Goldhirsch v Brown Bros. Harriman, LLC

2008 NY Slip Op 31326(U)

May 7, 2008

Supreme Court, New York County

Docket Number: 0103783/2007

Judge: Walter Tolub

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

PRESENT: _____ Justice

PART 15

Goldkursch, L

- v -

Brown Brothers

INDEX NO. 103783/07

MOTION DATE _____

MOTION SEQ. NO. 01

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 is denied in accordance with the accompanying memorandum decision.

FILED
MAY 09 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/30/08

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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LAWRENCE GOLDHIRSCH and KATHY ANN AMORE,

Plaintiffs,

Index No.
Mtn Seq.

-against-

BROWN BROTHERS HARRIMAN, LLC, HINES BUILDING MANAGEMENT CO., INC., FORTUNE INTERIOR DISMANTLING, INC., TRI-STATE DISMANTLING CORP., SPRINT RECYCLING CO., INC., and WALDORF HOLDING, INC.,

Defendants.

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WALTER B. TOLUB, J.:

In this action for private nuisance, plaintiffs Lawrence Goldhirsch and Kathy Ann Amore seek damages and injunctive relief. The complaint alleges that plaintiffs reside at 55 Liberty Street, New York, New York, directly across the street from the service entrance of a building located at 140 Broadway. Plaintiffs allege that, on numerous occasions from 2005 to the time the complaint was filed in 2007, defendant building owners undertook, and permitted their tenants to undertake, construction in the building between the hours of 6:00 p.m., and that the noise from the construction and removal of debris during those hours created a nuisance.

Defendant Sprint Recycling, Inc., ("Sprint") moves to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7). Sprint submits the affidavit of its Chief Compliance Officer, Charles A. Wilkes, Jr., who states that he is familiar with the

contracts between Sprint and its various clients in Manhattan, including the contract with Hines Interest, LP for waste removal at 140 Broadway. According to Wilkes, during the period alleged in the complaint, Sprint did not contract to remove construction waste from 140 Broadway; rather, the contract was for recyclable waste and mixed office waste. Wilkes states that Sprint never carted construction debris and was not involved in construction fo any kind at 140 Broadway. Finally, Wilkes states that Sprint first learned of the noise complaints through this lawsuit.

A party can incur liability for the creation of a private nuisance if his conduct interferes with the private use and enjoyment of land where the invasion is: "(1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities." (Copart Industries v. Consolidated Edison Co. Of New York, Inc., 41 NY2d 564, 569 [1977]). The elements of a private nuisance which involves intentional and unreasonable conduct 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"(id., at 570).

Whether or not a particular use of property is unreasonable and prejudicial to the rights of others depends on the facts of each case, and will vary depending on the particular surroundings

and use of the property (Slattery v. Herbstone Realty Co., 233 NY 420, 424 [1922]; MCCarty v. Natural Carbonic Gas Co., 189 NY 40, 46 [1907]).

Sprint argues that residents of urban areas must cope with certain everyday noises and that when plaintiffs chose to live in such an area, they must accept that the noise that is inherent in urban living. Sprint further argues that it was never notified of the noise complaints; therefore, they could not have intentionally created a nuisance. Sprint also contends that, since the complaint alleges that unreasonable noise was caused by construction and the removal of construction debris, and since Wilke's affidavit establishes that Sprint did not remove construction waste and was not involved in construction of any kind at 140 Broadway, plaintiffs' factual allegations have been refuted as a matter of law.

According to plaintiffs' sworn statements, however, Sprint would place a dumpster on the street which would be filled with refuse by building personnel When the dumpster was filled, it would be removed and replaced with an empty dumpster, often in the middle of the night. According to plaintiffs, that process "produces noises that would awaken the dead, much less the plaintiffs" (Affidavit of Lawrence Goldhirsch and Kathy Ann Amore, ¶8). Plaintiffs contend that though such noise might be bearable during the day, in the middle of the night, it was

unreasonable.

