

George v Board of Directors of One W. 64th St., Inc.
2011 NY Slip Op 32325(U)
August 19, 2011
Supreme Court, New York County
Docket Number: 114555/09
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART 2

Index Number : 114555/2009

GEORGE, KAREN

VS.

BOARD OF DIRECTORS

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED WITH _____
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/19/11

Ley
LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

IAS PART 2

-----X
KAREN GEORGE

Index No. 114555/09

Plaintiff,

-against-

BOARD OF DIRECTORS OF ONE WEST 64TH
STREET, INC., a Cooperative Corporation, MIDBORO
MANAGEMENT, INC., and MADONNA CICCONE,

Defendants.

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----X

LOUIS B. YORK, J.:

Motion sequences 2, 3, and 4 are consolidated for disposition and resolved as follows:

Karen George ("Plaintiff") is a shareholder and tenant in a cooperative located at One West 64th Street in New York City. Plaintiff claims that the tenant in Apartment 7A - the apartment located immediately below hers and owned by Madonna Ciccone ("Madonna") - caused an unreasonable amount of noise and vibrations to emanate into Plaintiff's apartment approximately 1.5 - 3 hours a day for over two years. Plaintiff alleges that the noise and vibrations were the product of amplified music, which Madonna and her guests used to conduct dance training and exercise routines. Plaintiff states that these disturbances forced her to leave her apartment on numerous occasions and greatly interfered with the entertainment of guests. Plaintiff further states that she continuously alerted the cooperative's board of directors and management company (collectively the "Building Defendants") and Madonna's representatives to this issue beginning in June of 2008, but that these parties failed to take appropriate steps to remedy the problem.

Plaintiff alleges that Madonna made one attempt at implementing noise abatement measures, which occurred in May 2009, but that this was ineffective, leaving the level of noise unchanged. Furthermore, she alleges that the Building Defendants breached their fiduciary duty by failing to enforce the terms of Madonna's proprietary lease and the cooperative's house rules - both of which prohibit tenants from emitting unreasonable noise from their apartments - and by failing to enforce a notice to cure ("Notice to Cure") which the Building Defendants served on Madonna following her May 2009 abatement effort.

Defendants dispute Plaintiff's characterization of the noise as unreasonable, claiming that it only occurred during the daytime, never in increments exceeding three hours, and never at a level prohibited by the New York City Noise Code. Defendants also state that Plaintiff failed to provide access to her apartment in September 2009 and on other occasions, which rendered an assessment of Madonna's abatement measures impossible. Defendants argue that this denial of access should bar Plaintiff's claims under the doctrines of *in pari delicto* and unclean hands. Furthermore, the Building Defendants contend that they acted in good faith in handling Plaintiff's complaints and their actions should therefore be protected under the business judgment rule.

In October 2010 Plaintiff brought suit against the Building Defendants setting forth the following four counts in her complaint: breach of warranty of habitability; private nuisance; request for injunctive relief, requiring the Building Defendants to compel Madonna to comply with her proprietary lease and the co-op's house rules; and attorneys' fees, costs and expenses pursuant to Plaintiff's proprietary lease. In July 2010 the Court denied Plaintiff's motion for partial summary judgment without prejudice on her claim for injunctive relief. The Court found that Madonna was a necessary party to the action and therefore needed to be joined as a party-

defendant before the motion could properly be decided. Plaintiff thereafter amended her complaint to add causes of action for nuisance and injunctive relief against Madonna.

There are currently four motions for summary judgment before the Court: Plaintiff's renewed motion for partial summary judgment on Plaintiff's injunction claim against the Building Defendants (motion sequence 2); the Building Defendants' motion for summary judgment on all claims asserted in Plaintiff's amended complaint (motion sequence 3); Madonna's cross-motion (to motion sequence) for partial summary judgment with respect to the two causes of action asserted against her; and Madonna's motion for partial summary judgment on the two causes of action asserted against her (motion sequence 4). The latter motion is identical to Madonna's cross-motion, and was made in order to give Madonna an opportunity to reply to Plaintiff's opposition to the cross-motion. However, Madonna never filed a reply. Therefore, the Court denies Madonna's motion for partial summary judgment as duplicative.

