STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JOANN FRANZ, ET AL.,

Plaintiffs,

vs. Case No. 2004-0563-CE

RIC-MAN CONSTRUCTION, INC., ET AL.,

Defendants.

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OPINION AND ORDER

Defendant Six-S, Inc. ("Six-S") moves for summary disposition. Defendant Ric-Man and defendant D'Agostini partially join in the motion.

Plaintiffs filed their initial complaint on February 10, 2004, and several subsequent amended complaints adding subcontractors, culminating in the seventh amended complaint on September 14, 2005. The substance of plaintiffs' complaint remains the same throughout each amendment, and stems from construction done near the plaintiffs' homes between June of 2001 and September of 2003. The construction project spanned approximately six miles, and each of the three general contractors (who were initial defendants in this action) was assigned a specific portion of the job.[1] According to plaintiffs, the construction done by defendants included water main, sewer, and road construction and repair. Plaintiffs alleged that defendants broke concrete and/or asphalt surfaces with a falling weight instead of cutting it with a saw, and that defendants' activities caused vibrations and dust to be emanated and physically trespassed upon plaintiffs' properties. Plaintiffs further claim that their properties, including plants, shrubs, fences,

[1] Lanzo Construction asserts its portion begins at 8 Mile Road and Marter Road and terminates at 9 Mile Road and Jefferson Avenue; Ric-Man Construction's portion spans from 10-1/2 Mile Road and Jefferson Avenue to 12-1/2

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driveways, foundations, walls, and ceilings, were destroyed. Plaintiffs bring claims for trespass (count I); nuisance (count II); and negligence (count III). Defendant Six-S now moves for summary disposition. Defendants Ric-Man and D'Agostini partially join in the motion, to the extent that Six-S moves for disposition of the trespass claim as far as it pertains to alleged trespass of intangible agents.

Defendant Six-S contends, first, that it is entitled to summary disposition of the trespass claim for two reasons. First, Michigan does not recognize a claim of trespass based on invasion of intangible agents, including dust, vibrations, sounds and noises, as plaintiffs claim, in part, here. Second, to the extent that plaintiffs assert Six-S physically trespassed onto their property with vehicles, there is no factual support for same, and the evidence actually shows that Six-S never drove a vehicle or any machinery onto plaintiffs' property. Defendant Six-S further argues that it is entitled to summary disposition of plaintiffs' nuisance and negligence claims because there is no genuine issue of material fact as to whether Six-S's construction activity caused the alleged dust, vibrations, and noise conditions to invade and damage plaintiffs' property.

Plaintiffs respond, first, that they do not contend that Six S physically trespassed on any of their properties. Further, plaintiffs admit that they are not personally aware of what Six-S did or did not do in connection with this project, and were only "tipped-off" by the notice of non-party at fault that Six-S was involved in supplying and laying concrete pavement. Plaintiffs maintain that the fact that they have no personal knowledge does not defeat their claims if there are facts from other sources that establish the elements of nuisance. Plaintiffs contend that while defendant Six-S includes a self-serving affidavit of its project manager, Paul McSorley, plaintiffs have not had a chance to depose Mr. McSorley, and plaintiffs do not yet know the details of that

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Mile Road to Jefferson Avenue; and L. D'Agostini's portion begins at 12-1/2 Mile Road and Jefferson Avenue and terminates at 14 Mile Road and Jefferson Avenue.

machine, e.g., its size, weight, dimensions, or the force and frequency of the vibrations it produces. Plaintiffs contend there are credibility questions as to whether the activities of Six-S in connection with the project were a proximate cause of the vibration nuisance of which plaintiffs complain. Further, plaintiffs contend this motion is pre-mature as discovery is not yet complete, and in particular the records of Six-S have not been produced, nor has the deposition of any Six-S employee or agent been taken.

