US Bank, N.A. v. Prestige Ford Garland Ltd. P'ship*, 170 S.W.3d 272, 278–79 (Tex. App.—Dallas 2005, no pet.).

[28] *See* Petition, ¶¶ 13-16.

b. Plaintiff is not entitled to injunctive relief.

13. In Texas, injunctive relief is not an available remedy if the alleged harm can be redressed through monetary damages.[29] Plaintiff alleges that the purported nuisance of Headington Realty's adjacent building will damage the value of the Wilson Building, which is an injury redressable by monetary damages. Indeed, Plaintiff also seeks damages for the alleged harm resulting from the purported nuisance.[30] Accordingly, Plaintiff cannot state a claim for injunctive relief under Texas law under the circumstances.[31]

V.

REQUEST FOR RELIEF

14. For all the foregoing reasons, Headington Realty respectfully requests that the Court grant its special exceptions, dismiss this lawsuit with prejudice, and award Headington Realty such other and further relief to which it may be justly entitled.

---

[29] *See Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 284 (Tex. 2004) ("A permanent injunction issues only if a party does not have an adequate remedy at law."); *Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 78 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (denying request for permanent injunction and concluding "plaintiffs were not entitled to injunctive relief because monetary damages could fully compensate them for any harm they may have suffered . . . .").

[30] *See* Petition, ¶¶ 13-14, 19.

[31] *See Schneider Nat'l Carriers, Inc.*, 147 S.W.3d at 284 ("If there is a legal remedy (normally monetary damages), then a party cannot get an injunction too. Accordingly, awarding both an injunction and damages as to future effects would constitute a double recovery."); *Tanglewood Homes Ass'n*, 436 S.W.3d at 78.

Respectfully submitted,

BREWER, ATTORNEYS & COUNSELORS

By: _____

William A. Brewer III
State Bar No. 02967035
wab@brewerattorneys.com
Michael J. Collins
State Bar No. 00785493
mjc@brewerattorneys.com
Robert M. Millimet
State Bar No. 24025538
rrm@brewerattorneys.com

1717 Main Street, Suite 5900
Dallas, Texas 75201
Telephone: (214) 653-4000
Facsimile: (214) 653-1015

COUNSEL FOR DEFENDANT
HEADINGTON REALTY AND CAPITAL LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via eservice upon the following counsel of record on this 6th day of August, 2015:

James M. Stanton
Stanton@stantontrialfirm.com
William G. Compton
Compton@stantontrialfirm.com
Stanton Law Firm, P.C.
9400 N. Central Expressway, Suite 1304
Dallas, Texas 75231

COUNSEL FOR PLAINTIFF
FC WP BUILDING LLC

Robert M. Millimet