

Brodcom W. Dev. Co. v Best
2009 NY Slip Op 31286(U)
June 15, 2009
Civil Court of the City of New York, New York County
Docket Number: 85018/08
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART S

BRODCOM WEST DEVELOPMENT CO.,
A PARTNERSHIP

HON. SABRINA B. KRAUS

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 85018/08

NINA BAUM BEST
55 WEST END AVENUE
APT S-15E
New York, New York 10023

Respondent-Tenant

“JONH DOE” AND/OR “JANE DOE”

Respondents- Undertenants

X

BACKGROUND

This summary holdover proceeding was commenced by **BRODCOM WEST DEVELOPMENT CO.** (Petitioner) and seeks to recover possession of **Apartment S-15E** at **55 West End Avenue** (Subject Premises), based on the allegation that **NINA BAUM BEST** (Respondent), has created a nuisance in the Subject Premises, based on the behavior of her dog.

PROCEDURAL HISTORY

The proceeding was commenced by issuance of a Notice of Termination dated July 29, 2008, terminating Respondent’s testimony as of August 31, 2008. The Notice of Petition and Petition issued on or about September 11, 2008, and the proceeding was originally returnable on September 26, 2008. The petition alleges *inter alia* that Respondent’s dog barks constantly, is allowed to run in public areas of the subject building without a leash and was permitted to

urinate and defecate in public areas in the subject building. On or about February 19, 2009, Respondent appeared herein through counsel, and filed a Notice of Appearance and Answer. The answer asserted a general denial, that the predicate notice was impermissibly vague and had been vitiated by the acceptance of rent, and asserted counterclaims based on breach of warranty of habitability and for attorneys' fees.

On May 13, 2009 the proceeding was assigned to Part S for trial, and the trial commenced. The trial continued on May 19 and 27. On May 27th, 2009 the trial concluded, and the Court reserved decision.

FINDINGS OF FACT

Respondent is the rent-stabilized tenant of record for the Subject Premises, based on a written lease agreement dated July 12, 2006 for a one year term, and thereafter renewed. Petitioner is the landlord of the Subject Premises, pursuant to the aforementioned lease. The building is specifically designated by Petitioner as a dog friendly building, and many other residents own dogs.

Respondent has lived in the Subject Premises since August 2006. Respondent testified that she purchased a dog in September 2007. The dog is a Blue Yorkshire Terrier named Lexi and weighs less than ten pounds.

At trial Petitioner presented evidence from four witnesses, all current or former tenants, living on the same floor in the subject building as the Respondent.

JENNIFER SHEPHERD - APT. 15K

Jennifer Shepherd has lived in apartment 15 K, across the hall from the Subject Premises, since July 2004. Ms. Shepherd first became aware of Respondent when she moved in,

because at the time Respondent was using a wheelchair and sometimes left the wheelchair in the hallway.

Ms. Shepherd has been disturbed by Lexi for the past two years. The disturbance is in large part caused by the Lexi's constant barking, which Ms. Shepherd described as high pitched, squeaky, very loud as if the dog was in pain. Ms. Shepherd is unable to sleep in her apartment, without disturbance from the barking, which wakes her up both in the middle of the night and in the early morning hours. The dog starts barking as early as 5:30 am daily, and continues throughout the morning. Ms. Shepherd has been disturbed by the dog's barking between the hours of 1am and 3am, on as many as twenty occasions in the two years preceding the trial. Ms. Shepherd is disturbed for greater periods of time by the barking on weekends, because she is home more on the weekends, and the dog barks at all hours on weekends.

Ms. Shepherd stated that any noise or activity will start the dog barking, including walking in the hallway, or removing her keys to unlock the door to her apartment. The dog's constant barking has interfered with Ms. Shepherd's use and enjoyment of her apartment for the past two years, and she is considering moving out of the subject building, because she does not wish to continue to be exposed to the disruptions caused by the dog barking. Ms. Shepherd is able to identify Lexi's barking and distinguish it from other dogs on the floor, based on several instances where she observed Lexi barking.

Ms. Shepherd had confronted Respondent about the barking, and suggested to Respondent that there were anti-barking devices available, which could be used to stop the dog's behavior. Ms. Shepherd left Respondent a note about such a device, with some information regarding the device, and offered to purchase the device for Respondent's use. Based on

Respondent's acceptance of said offer, Ms. Shepherd purchased the device and delivered it to Respondent, but Respondent has never used the device.