In accordance with a Court directive on March 29, 2011 Madonna filed an affidavit with the Court in which she stated that she had constructed a studio within one of her other New York City properties to use for her exercises, and is therefore no longer using Apartment 7A for the activities which formed the basis of Plaintiff's complaints. In response to the submission of this affidavit, on June 29, 2011 the parties entered into a stipulation whereby Plaintiff voluntarily discontinued her claims for injunctive relief against the Building Defendants and Madonna. Accordingly, Plaintiff's motion for partial summary judgment and those portions of the defendants' motions for summary judgment relating to Plaintiff's injunction claims are moot.

For the ensuing reasons the Building Defendants' motion for summary judgment is granted with respect to Plaintiff's nuisance claim against them, and denied as to Plaintiff's

remaining claims. Furthermore, Madonna's cross-motion for partial summary judgment is denied.

Analysis

In order to obtain summary judgment the movant "must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 967, 525 NYS2d 793 [1988] (citations omitted)). The party opposing the motion must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Id* at 967). If a party moves for summary judgment on multiple causes of action the court may grant its motion as to one or more of those causes of action. (CPLR § 3212(e)). The denial of summary judgment does not indicate that the Court finds a particular party's arguments persuasive. Instead, it indicates only that enough evidence has been presented to raise a triable issue.

Warranty of Habitability

The first issue before the Court is whether the Building Defendants are entitled to summary judgment on Plaintiff's claim for breach of the warranty of habitability. The warranty of habitability provides that (1) residential premises be fit for human habitation; (2) the condition of the premises be in accord with the uses reasonably intended by the parties; and (3) the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety. (Real Property Law § 235-b; *Park West Management Corp. v. Mitchell*, 47 NY2d 316, 328, 418 NYS2d 310, 317 [1979]). The warranty is an implied covenant made by landlords in every residential lease and rental agreement, including proprietary leases issued by cooperatives.

(*Suarez v. Rivercross Tenant's Corp.*, 107 Misc2d 135, 438 NYS2d 164 [1st Dept 1981]; see *Misra v. Yedid*, 37 AD3d 284, 285, 831 NYS2d 40, 41 [1st Dept 2007])(upholding finding of violation of the warranty)).

Disturbances caused by third parties, including noise emanating from tenants in neighboring apartments, have in certain cases been found to constitute a breach of the second prong of the warranty. (see *Nostrand Gardens Co-Op v. Howard*, 221 AD2d 637, 634 NYS2d 505 [2nd Dept 1995]). In *Nostrand*, however, the evidence revealed the plaintiff was subjected to excessive noise emanating from a neighboring apartment “through the late night and early morning hours.” (*Id.* at 638, 634 NYS2d at 506-07). In other cases which found a breach of this warranty due to noise, the noise has been so excessive that it is deemed to have deprived the plaintiff of “the essential functions that a residence is supposed to provide.” (*Kaniklidis v. 235 Lincoln Place Housing Corp.*, 305 AD2d 546, 547, 759 NYS2d 389, 390-91; see *Solow v. Wellner*, 86 NY2d 582, 589, 635 NYS2d 132, 135 [1995]). Whether particular noises rise to this level is a material issue of fact which, if controverted, precludes summary judgment. (see *Armstrong v. Archives L.L.C.*, 46 AD3d 465, 847 NYS2d 583 [1st Dept 2007]).

Pursuant to Plaintiff's proprietary lease, the Building Defendants have impliedly warranted that her tenancy will be free from interferences which deprive her of the essential functions of her residence. One of the most basic functions of a residence is to provide shelter from the outside world for its occupants to think, interact and relax in peace. If the noise caused by Madonna's activities prevented Plaintiff from being able to use her apartment for these purposes, then the warranty of habitability has been breached. Among the facts which the Court must logically ascertain in order to make this determination are the volume of the noise, its

duration, its frequency, the times of day during which it occurred and any secondary effects caused by its production.

The Building Defendants' first argument in furtherance of their motion for summary judgment on the habitability claim is that the noise emitted from Madonna's apartment was not unreasonable as a matter of law. In support of this argument the Building Defendants offer the affidavit of Michael Wolfe, the president of Midboro Management, Inc., who states that Plaintiff's complaints to the Building Defendants pertained only to alleged disturbances lasting between 1.5 and 3 hours in length and occurring only between the hours of 9:00 a.m. and 6:00 p.m. Mr. Wolfe also states that the Building Defendants obtained a sound measuring device in December 2008 which was used to measure the level of noise in Plaintiff's apartment during many of the alleged disturbances, and that the level measured was always below that prohibited by the Administrative Code of the City of New York § 24-218 ("Noise Code"). This contention is also supported by Bonnie Schnitta, an acoustical engineer who conducted the sound abatement efforts in Madonna's apartment on May 9, 2009. In her affidavit Ms. Schnitta states that she reviewed sound measurements taken in the hallway outside of Plaintiff's apartment following the abatement efforts and that those measurements were all within 10 decibels of the ambient noise level – a level of noise permitted by the Noise Code.

