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

PRESENT: ACOSTA Justice

PART 61

ZIPPER, SHEILA, ET AL

-v-

HAROLDON COUNTY CORPORATION, ET AL.

INDEX NO. 110986/03

MOTION DATE

MOTION SEQ. NO. 7

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

After Trial, Defendant's cross-claim for ejectment is decided as per attached decision and judgment.

This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12/12/05

SO ORDERED

J.S.C.
ROLANDO T. ACOSTA

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

DUPLICATE ORIGINAL.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

DECISION/JUDGMENT

Sheila Zipper and Gerald Zipper,

Index No. 110986/03

Plaintiffs

– against–

Present:
Hon. Rolando T. Acosta
Supreme Court Justice

Haroldon Court Condominium,

Defendants.

The Zippers commenced this action against Haroldon Court Condominium, Reads Ventures Co LLC and others (Condominium) seeking an order to compel the Condominium to abate a nuisance allegedly caused by Rebecca Rosenbaum. The Condominium joined Rosenbaum as a defendant and asserted a cross-claim against her seeking an order of ejectment. It was agreed by the parties that the cross-claim for ejectment would be tried by the Court prior to the claims asserted by the Zippers against the various defendants. The trial commenced on January 18, 2005 and ended on January 31, 2005. After trial, the parties engaged in extensive negotiation, with the Court's assistance, in an attempt to settle the matter. The negotiations came to an end in September 2005.

At issue in this case is whether Rosenbaum is causing a nuisance in her rent stabilized apartment, 14A . Specifically, the Notice to Cure alleged that "[t]here is a classic Collier condition in [the] apartment" as well as "soot and garbage strewn throughout." These conditions, the condominium alleged, "constitute a fire hazard, a nesting ground for vermin and roaches and a breading area for noxious odors [which emanate from her apartment and disturbs the other tenants], endangering the life, safety, health and well-being of the other tenants in the buuilding."

The Condominium presented testimony by the Zippers, the owners of apartment 14C, who essentially testified that the odor emanating from apartment 14A from the fall to the spring is so noxious that it interferes with their use and enjoyment of their apartment. They also presented testimony from Lloyd Spence, who purchase the apartment directly below 14A and who experienced 8 to 9 water leaks, which he attributed to Rosenbaum; New York City Firefighter Kevin Swift, who testified that in early December 2004, he and several other firemen responded to apartment 14A to ascertain the cause of a water leak going down into apartment 12A and that when the door was opened (he personally did not enter) there was a "substantial" odor, which he described as "like rotten or something like urine mix, just very overwhelming;" and Lieutenant Edward Meehan, New York City Fire Department, who accompanied Swift and actually entered the apartment, which he described as "in

disarray, garbage thrown everywhere" with a "pretty bad" odor, but who did not locate the source of the leak. The condominium also presented testimony from the superintendent, handy man, property manager and Read Venture's in house counsel.

Rosenbaum and her special needs son, Simeon, testified and presented testimony from Rosa Delgado, their house keeper, who has been cleaning the apartment since May 2005 and has never smelled noxious odors in the apartment; Walter Bernard, a family friend who has been visiting the Rosenbaums for 15 years and had never smelled odors in the apartment; John Loughlin, Simeon's special education teacher, who tutors Simeon on weekdays from 8:30 to 10:30 a.m., twelve months a year, and has never smelled odors or seen the house in disarray; and, Nathan Cherniak, who has known Simeon for over six years and who visits often and never smelled an odor in the apartment or seen it in disarray.

Jacob Goodman, an attorney, also testified for Rosenbaum. He had represented Rosenbaum in a prior case before Judge Wendt, where the landlord had alleged that Rosenbaum was a nuisance based on the odor emanating from her apartment. Goodman went to the apartment on three separate occasions and never smelled an odor and the apartment was in a reasonably clean condition. Interestingly, Judge Wendt inspected the apartment and found that "there wasn't a nuisance condition" (Defense Exhibit D at p. 3).

The Rent Stabilization Code permits an owner to recover possession of a housing accommodation where it has been established that the tenant is committing a nuisance in the premises. 9 NYCRR 2524.3(b). The Court of Appeals defined what conduct would constitute a nuisance in Domen Holding v. Aranovich, 1 N.Y.3d 117 (2003). The Court explained:

> To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land (see Restatement [Second] of Torts § 821D; see also Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 568 [1977]). The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance (see Restatement [Second] of Torts § 821D, Comment b; see also Nussbaum v Lacopo, 27 NY2d 311, 315 [1970]). However, not every annoyance will constitute a nuisance (see 2 Dolan, Rasch's Landlord and Tenant--Summary Proceedings § 30:60, at 465 [4th ed]). Nuisance imports a continuous invasion of rights--"a pattern of continuity or recurrence of objectionable conduct" (Frank v Park Summit Realty Corp., 175 AD2d 33, 34 [1st Dept 1991], mod on other grounds 79 NY2d 789 [1991]).