Ms. Shepherd has regularly observed Lexi running in the hallway of the 15th floor without a leash. Ms. Shepherd believes that the dog has urinated and defecated in the public hallway on the fifteenth floor, and that the carpet in the hallway is stained as a result, and sometimes smells from feces. Ms. Shepherd was nervous when the dog was permitted to roam the hallway without a leash, and feared that Lexi would bite her.

On June 12, 2008, when Ms. Shepherd came home, she observed that Respondent's door was ajar¹, and Lexi was perched at the entrance. Ms. Shepherd asked Respondent to close her door, and Respondent initially refused. Some back and forth took place and eventually Respondent called the police. The next day, Ms. Shepherd circulated a petition among her neighbors, asking them to support her request to Petitioner that Respondent be relocated from the Subject Premises. The petition (Exhibit 6) was signed by a total of eleven residents living on the same floor as Respondent, including residents of apartments 15G, 15A, 15B, 15 I, 15J, 15 F, and 15D .

The Court found the testimony of Ms. Shepherd to be precise and credible.

DANIEL WINELL - APT. 15D

Daniel Winell has resided in apartment 15 D, directly next to the Subject Premises, for approximately six years. Mr. Winell first met Respondent about three years ago. Mr. Winell

¹ Almost all witnesses testified that Respondent was in the habit of leaving the door to the Subject Premises ajar, Respondent admitted this behavior, which appears to have stopped a few months before the trial.

described Lexi as an unbelievable unrestrained dog, and has observed Lexi on numerous occasions roaming the hallway of the 15th floor off leash.

Mr. Winell described Lexi's barking as "rabid", "maniacal", "howling" and "earsplitting", and noting that there have been occasions when Lexi barks for an hour at a time. In attempting to describe Lexi's barking in a written complaint to Petitioner, Mr. Winell wrote "(i)magine a dog that's infected with rabies, addicted to crack, withdrawing from steroids, and hasn't been fed for five days straight. (Exhibit 7)." Mr. Winell has heard the dog barking at all hours, including the middle of the night. The barking can start as early as 5:00 am, and typically the dog barks incessantly or not at all. Over the past two years, the barking has disturbed Mr. Winell on hundreds of occasions, and that he has experienced up to twelve incidents in a single day.

Mr. Winell has repeatedly observed Lexi running in the hallway, without a leash. One incident occurred in April 2008, when Mr. Winell opened the door to his apartment, and saw Lexi run by charging towards a young child, who lives in a neighboring apartment. A guardian quickly picked the child up to protect the child from harm. Mr. Winell observed that both the child and his guardian appeared to be frightened.

Mr. Winell knows that the barking is from Lexi, as opposed to other dogs on the floor, and can identify her bark, based on the many occasions when Respondent left her door open and Mr. Winell observed Lexi barking. Mr. Winell twice tried to discuss the problem directly with Respondent. The first occasion was soon after Respondent had purchased the dog. Mr. Winell thought Respondent might not be aware of her dog's behavior, when she was out, and advised Respondent that the dog had barked incessantly, at night, in her absence. Respondent was

pleasant and apologetic. The second occasion was last spring, when Respondent's door was ajar, and Respondent slammed the door in Mr. Winell's face, without addressing him.

Lexi's constant barking has made Mr. Winell miserable when spending time in his home. The barking is so loud, it sounds like Lexi is in his apartment, and guests and delivery people assume the barking is from his apartment, when they ring his bell. Mr. Winell described Lexi as a small dog, that does not appear menacing, but describes the sounds made by Lexi as frightening.

Mr. Winell has attempted to use earplugs in his apartment and a sound soother to block the noise of the barking. He is often unable to use the phone in his apartment, without interruption from the barking. Mr. Winell has a one bedroom apartment, and his bedroom is on the furthest side away from the Subject Premises. However, even with Mr. Winell's bedroom door closed, the sound of the barking is loud and disruptive. The presence of Lexi has interfered with Mr. Winell's ability to sleep in his apartment. Mr. Winell's sleep has repeatedly been disturbed by Lexi from 1:30 am forward, and if he gets up during the night to use his bathroom or get a drink of water, the dog will start barking. The barking also interferes with Mr. Winell's ability to have guests in his apartment, and has diminished the quality of life in his apartment overall, including his ability to occupy his apartment in peace, and concentrate or focus on anything while at home.

Particularly early on, Respondent left Lexi unattended in the Subject Premises overnight, and on those occasions, Lexi would literally bark all night long. Mr. Winell ascertained that the dog was alone on such occasions because he tried Respondent's doorbell without response, and no lights were on in the Subject Premises.