Plaintiff contradicts these assertions in her affidavit, stating that the noise occurred at different times throughout the day on weekdays and weekends, varied in duration¹, and was of such volume as to be deafening and cause her floors and walls to shake. Additionally, Plaintiff

¹ The Court notes that Plaintiff characterizes the duration of the noise differently in her affidavit and verified complaint. In her affidavit Plaintiff states that the noise occurred "for an average continuous period of 1.5 to 3 hours" (*George Affidavit* ¶ 3 [Feb. 18, 2011]), while in her complaint Plaintiff claims that the noise "lasts anywhere from 1.5 to 3 hours" (*George Verified Complaint* ¶ 36 [Sept. 8, 2010]). Plaintiff has not explained the contradiction, but the difference may be attributable to the fact that Plaintiff alleges the noise continued after she filed her complaint, and the invasions which allegedly occurred thereafter may have exceeded 3 hours in length.

argues that the Building Defendants' decision to serve Madonna with the Notice to Cure after her May 2009 abatement effort further evidences the unreasonableness of the noise.

Plaintiff also offers the affidavit of Benjamin Sachwald, an acoustical engineer retained by Plaintiff. In his affidavit Mr. Sachwald states that the sound measurements taken by the Building Defendants are unreliable because the Building Defendants failed to show that the instrument used to measure the sound was properly calibrated, where the measurements were taken and how the measurements were calculated. Furthermore, Mr. Sachwald states that in March and April 2009 he personally observed noise levels in Plaintiff's apartment to be "in excess of 5 and 7 decibels above the ambient sound level", which he found to be "readily noticeable and intrusive." (*Sachwald Affidavit* ¶ 6 [Jan. 31, 2011]).

The Court finds that Plaintiff has satisfied her burden in opposing the Building Defendants' motion for summary judgment on this cause of action. Plaintiff's affidavit and the affidavit of her expert, Mr. Sachwald, both demonstrate that the reasonableness of the noise is in dispute. While Plaintiff has not offered evidence to show that the noise emanating from Madonna's apartment violated the Noise Code, such evidence is not necessary to establish a breach of the warranty. To hold otherwise would require the Court to ignore the possibility that certain noises possess characteristics which make them more intrusive than others. Whether the noise in question possessed such qualities as to violate the warranty of habitability is a question of fact which must be left for trial. Furthermore, the fact that the Building Defendants sent the Notice to Cure to Madonna does not conclusively establish a breach of the warranty of habitability. As stated in *Armstrong v. Archives L.L.C.* "a defendant's notice to cure reciting the dates and substance of noise complaints against the offending tenant does not constitute a

conclusive admission or proof that the alleged noise rose to the level of a breach of the warranty of habitability.” (*Armstrong*, 46 AD3d at 465, 847 NYS2d at 584).

The Building Defendants’ next argument is that they have acted in good faith in dealing with Plaintiff’s complaints and should thus be protected by the business judgment rule. This argument is unavailing. While decisions made by cooperatives are generally given deference by the courts absent a showing of bad faith (*Matter of Levandusky v. One Fifth Ave Apartment Corp*, 75 NY2d 530, 554 NYS2d 807 [1990]), a landlord’s good faith attempts to remedy a condition constituting a breach of the warranty of habitability will not provide it with a defense to the breach. (*Tower West Associates v. Derevnuk*, 114 Misc2d 158, 164, 450 NYS2d 947, 952 [Civ Ct, NY County 1982]). The Building Defendants’ good faith efforts may impact a determination of damages, but these efforts do not provide them with a sufficient basis for summary judgment.

The Building Defendants’ next argument is that the doctrines of unclean hands and *in pari delicto* should bar Plaintiff’s claims. This argument is also unpersuasive. “The doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages.” (*Manshion Joho Center Co, LTD v. Manshion*, 24 AD3d 189, 190, 806 NYS2d 480, 482 [1st Dept 2005]). As Plaintiff’s only equitable claims have been rendered moot by the June 29, 2011 stipulation, this defense is no longer applicable to Plaintiff’s claims.