As the court noted in Stiglianese v. Vallone, 168 Misc. 2nd 446 (Civil Ct., Bronx Co. 1995), however, "[t]he prevailing philosophy has been that noise and odors are an inescapable reality of urban life." Indeed, mere annoyance in and of itself does not create a nuisance." Id. at 452, citing Twin Elm Management Corp. v. Banks, 181 Misc. 96, 98 (Mun.Ct.Qns.Dist.1943). This is consistent with state policy disfavoring the drastic remedy of lease forfeiture. See Vanguard Diversified, Inc. v. Review Co., 35 A.D.2d 102 (2nd Dept. 1970); Staples, Inc. v. Moses, 9 Misc. 3d 1102(A) (Sup. Ct.,

NY Cty. 2005); cf. WPA Partners LLC v. Port Imperial Ferry Corp., 307 A.D.2d 234, 237 (1st Dept. 2003)(in context of a Yellowstone injunction, Court noted that law disfavors forfeiture). The burden is on the landlord to establish that the tenant is causing a nuisance. RPAPL § 711(1).

The present case is difficult because Rosenbaum clearly has problems maintaining her apartment. Indeed, Judge Hoffman assigned a Resource Assistant to help Rosebaum clean out her apartment on June 12, 2000 (Plaintiff's Exhibit 92), and Judge Wendt inspected the apartment on three occasion in 2001 before finding that the apartment had been cleaned up sufficiently as to not constitute a nuisance (Defendant's Exhibit D). Moreover, consistent with the Zipper's claims, there clearly have been instances where the odor emanating from Rosenbaum's apartment surpassed that which would be deemed an "inescapable reality of urban life." For instance, in December 2004, Lieutenant Meehan and Fireman Swift described an odor, which if continuous could be deemed a nuisance. The burden, however, is on the Condominium to establish that the clutter and odor emanating from the apartment was not only continuous but of such a degree as to interfere with the other tenants' interest in the use of their apartments. In the Court's opinion, the Condominium failed in its burden. Indeed, Swift testified that although a foul odor emanated from the apartment when the door was opened, as soon as it was closed, the odor dissipated

"in about 20 seconds" (295).[1]

The Court credits Rosenbaum's witnesses that overall the apartment is odor free and reasonably well maintained. Rosenbaum's house keeper testified credibly that she has been cleaning the apartment twice a week, including cleaning out the cupboards in the kitchen and the litter box, since May 2004. And although, there is some cat odor, in her opinion, the apartment is odor free. Significantly, her testimony was supported by Simeon's Special Education teacher who testified that he goes to the apartment every weekday throughout the year for two hours and has never encounter noxious odors.

There is also no record support for the claim that whatever roach and vermin problem may exist in apartment 14A is actually interfering with the other tenants. Indeed, Gerald Zipper testified that there have been roaches in his apartment "only on several occasions (86-87), and Sheilah Zipper added that they have had "very little problem in [the] apartment with roaches" (171). As far as mice and rats, Gerald stated that they have had no rodents for at least 15 years (86-87) and Sergio DeLeon, the handy man, added that there are no mice in the building and he has seen rats only once or twice (426-27). Moreover, the clutter has been isolated to two rooms, the

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1. Numbers in parentheses refer to pages in the trial transcript.

living room and the dining room, which the Rosenbaums use as storage rooms. Although the stacked boxes may cause a fire hazard,[2] that condition can be easily remedied. It should also be noted that the bulk of the photographs introduced into evidence by the Condominium (Plaintiff's Exhibits 11 and 12) indicating the extent of the clutter in the apartment predate the July 27, 2001 inspection by Judge Wendt.

The condominium also presented testimony that Rosenbaum had caused several leaks which affected apartment 12A. The Court, however, finds that the Condominium did not establish by a preponderance of the evidence that Rosenbaum actually caused these leaks. Indeed, it should be noted that Lieutenant Meehan entered Rosenbaum's apartment expressly to look for the source of a water leak trickling into apartment 12A and did not find the source of the leak (437). Moreover, Michael Alejandro, the property manager, testified that there are approximately 100 water leaks a year in the 100-year-old building and most are caused by old pipes (531).

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2. Although Fireman Swift did not enter the apartment, he testified that after the visit there was a "heads up" among the four firefighters that responded on that day. By "heads up" he meant that they would be aware of the cluttered condition of the apartment in the event they had to return for a fire (287, 290-92). He never discussed the condition of the apartment with the other firefighters at the station nor was there a written memorandum issued regarding safety precautions in the event that they had to return for an emergency (290-92). Lt. Meehan confirmed that no memoranda or verbal warnings were given to the firefighters at the firehouse (453).

Based on the foregoing, the Court will not issue an ejectment order in this case. The Condominium is ordered to offer Rosenbaum a lease renewal if one has not been issued already within 30 days of this Order. Rosenbaum, however, is ORDERED to remove the clutter from the two rooms being used as storage rooms within 30 days of this order and to stop using the two rooms as storage rooms to avoid creating a potential fire hazard.

This constitutes the Decision and Order of the Court.

SO ORDERED

Dated: November 21, 2005

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.