Defendant Six-S moves for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). A motion brought under MCR 2.116(C)(8) tests the sufficiency of the complaint on the basis of the pleadings alone. *By Lo Oil*, 26. The trial court must grant the defendant's motion if no factual development could justify the asserted claim for relief. *By Lo Oil*, 26. A (C)(10) motion tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. *By Lo Oil*, 26. If the moving party satisfies its burden of production, the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. *By Lo Oil*, 26-27.

First, plaintiffs do not contest dismissal of the trespass claim. Moreover, the Court notes that it is well-settled that recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). Such facts are not alleged against this defendant.

Second, the Court is not persuaded plaintiffs support a claim for nuisance or negligence against defendant Six-S, and further discovery is not needed to resolve this issue. Both nuisance and negligence contain the "causation" element. According to the Restatement, an actor is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992), citing 4 Restatement Torts, 2d, §§ 821D-F, 822, pp 100-115. To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Haliw v City of Sterling Heights,* 464 Mich 297, 309-310; 627 NW2d 581 (2001).

In this case, defendant Six-S presents the deposition testimony of David Bade, the project manager for Lanzo, the contractor for whom Six-S performed cement paving work. Mr. Bade testified that Six-S was not involved in the removal of concrete. (Tr 28) When asked if Six-S used any machines that would cause vibrations, Bade testified that there is specific equipment for concrete paving, a "large machine that rolls very slowly along the project." (Tr 29) The machine is not also a mixer, but instead, the wet concrete comes in mix trucks, put into the paving machine, and moved slowly along he project and lays down the concrete. (Tr 29) Bade confirmed that part of the paving equipment is a device "that vibrates it or pats it or taps it or does something to it to make sure it fits down with no bubbles and no empty spaces." (Tr 30) Bade further explained that Six-S used "generally accepted paving methods" during the work,

and that there was nothing unusual about what they did, the type of equipment used or the method of construction used. (Tr 87) Mr. Bade testified that they only received one complaint, from the owner of a passing vehicle which got a little curing compound on the car, but no complaints related to anything like vibration or dust. (Tr 88) Mr. Bade explained, "I mean, that operation, basically because it was wet concrete, doesn't create dust and they didn't do the sub base, so their machines really don't cause any vibration or much vibration at all." (Tr 88) Defendant Six-S further attaches the affidavit of Paul McSorley, its project manager, who swears that Six-S brought no equipment to the job site that could have caused vibration, damage or dust to plaintiffs' properties. Defendant Six-S also attaches the deposition testimony of the two homeowners who remembered seeing Six-S's vehicles, the Conleys. Both testified that they saw Six-S mixing cement. When asked, "Did you experience any vibrations while Six-S was performing its work," Grace Conley responded, "No." (Tr 46)

Plaintiffs contend summary disposition is premature, as discovery is not yet complete, and further discovery may show that Six-S caused vibrations. The Court does not agree. Michigan courts have held that a grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). However, a disputed issue must be before the court. *Bellows*, 561. If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. *Bellows*, 561. Here, plaintiffs have not presented any independent evidence that a cement paver of any sort could cause the kind of vibrations that damaged plaintiffs' homes. If plaintiffs had at least produced such evidence, further discovery of the particular type of cement paver used by Six-S would be relevant. Instead, the Court is

presented with evidence that the cement paver was of the ordinary type used, and that one of the homeowners who noted Six-S's presence determined that defendant's work in fact did not cause vibrations in the home. The Court is not persuaded that further discovery would be likely to uncover factual support for the nonmoving party's position.

For the foregoing reasons, defendant Six-S, Inc.,'s motion for summary disposition is GRANTED. The Court further GRANTS the motions of D'Agostini and Ric-Man pertaining to the trespass claim to the extent that it alleges trespass of intangible agents. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

IT IS SO ORDERED.

Dated: June 1, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Bettie K. Ball
Donnelly W. Hadden
Ronald A. Deneweth
William Kiriazis
Charles A. Huckabay
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CIRCUIT JUDGE

JUN 1 - 2006

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BY: _____ Court Clerk