

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2003-1949

56

ROBERT F. CASEY, JR. & others¹

vs.

MICHAEL GOULIAN & others²

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS'
JOINT MOTION FOR SUMMARY JUDGMENT**

The plaintiffs, Robert F. Casey, Jr ("Casey"); Rita A. Casey; David McCoy ("McCoy"); Amy McCoy; and Beverly Smith, bring this action against the defendants, Michael Goulian; Executive Flyers Aviation, Inc; Center of Mass Aerobatics, LLC; Kent G. Christman; Steve S. Pennypacker; and Peter E. Bocon, claiming a common law nuisance. This matter is before the court on the defendants' joint motion for summary judgment under Mass. R. Civ. P. 56. For the reasons stated below, the defendants' motion is **DENIED**.

BACKGROUND

The plaintiffs are longtime residents of Ayer, Massachusetts, a town located about 35 miles north of Boston. Ayer is approximately 9.6 square miles in size, with a population density of 808 persons per square mile. Defendant, Executive Flyers Aviation, Inc., is a flight training school based in Bedford, Massachusetts. It has 32 aircrafts in its fleet, and defendant, Michael Goulian, is one of

¹ Rita A. Casey; David McCoy; Amy McCoy; and Beverly Smith

² Executive Flyers Aviation, Inc; Center of Mass Aerobatics, LLC; Kent G. Christman; Steve S. Pennypacker; and Peter E. Bocon

its owners and principal. Defendants Christman, Pennypacker and Bocon were formerly joint owners of a single-engine airplane, title to which was held in the name of defendant, Center of Massachusetts Aerobatics, LLC. These defendants no longer own nor operate this plane.

The plaintiffs have brought a common law nuisance suit, alleging that the defendants have caused a nuisance by engaging in aerobatic flight activity over their homes. They claim that these flights, which last between five and thirty minutes, bring extreme noise and vibrations to their residences. In highlighting the effects of the flights, Casey claims that the use of earplugs and a white noise sound machine does not alleviate the sounds of the airplanes. Similarly, McCoy states that the defendants' aerobatic flying activities compelled him to expend substantial sums to build a sound proof room in his home, which unfortunately offers little relief. All plaintiffs state that they have observed the defendants flying at low altitudes. Casey asserts that he has seen planes flying at an estimated 800 feet. McCoy says that he has observed planes a mere 30 feet above his house.

After the plaintiffs filed this claim, the defendants removed it to Federal District Court based on federal question jurisdiction. U.S. District Court Judge Saris sent the proceeding back to state court, finding that the case involved no federal question nor any other ground for federal jurisdiction. The defendants have moved for summary judgment.

DISCUSSION

I. Summary Judgment Standard

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Comm'r of Corr.*, 390 Mass. 419, 422 (1983); *Cnty. Nat'l Bank v. Dawes*, 369 Mass.

550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

II. Federal Preemption

A. Field Preemption

The defendants' have put forward an argument of field preemption, meaning that aviation is an area of law in which the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n.*, 505 U.S. 88, 98 (1992) (citations omitted). Field preemption of aviation law would bar the plaintiffs' nuisance suit, as it would prevent the plaintiffs' from bringing any state law claims based on the defendants' flying activities. However, Judge Saris, in sending this case back to state court, implied her rejection of this argument of field preemption. *Casey v. Goulian*, 273 F.Supp. 2d 136, 137, 139 (2003) (citing 28 U.S.C. §§ 1331 and 1441). Specifically, Judge Saris said, "only 'complete' preemption affects federal subject matter jurisdiction."³ *Id.* By sending the matter back

³ While there is some debate on this subject, the term complete preemption is generally used synonymously with the term field preemption. See, e.g., *Ting v. AT & T*, 319 F.3d 1126, 1135 (9th Cir. 2003) ("[f]ederal law can preempt and displace state law through . . . field preemption (sometimes referred to as complete preemption)"); *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 787 (7th Cir. 2002) ("Complete, or field, preemption exists where Congress has so completely preempted a particular area that no room remains for any state regulation and the complaint would be necessarily federal in character"); however, see *Sullivan v. American Airlines, Inc.*, 424 F. 3d 267, 278 n.7 (2nd Cir. 2005) ("Some commentators seem to equate the defense of field preemption, which defeats a plaintiff's state-law claim because federal law occupies the field within which the state-law claim falls, with the

thereby her rejection of the defendants' complete or field preemption argument. This Court will abide by Judge Saris' sound decision and will not attempt to revisit the issue of field preemption.