Mr. Winell has complained to Petitioner about the dog. The first time he complained was after his second attempt to discuss the issue with Respondent directly, which resulted in her slamming the door in his face. Mr. Winell signed the petition circulated by Ms. Shepherd, and categorically agrees with the statements therein. Mr. Winell also added his own written addendum (Exhibit 7) to the petition.

Mr. Winell has smelled feces and urine in the hallway on the 15th floor, but he never observed a dog urinating or defecating in the hallway. Mr. Winell has seen feces in the hallway on several occasions, but more often Mr. Winell has observed wet spots on the carpet in the hallway and smelled urine.

The Court found Mr. Winell to be a credible witness who offered detailed and precise testimony.

CAROL EDWARDS - APT. 15A

Carol Edwards has lived in apartment 15A for over 13 years, and first met Respondent over three years ago. Ms. Edwards has often observed Lexi in the hallway without a leash. Most frequently, Ms. Edwards observes this on her return home, as she attempts to get off the elevator, when Lexi charges towards her, making her and her children feel as if they were under attack. Lexi was routinely off leash and by the elevator, when Ms. Edwards was returning to her apartment and coming off the elevator. This behavior occurred approximately three times a week, from the time Respondent acquired the dog, until a few months before the trial.

Ms. Edwards and her children would freeze in place when Lexi charged and barked at

them, until Respondent would come to collect the dog. The dog would charge right up to Ms. Edwards' feet and remain there barking, until Respondent arrived.

Ms. Edwards has also been disturbed by the dog due to the smell of urine and feces in the hallway, which is apparent as soon as she exits the elevator on the 15th floor. Ms. Edwards actually observed Lexi defecate right in front of her apartment door, approximately one year prior to the date of the trial. On that occasion Respondent was not present, and Ms. Edwards called the concierge, who quickly came up and cleaned up Lexi's mess.

Additionally, Ms. Edwards and her family have been disturbed by Lexi's constant barking. Lexi would bark constantly, particularly when left alone in the Subject Premises. The barking sounded almost like crying as if there was something wrong with the dog. Since Respondent got Lexi, the barking has been fairly constant, occurring on a nightly basis. The barking has been a particular source of distress, because Ms. Edwards' daughter, who is 15 years old, suffers from bi-polar disorder. The nightly episodes of barking have been intolerable for her daughter, and have regularly disrupted Ms Edwards' sleep and her daughter's sleep. One night, Ms. Edwards was woken up by Lexi's barking at approximately 2am, and then discovered her daughter was missing from the apartment. The child was later found in a nearby park, where she had gone to escape Lexi's barking.

MARTIN SLOAN (FORMERLY OF APARTMENT 15J)

Martin Sloan also testified on behalf of Petitioner. Mr. Sloan lived in apartment 15J, at the subject building, from approximately 1995 to February 2009. Mr. Sloan moved out of apartment 15J, because he could no longer tolerate living near Respondent and her dog, and currently lives in a neighboring building, owned by the same landlord.

Mr. Sloan is a dog lover and owns several large dogs himself. Respondent had a habit of leaving her apartment door ajar, and allowing Lexi to roam freely in the hallway. Mr. Sloan has observed Respondent's dog defecate in the public hallway on the 15th floor, on more than one occasion. A few months after Respondent got the dog, Mr. Sloan observed the dog defecate in front of the door to apartment 15A. Mr. Sloan cleaned up after the dog and then knocked on Respondent's door. Respondent denied that her dog had committed the offense. On two other occasions, Mr. Sloan observed the dog urinate in the hallway. The first time the hallway carpet had stains from ruination and defecation, was after Respondent moved into the subject building.

Mr. Sloan was also disturbed by the dog's barking. The dog routinely barked as early as 5:00 am in the morning, and woke him up regularly in the middle of the night, as late as 1:30 or 2:00 am. The barking was high pitched, prolonged, constant and continued unabated, for as long as an hour at a time. The barking interfered with Mr. Sloan's ability to have guests in his apartment, and he asked Respondent to keep Lexi in a different room, with the door closed, when he was having guests.

Mr. Sloan signed the petition circulated about Lexi and added his own addendum. Mr. Sloan and his wife had asked Respondent to walk her dog outdoors, instead of allowing it to run loose in the hallways, to keep the door to her apartment closed or keep the dog enclosed in the bedroom when she was leaving the apartment door open, and to use the dog collar Ms. Shepherd had purchased to curtail barking.