The doctrine of *in pari delicto* is also inapplicable to the instant case. This defense will bar a Plaintiff’s claim only where the parties have engaged in “immoral or unconscionable conduct that makes the wrongdoing of the party against which it is asserted at least equal to that of the party asserting it.” (*Chemical Bank v. Stahl*, 237 AD2d 231, 655 NYS2d 24 [1st Dept 1997]). If such immoral or unconscionable conduct is established the courts “will not intercede

to resolve a dispute between the two wrongdoers.” (*Kirschner v. KPMG LLP*, 15 NY3d 446, 464, 912 NYS2d 508, 517 [2010]).

The Building Defendants claim that Plaintiff denied access to them on at least six occasions between February 2009 and January 25, 2010, and completely denied access since January 25, 2010. Defendants argue that this denial of access rendered any assessment of Madonna’s abatement efforts impossible and should operate to bar her claims from being heard by the court. While Plaintiff’s alleged denial of access, if proven, may reduce Plaintiff’s damages, it can hardly be said that the actions the Building Defendants allege she engaged in amounted to immoral or unconscionable conduct. Furthermore, Plaintiff has stated that she had in fact allowed access consistently throughout the period in question and any purported denials she made were made for good reason.

Nuisance

The next issue is whether the Building Defendants’ motion for summary judgment and Madonna’s cross-motion for partial summary judgment on Plaintiff’s nuisance claims should be granted. The elements of a claim for private nuisance are “(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s property right to use and enjoy land, (5) caused by another’s conduct in acting or failure to act.” (*61 West 62 Owners Corp. v. CGM EMP LLC*, 77 AD3d 330, 334, 906 NYS2d 549, 553 [1st Dept 2010] (citations omitted)). While a cooperative’s failure to take action may constitute a nuisance in some cases, a cause of action for nuisance cannot lie as against a cooperative which “did not create the nuisance and [] had surrendered control of the premises to [a tenant or apartment owner].” (*Bernard v. 345 East 73rd Owners Corp.*, 181 AD2d 543, 544, 581 NYS2d 46, 46 [1st Dept 1992]; see also *Sherlock v. 20 E. 9th St. Owners Corp.*, 2011 WL 1337447, 2011 NY Slip

Op 30750(U) [Sup Ct, NY County 2011] (summary judgment granted in favor of cooperative's board of directors and management company on nuisance claim asserted by tenant for disturbances caused by neighboring tenant's noise)). Thus, the fact that a cooperative allowed a nuisance to continue unabated, without more, is not grounds for imposing liability for private nuisance.

Plaintiff argues that the Building Defendants are liable for causing a private nuisance by failing to enforce the terms of Madonna's proprietary lease and the house rules, which resulted in Plaintiff being subjected to an unreasonable interference with her tenancy. The facts are undisputed though that the Building Defendants did not directly create the alleged disturbances and had surrendered control of Apartment 7A to Madonna prior to the inception of the disturbances in question. Any remedy the Plaintiff may have against the Building Defendants thus lies solely in her breach of the warranty of habitability claim, not in a claim for nuisance.

With respect to Madonna's cross-motion for partial summary judgment on Plaintiff's nuisance claim, the Court finds that Plaintiff has introduced sufficient evidence to place the reasonableness of the noise in dispute for reasons previously stated in this decision. Therefore, Madonna's cross-motion for partial summary judgment on this claim is denied.

Attorneys' Fees, Costs and Expenses

Last, Plaintiff's claim for attorneys' fees, costs and expenses pursuant to her proprietary lease cannot be determined until the warranty of habitability claim is decided. Therefore, the Building Defendant's motion for summary judgment on this claim is denied.

Based on the foregoing, it is

ORDERED that Plaintiff's motion for partial summary judgment on the fourth and fifth causes of action are denied as moot; and it is further

ORDERED that Madonna's motions for partial summary judgment on the third and fifth causes of action are denied; and it is further

ORDERED that the Building Defendants' motion for summary judgment is granted as to the second cause of action, and denied as to the first, third and sixth causes of action.

Dated: 8/19/11

FILED

AUG 24 2011

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Louis B. York, J.S.C.

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