On a motion to dismiss, the allegations in the complaint must be considered as true (Rovello v. Orofino Realty Co, Inc., 40 NY2d 633 [1976]), and where a motion challenges the complaint, the facts pleaded must be given every favorable inference (Morone v. Morone, 50 NY2d 481 [1980]). The court may consider extrinsic evidence submitted on a motion to dismiss, and in doing so, need not assume the truthfulness of the pleaded allegations (Penato v. George, 52 Ad2d 939, 941 [2nd Dept 1976]). Under such circumstances, the inquiry will be not unlike that of a motion for summary judgment (id.). The court may consider Wilke's affidavit asserting that Sprint did not have a contract to remove construction debris from 140 Broadway. In response to that affidavit, however, plaintiffs have submitted sworn statements that Sprint placed dumpsters beside the 140 Broadway building, which, when full, were removed in the middle of the night, causing unreasonably loud noise. Thus, the court is faced with a factual dispute which may not be resolved on this motion.

In any case, in considering a motion to dismiss, the question is whether the pleader has a cause of action, and not whether he or she has properly stated one (Rovello, 40 NY2d 663). Here, the specific contents of dumpsters is less critical to plaintiffs' cause of action for nuisance than the time of the removal and the level of noise created by the removal. Even if

the dumpsters contained recyclables rather than construction debris, plaintiffs may have a cause of action for nuisance.

To the extent that defendant contends that it was never informed of a noise complaint and, therefore, could not be liable for intentionally creating a nuisance, "[a]n invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct" (Copart, 41 NY2d at 571 (citation and internal quotation marks omitted). Plaintiffs do not allege that Sprint moved its dumpste4rs in the middle of the night for the purpose of causing noise. Even without having received specific complaints, however, a company in the trash hauling business is likely to know that moving dumpsters causes considerable noise, and that doing so in the middle fo the night may substantially disrupt the sleep of people in the neighborhood.

Finally, Sprint contends that, since plaintiffs filed their complaint, they have moved, and therefore, their action is moot and should be dismissed. Plaintiffs do not contest that they have moved; rather, they seem to question the existence of the doctrine of mootness, but also contend that, since the noise forced them to move, their lawsuit should not be rendered moot.

If plaintiffs can establish that they sustained damages as a result of the noise while they were living at 55 Liberty Street

(see, JP Morgan Chase Bank v. Whitmore, 41 Ad3d 433 [2nd Dept 2007] (damages awarded where noise of exhaust fans prevented apartment owner from using her deck or sleeping in her bedroom and resulted in a decrease in the rental value of her unit)), the mere fact that they no longer live there does not render their action for past damages moot.

Plaintiffs' third cause of action for injunctive relief is a different matter. "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will stuffer irreparable harm absent the injunction" (Icy Splash Food & Beverage, Inc., v. Henckel, 14 AD3d 595, 596 [2nd Dept 2005]). Whether viewed in terms of the well-established doctrine of mootness or of standing, it is hard to see on what basis plaintiffs can claim any ongoing harm, much less irreparable harm, that would entitle them to injunctive relief, since they no longer are exposed to the alleged noise, and no longer suffer an injury which is different from that of the general public (see, e.g. Zupa v. Paradise point Assn., Inc., 22 Ad3d 843 [2nd Dept 2005] (finding standing to maintain a cause of action to enjoin a private nuisance of plaintiffs in close proximity to the property in question, but rejecting standing of plaintiff whose property is more than one half mile away); see also, Lichtman v. Nadler, 74 AD2d 66 [4th Dept 1980]).

Lastly, the court notes that even though plaintiffs may be

able to prove damages, the monetary value of those damages will likely not reach the minimum threshold required by this Court. As such, pursuant to CPLR 325-d, this matter is transferred to the Civil Court of the City of New York for immediate resolution.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted with respect to the third cause of action, and is otherwise denied; and it is further

ORDERED that defendant Sprint Recycling Co., Inc. is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that this action be transferred to the Civil Court of the City of New York pursuant to CPLR 325-d.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/7/08

HON. WALTER B. TOLUB, J.S.C.

FILED
MAY 09 2008
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