In response, Respondent refused to keep the door to her apartment closed, and stated her dog was not bothering anyone by running loose in the hallway. Respondent also replied by stating that the 5:00 am morning barking (apparently related to the delivery of the morning

newspapers) could be addressed by newspapers being held at the front desk, rather than delivered, and that other late night barking would be avoided if residents on the floor curtailed coming and going from their apartments during such hours.

RESPONDENT'S CASE

Respondent testified that when she first bought Lexi, the dog was kept in her crate and would urinate and defecate in the crate. Later Respondent stated she trained the dog to use pads and a "potty" which she kept in her bathroom. The dog was not walked outside on a regular basis. Respondent testified that at the time she was not able to walk and was wheelchair bound.²

Respondent's testimony was not credible, and included several outrageous claims. For example, Respondent quite incredibly testified that Lexi never barked on a single occasion, for the first year and a half that Respondent owned the dog. Other outrageous claims centered on Mr. Sloan. Respondent testified that she saw Marty Sloan stomp on Lexi in the hallway, that Lexi was traumatized by the incident, but that Mr. Sloan still had to shoo the dog away, after stomping on it. Respondent testified that every time Mr. Sloan saw her dog, he would flap his arms like a chicken and start stomping. Respondent testified that in June 2008 she observed Mr. Sloan on his hands and knees, outside her door, impersonating a dog. Finally, Respondent testified that Mr. Sloan took his dogs' feces and rubbed it on the door to the Subject Premises and that Respondent collected samples of said feces and sent some to management. While Respondent stated that she did not observe Mr. Sloan smear the feces on her door, she is inexplicably certain that Mr. Sloan did so.

² This assertion is contradicted by the testimony of other witnesses, who stated that Respondent kept the wheelchair outside the apartment in the hallway, and from the inception of her tenancy was observed to be quite agile at walking or even running when she wanted to or needed to.

Respondent also presented some character witnesses to attest to both Respondent's behavior, and her dog's behavior, however the Court finds that the testimony of these witnesses does not support any defense to the underlying allegations. For example, Respondent presented the testimony of Uri Gordon. Mr. Gordon was a credible witness, who testified that he had been in the Subject Premises on several occasions. Mr. Gordon testified that he was out of state from September 2006 through June 2007. Mr. Gordon was only in the Subject Premises a few times therefor when Lexi was present. On those occasions there were many people in the Subject Premises and Lexi received a lot of attention, so its natural that Mr. Gordon didn't observe any behavioral problems with the dog.

The next witness for Respondent was Elaine Sassower.. Ms. Sassower has been a close friend of Respondent since May 2006. Ms. Sassower testified that Lexi barks but that there is nothing unusual about her barking. Almost all of the time Ms. Sassower observed Lexi at the Subject Premises, Respondent was wheelchair bound, and kept the dog on her lap. Clearly Lexi was happy during these occasions, and the prolonged barking was not occurring. Ms. Sassower had not been in the Subject Premises in 2008, and was there in 2007 for overnight visits on approximately ten occasions.

Respondent's boyfriend Rony Moshe also testified. Mr. Moshe intends to marry Respondent. Mr. Moshe has slept at the Subject Premises on hundreds of occasions, since he and Respondent have been together. Mr. Moshe has a home in Cherry Hill, and periodically takes Lexi to stay with him in his home. Mr. Moshe has heard Lexi barking, but to him the dog's barking sounds like singing. Mr. Moshe has hearing loss. Mr. Moshe and Respondent intend to

breed Lexi, and estimate that they will be able to sell the puppies for approximately \$3,000.00 each.

The next witness presented by Respondent was Danielle Santonella, who presented expert testimony as a dog trainer. Ms. Santonella was a credible witness, but her testimony was of little probative value. As of January 30, 2009, months after the commencement of this proceeding, Ms. Santonella had only observed the dog on one occasion. Ms. Santonella had four one hour sessions total with Respondent and Lexi between January 30th 2009 and the date of her testimony. Ms. Santonella testified that Lexi barks for attention, and instructed Respondent not to reward Lexi for such behavior. Ms. Santonella does not believe that Lexi suffers from separation anxiety, based on a test she conducted on one of the one hour sessions.

