

**61 W. 62 Owners Corp. v CGM LLC**

2009 NY Slip Op 31739(U)

June 23, 2009

Supreme Court, New York County

Docket Number: 107341/09

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

61 WEST 62 OWNERS CORP.,  
Plaintiff,  
- v -

Index No.: 107341/09

Motion Date: 06/23/09

CGM LLC, CGM EMP RTP LLC,  
WEST 64 EMPIRE ASSOCIATES, LLC,  
THE CHETRIT GROUP, LLC,  
Defendants.

Motion Seq. No.: 01

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this show cause order for a preliminary injunction.

Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1

2, 3, 4

5

**FILED**

AUG 03 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers,

The motion is denied.

Plaintiff, owner of the residential cooperative apartment building located at 61 West 62<sup>nd</sup> Street, New York, New York, has commenced an action that alleges private nuisance seeking an abatement and compensatory as well as punitive damages. At issue is plaintiff's claim that residents of the cooperative are suffering injury as the result of "incredibly loud and unbearable noise" emanating from the rooftop bar ("bar") leased and operated by defendants, which is located on the 12<sup>th</sup> floor rooftop/penthouse area of the Empire Hotel ("hotel") that adjoins

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

plaintiff apartment building. Plaintiff complains of loud bass-heavy music, amplified deejay noise and crowd noise "in the early evening hours and often lasting past 3:00 a.m. that penetrate [their] apartments on many nights" and that are at decibel levels that violate the New York City Noise Control Codes ("Noise Control Codes") and other applicable regulations.

Plaintiff moves for a preliminary injunction that would enjoin defendants from operating the bar in a manner that results in noise levels in any of its residential apartments that violates Noise Control Codes, and also restrains defendants from allowing patrons of the bar to congregate in non-enclosed portions of the bar area during late evening hours.

Plaintiff presents the affidavits of residents from nine households who chronicle an extremely uncomfortable and stressful living condition. They describe an inability to relax in the evening hours and extreme difficulty in sleeping, which severely degrades their quality of life.

Many also assert that they have made complaints to both the New York City Police Department and to New York City's 311 operators, which have taken no action to abate the noise.

Defendant operator contends that the bar is operated in accordance with the certificate of occupancy issued by the New York City Department of Buildings. It claims that despite the absence of restrictions on the liquor license issued by the New

York State Liquor Authority, it voluntarily does not play music on the open-air east terrace after 11:30 pm on Sundays through Thursdays, and after 12:30 a.m. on Fridays and Saturdays. In addition, it has voluntarily informed its patrons that the open-air part of the terrace is to be vacated at those same times, and has instructed such patrons to use only the north end of the terrace, as far away from plaintiff's building as possible, during those hours. The operator also represents that it has entered into a contract to spend \$23,000 on upgrades to the stereo system which will allow music to be played at lower levels.

The defendant also describes a visit by the local community board, wherein representatives from the offices of two politicians and board members visited four of the residents' apartments that took place in September 2008. According to defendant, the visit took place in advance of the board's vote on an application for a liquor license for a restaurant on the second floor of the hotel. Defendant contends that during the visit to each apartment, while the bar music remained at full volume, none of the visitors were able to hear any loud music. The board subsequently approved the liquor license application for the second floor resident. Finally, defendant operator claims that the New York City Police Department has visited the bar on numerous occasions and that the New York City Fire

Department was summoned to the bar as recently as May 2009. There is no dispute that no violation of the Noise Code or any other regulation was ever issued by any agency.

To obtain a preliminary injunction, a plaintiff is "required to establish (1) a likelihood of success on the merits . . . ; (2) irreparable injury in the absence of the injunction; and (3) a balancing of the equities in his favor." Terrell v Terrell, 297 Ad2d 301, 303 (1<sup>st</sup> Dept 2001).

The New York City Department of Environmental Protection, the agency charged with enforcement of the city's noise code, lists noise complaints as the number one quality of life issue for city residents and tourists and touts that the new noise code, effective July 1, 2007, "establishes a flexible, yet enforceable noise code that responds to the need for peace and quiet while maintaining New York's reputation as the City that never sleeps'." (<http://www.ci.nyc.ny.us/html/dep/html/airnoise.html>). The Department's website directs aggrieved residents to call 311 in order to contact the Department. (<http://www.ci.nyc.ny.us/html/dep/html/contact.html>).

People v Bender, 14 Misc3d 1233(a) (NYC Criminal Court 2007).

As for plaintiff's cause of action of private nuisance, the law set forth in Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc., 41 NY2d 564 (1977) still holds. Quoting Prosser on Torts, Judge Cook wrote that "'There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all men". 41 NY2d at 566.

In Copart, the Court of Appeals affirmed the jury verdict that found in the favor of defendant owner of a power plant and dismissed the complaint of plaintiff, a new car business, that complained that noxious emissions from defendant's smokestacks caused damage to the exterior of cars on its premises resulting in the closure of the business.