B. Conflict Preemption

Judge Saris' decision did not address the issue of conflict preemption. In reserving this issue for the state court, she said, "conflict preemption is merely a defense to the merits of a claim...Perhaps defendants have a valid preemption defense on the merits...In any event, the defendants will have to address their arguments in the state court." *Casey*, 273 F.Supp. 2d at 139, 140. Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98 (citations omitted).

Massachusetts regulations state that aerobatic flight may not take place "[o]ver thickly settled areas or districts or over an open-air assembly of persons," or "below an altitude of 1500 ft. above the surface." 702 Code Mass. Reg. § 4.06. A thickly settled district is defined as "the territory contiguous to any way which is built up with structures devoted to business, or the territory contiguous to any way where the dwelling houses are situated at such distances as will average less than two hundred feet between them for a distance of a quarter of a mile or over." G.L. c. 90, § 1. Federal regulations prohibit aerobatic flight: "over any congested area of a city, town, or settlement; Over an open air assembly of persons; . . . [or] Below an altitude of 1,500 feet above the surface."

doctrine of complete preemption, which creates federal subject-matter jurisdiction over preempted state-law claims. . . . But no Supreme Court case has ever held the two forms of preemption to be equivalent").

14 C.F.R. § 91.303. It appears that no federal case, statute, or regulation provides a further definition of the term "congested area."

The question of federal preemption "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Given this assumption and the strict definition of conflict preemption, this Court finds no conflict between the state and federal regulations. Pilots are certainly able to abide simultaneously by both sets of regulations. In complying with state law and in avoiding aerobatic flight "[o]ver thickly settled areas or districts or over an open-air assembly of persons," or "below an altitude of 1500 ft.," pilots would not be violating federal regulation. See *Florida Avocado Growers v. Paul*, 373 U.S. 132, 133-134, 141 (1963) (no conflict preemption where California regulations required that avocados sold in state contain 8% of their weight in oil and the federal regulations on avocados did not address oil content). Also, the Massachusetts regulation of aerobatic flight cannot be said to be a hindrance to the federal regulation. Both schemes are intended to protect public safety and decrease noise pollution. See, contra, *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 684-685 (1996) (finding that a Montana law requiring arbitration clauses to be typed in underlined capital letters and appear on the first page of contracts conflicted with and was preempted by the Federal Arbitration Act which stated all that arbitration clauses of valid contracts were enforceable. The Court found conflict between the two laws since the goal of the federal act was to establish the legitimacy of arbitration clauses). This Court concludes that the federal and state regulations are not in conflict, and the state law is not preempted by conflict preemption. Therefore, both federal and state regulations govern the defendants' aerobatic flying activities.

merits. Under Massachusetts law, a nuisance arises “when a property owner creates, permits, or maintains a condition or activity on his property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another.” *Doe v. New Bedford Housing Authority*, 417 Mass. 273, 288 (1994) (citations omitted). The plaintiffs’ assertions about the distress caused by the defendants’ flying activities are sufficient evidence for a jury to find that the defendants have committed a nuisance. See *Godard v. Babson-Dow Mfg. Co.*, 313 Mass. 280, 282-284 (1943) (noise and vibrations caused by the defendant constituted an actionable private nuisance).

However, as a matter of the law, the defendants may have a viable and complete defense to the plaintiffs’ nuisance claim, namely, “[l]egislative sanction[, which] makes that lawful which otherwise might be a nuisance.” *Smith v. New England Aircraft Co. Inc.*, 270 Mass. 511, 523 (1930) (addressing specifically the issue of aircrafts flying over privately owned land); see also *Hub Theaters, Inc., v. Mass. Port Authority*, 370 Mass. 153, 155 (1976). Here, the defendants may have the defense that their activities are in full compliance with the applicable state law; however, the plaintiffs have presented sufficient evidence, at the summary judgment stage, that the defendants are violating state regulations.⁴

As mentioned in the earlier section, Massachusetts regulations forbid aerobatic flight “[o]ver thickly settled areas or districts or over an open-air assembly of persons,” or “below an altitude of

⁴ It should be noted that if this Court were to find preemption of the state law by conflict, the plaintiffs could not sustain their nuisance claim. The plaintiffs do not allege that the defendants are violating federal regulations of aerobatic flight.