In rebuttal, Petitioner presented the testimony of two of its employees, whose testimony was primarily aimed at rebutting Respondent's claims regarding conditions in the Subject Premises, related to vents, air conditioning, and the dishwasher. Respondent had alleged these conditions were the basis for her practice of leaving the door to the Subject Premises ajar, as well as the cause of stains and odors, outside the door to the Subject Premises, in the hallway. The second of these witnesses was Purshotam Gayadin, a handyman employed by Petitioner. Mr. Gayadin testified that he has often seen the door to the Subject Premises ajar, and that he has heard Lexi bark, describing the bark as loud. Mr. Gayadin also testified that Lexi has a tendency to charge and snap at him, when he is in the Subject Premises, and that Respondent will generally hold the dog when he is there, or put the dog in the bathroom. Mr. Gayadin also testified that the stain outside the Subject Premises, on the carpeting in the hallway, is not related to any issues with the dishwasher, but is from Lexi urinating on the carpet.

DISCUSSION

When a tenant uses her apartment in a way that interferes with the use and enjoyment of other tenants of their apartments that behavior can constitute a nuisance (*Copart Indus. v. Consolidated Edison Co. of NY*, 41 NY2d 564 [1977]). “The term ‘use and enjoyment encompasses the pleasure and comfort derived from the occupancy ... and the freedom from annoyance” (*Domen Holding Co. v. Aranovich*, 1 NY 3d 117, at 123-124 citing Restatement [Second])of Torts § 821D, Comment b). To establish a cause of action for nuisance, Petitioner must prove that Respondent’s behavior constituted a continuous invasion of the rights of the other residents of the building (*Frank v. Park Summit Realty Corp.*, 175 AD2d 33 [1st Dept, 1991] *mod on other grounds* 79 NY2d 789).

Allegations regarding constant dog barking and other types of noise have been found to constitute nuisance warranting eviction (*See eg Crotona Park West v Aponte*, NYLJ, Mar. 20, 2002, Civ. Ct. N.Y. Co.[*allegations of continuous barking sufficient to state a cause of action for nuisance*]; *17th Holding LLC v. Rivera*, 21 Misc.3d 55 [App Term 2nd Dept, 2008][*excessive noise sufficiently established that tenant permitted a nuisance allowing landlord to evict*]

Petitioner established at trial that Respondent willfully engaged in a course of conduct, which substantially interfered with the ability of her neighbors to use and enjoy their apartments. Respondent did this by repeatedly leaving her door ajar, thereby encouraging Lexi to bark at people in the common hallway, and allowing the noise from barking to be less contained. Respondent’s deliberate conduct also included allowing her dog repeatedly to run in the hallway unleashed, to urinate and defecate in the hallway, and most egregiously, ignoring the fact that her dog was barking for hours on end and disturbing the ability of her neighbors to sleep

and otherwise enjoy their apartments. The most disturbing incidents of prolonged barking occurred when Lexi was left alone overnight, or for long periods of time in the Subject Premises. Respondent could easily have avoided this situation, if she had complied with building regulations about maintaining her dog, and been responsive to her neighbors when advised of the extent of the disturbance Lexi's barking created.

Respondent's arguments at closing that all of her neighbors lied because they hate her and have some unexplained personal vendetta against her is not found credible by the Court. Rather, the Court finds that Respondent's testimony lacked credibility, and that any tensions with her neighbors arose out of Respondent's complete and utter disregard for how the behavior impacted them.

Respondent failed to establish any legal defense to the *prima facie* case established by Petitioner. Respondent asserted a defense in paragraph two of her answer that the pleadings were vague and lacked sufficient factual specificity. The Court finds that the factual allegations in the pleadings are specific and detailed.³

CONCLUSION

Based on the foregoing, the Court awards Petitioner a final judgment of possession. While Petitioner alleges that the conduct is not subject to cure, the Court disagrees. The Court finds that the conduct could be readily cured by the permanent removal of Respondent's dog

³ The notice of termination fails to reference the Rent Stabilization Code or any of its specific provisions. Given that both the Lease (*See eg* Art. 12, Exhibit 4) and the Code provide for the termination, based on objectionable conduct, this constitutes poor and potentially defective drafting. However, Respondent's defense is limited to factual assertions, and affirms that the cause of action is based on nuisance, R precluding any finding that Respondent was inhibited in her ability to present a defense.

Lexi from the Subject Premises. Therefore, issuance of the warrant is stayed for ten days to allow Respondent to cure by permanently removing the dog from the Subject Premises. In the event Respondent fails to cure, the warrant of eviction may issue and be executed after service of a Marshall's notice.

This constitutes the decision and order of this Court.

Dated: New York, New York
June 15, 2009

Sabrina B. Kraus, JHC

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