The Copart court stated:

[O]ne is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities (Restatement, Torts 2d (Tent Draft No. 16), s 822; Prosser, Torts (4th ed.) \*\*\*

[As for intentional and unreasonable nuisance,] [t]he elements. . . 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.

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'An 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' (citations omitted).

Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc., 41 NY2d 564, 569-570 (1977).

The dissent in Copart, which would have reversed the jury verdict since opining that the charge mixed negligence and nuisance principles and misled the jury, set forth concepts that are very similar to the weighing of equities that the court must conduct on an application for provisional relief.

Nuisance traditionally requires that, after a balancing of the risk-utility considerations, the gravity of harm to a plaintiff be found to outweigh the social usefulness of a

defendant's activity (Prosser, Torts (4th ed.), p. 581). For no matter whether an act is intentional or unintentional, there should be no liability unless the social balance of the activity leads to the conclusion that it is unreasonable.\*\*\*"An intentional invasion of another's interest in the use and enjoyment of land is unreasonable ... if (a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is substantial and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct"(citation omitted).

Copart at 572.

Plaintiff has not demonstrated a likelihood of success on the merits of the private nuisance claims. As for any claim that defendants are negligently or recklessly interfering with plaintiff occupancy of their apartments, there is no dispute that the defendants have made efforts to ameliorate any noise, and plan to conduct a substantial amount of additional work in attempt to address plaintiff's claims. Moreover, the New York City Department of Environmental Protection, the agency responsible for enforcing the Noise Control Code, has never issued any violations to the bar.<sup>1</sup> Clearly, plaintiff's affidavits place the issue of the violation of the Noise Control Code in stark dispute. On the same basis, plaintiff has not demonstrated a likelihood of success on their private nuisance based upon intentional and unreasonable conduct.

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<sup>1</sup>To the extent that the plaintiff contends that the City, through its agency, has failed to enforce the Noise Control Code, its remedy is to challenge such agency inaction pursuant to Article 78 of the Civil Practice Laws & Rules.

Moody v Filipowski, 146 AD2d 675 (2d Dept 1989), where the court held that the language in the two deeds clearly demonstrated the likelihood of plaintiff homeowner's success on the merits, is distinguishable from the facts at bar where there is no instrument establishing the right of plaintiff to the ultimate relief it seeks.

As to irreparable harm with regard to the private nuisance claims:

The rule respecting the use of one's own premises, where it unfavorably affects adjacent premises, is well settled. If the use is reasonable, there can be no private nuisance; but if the use is unreasonable, and result in substantial injury, an actionable nuisance exists, and whether a given use is reasonable or not is a question of fact, depending on many and varied facts. (Citation omitted.) That, ordinarily, is a question to be determined upon a trial, and should not be determined in advance upon a preliminary motion, unless the plaintiff's right to relief is clear and practically beyond dispute; and more especially is this true where there is no doubt suggested as to the ability of the defendant to respond in damages.

The order appealed from is in effect a mandatory injunction, requiring the defendant to make important structural changes in its building or to discontinue business altogether. By the order the litigation is in effect determined, and gives to plaintiff the same relief which he seeks to obtain by judgment. Such orders should be granted with great caution, and only under exceptional circumstances. (Citation omitted.) This is not such a case. The defendant has already offered to remove at its own expense all cause for complaint by a method which involves the acquiescence of plaintiff, and we are by no means satisfied that plaintiff was not unreasonable, under all the circumstances, in withholding his acquiescence. This is one of the questions which can best be answered at the trial.

Newbold v Childs Co., 148 AD 153 (1<sup>st</sup> Dept 1911).

Plaintiff's right to enjoin the operation of the bar, as it is currently conducted, is neither clear nor "practically beyond dispute". Stiglianese v Vallone, 168 Misc2d 446, rev'd 174 Misc2d 312 (App Term 1<sup>st</sup> Dept 1997), rev'd and original judgment reinstated, 255 AD2d 167 (1<sup>st</sup> Dept 1998), which awarded plaintiff an injunction and damages on his claim for private nuisance based on noise disturbances after trial, is not to the contrary.

Weighing the equities, the court finds no precedent for granting relief that would upset the status quo and potentially harm the bar's business. While the court is mindful of the distress and discomfort that plaintiff describes, and finds that the residents are neither required to move from their home or to seek medical care to demonstrate injury (See Andrews v Perry, 127 Misc 320, 326 [Onondaga Co Sup Ct 1926] and State ve Fermenta ASC Corp, 166 Misc2d 524, 533 [Suffolk Co Sup Ct 1995]), plaintiff has not met the requirements for a provisional remedy interfering with the operation of the bar.

The parties are directed to attend a preliminary conference on August 25, 2009, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York.

This is the decision and order of the court.

Dated: June 23, 2009

ENTER:

**FILED**

*[Signature]*  
**HON. DEBRA A. JAMES**

J.S.C.

AUG 03 2009

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