1500 ft. above the surface.” 702 Code Mass. Regs. § 4.06. For reasons to be stated below, the record shows that the defendants are not violating the former portion of this statute but that they may be violating the latter half.

The records shows that the plaintiffs have not demonstrated that the neighborhood of Ayer in which they live is a “thickly settled” area over which aerobatic flight is forbidden. As mentioned above, a thickly settled area is defined as “the territory contiguous to any way which is built up with structures devoted to business, or the territory contiguous to any way where the dwelling houses are situated at such distances as will average less than two hundred feet between them for a distance of a quarter of a mile or over.” G.L. c. 90 § 1. In the record, the plaintiffs have stated that the city of Ayer is 9.6 square miles in size, with a population density of 808 persons per square mile. Also, they have said that their respective homes are located within one mile of one another. Based on these facts, the plaintiffs profess that the entire town of Ayer is a thickly settled area as defined under statute. This conclusion is not supported. Facts about Ayer’s population density and the distance between the plaintiffs’ homes is insufficient to show that the plaintiffs’ neighborhoods or adjoining neighborhoods contain a quarter mile area in which the residential homes are less than two hundred feet apart. Also, the plaintiffs have not presented evidence to suggest that the area of Ayer is which the plaintiffs live is adjacent to a business district.⁵

Regions defined in case law as thickly settled are generally streets or neighborhoods and not

⁵ McCoy stated in his affidavit that he had observed the defendants fly over the Ayer School Complex and the downtown area. Such areas might be deemed as business districts and therefore fit into the definition of “thickly settled” area, and the defendants would not have the right to fly over these areas. However, the plaintiffs may not base their claims on the defendants’ flights over the Ayer School Complex or the downtown area, as the plaintiffs have no property interests in those areas. See *Connerty v. Metropolitan Dist. Comm’n*, 398 Mass. 140, 147 (1986) (“To bring a private nuisance action, a plaintiff must have some interest in the property affected”).

[of Saugus] is thickly settled; Essex Street is one of the principal streets of the town. School Street extends for about one half mile, from the tracks to Central Street, also a main street, and there are six accepted streets which intersect with School Street in this distance"); *Noyes v. Raymond*, 28 Mass. App. Ct. 186, 193 (1990) (describing an accident scene as a "built up area" with an expert witness disclosing that "within the 300 to 700 feet Joseph travelled before the accident, there were two motels and at least one other structure on the north side of Route 6, a structure on the south side, and a crosswalk"). In contrast, the plaintiffs have presented only very general data about the population or construction density in their particular neighborhoods. They assert general statistics about the town of Ayer, and conclude that the entire town is thickly settled. This conclusion is not amply supported.


In contrast, the record contains evidence that the defendants are violating the height restriction in the Massachusetts regulations for aerobatic flight. Casey states that he has observed the defendants' flying at 800 feet, well below the required 1500 feet. McCoy avers in his affidavit that he has seen the defendants' planes a mere 30 feet above his house. Other plaintiffs assert that they have seen the defendants' flying at low altitudes. While the plaintiffs have not used any technological devices to gage the height of the defendants' airplanes, eye-witness observations of plane altitude are sufficient to find violations of aviation regulations. See *Owens v. Natl. Transp. Safety Bd.*, 734 F.2d. 396 (8th Cir. 1984); *Terry v. Natl. Transp. Safety Bd.*, 608 F.2d. 421 (10th Cir. 1979).

In order to sustain their nuisance suit, the plaintiffs must show that the defendants are violating state regulations. Because the record does not contain evidence to support that the

plaintiffs live in a thickly settled area, they must demonstrate at trial that the defendants are flying at altitudes below the required height. If they are able to prove this and the other elements of their nuisance suit, then they may prevail at trial. Therefore, the defendants are not entitled to judgment as a matter of law.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that defendants' joint motion for summary judgment is **DENIED**.


S. Jane Haggerty
Justice of the Superior Court

DATED: February 9, 2007
Entered: February 14, 2007