[* 1]

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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 114448/2007

HALPERN, ROBERT

INDEX NO. _____

VS

RAMEN SETAGAYA, INC.

MOTION DATE _____

Sequence Number : 004

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. _____

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 decided in accordance with the annexed Memorandum Decision and Order.

FILED

JUL 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 8, 2011

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 11

----------X Index No. 114448/07

ROBERT HALPERN and LEONARDO CIOGLIA ,

Plaintiffs,

-against-

RAMEN SETAGAYA, INC., and PAN ASIAN RESTAURANT, INC.,

Defendants.

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Joan A. Madden, J.:

In this action asserting a cause of action for nuisance, defendant Pan Asian Restaurant, Inc. ("Pan Asian")[1] moves for summary judgment dismissing the complaint filed against it. Plaintiffs oppose the motion, which is denied for the reasons set forth below.

FILED
JUL 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

Background

Plaintiffs reside in adjacent apartments on the third floor of the five-story mixed use building at 141 First Avenue, New York, New York, ("building"). In June 2007, one or both of the defendants opened a Japanese noodle restaurant, Ramen Setagaya, in the commercial space on the first floor. There is a second restaurant, Bibim Bar, that shares the first floor commercial space with Ramen Setagaya. In or about November 2006, and prior to the opening of Ramen Setagaya, two exhaust fans with vents, and a heating, ventilation and air conditioning ("HVAC") system were installed on the restaurant's roof.

Plaintiffs allege that there is continual noise from the exhaust and/or HVAC system at all hours of the day which causes them to keep their overlooking kitchen

[1]Although named as a defendant, Ramen Setegaya has not answered.

windows closed. In July of 2007, Halpern first complained to the New York City Department of Environmental Protection ("DEP") regarding the noise created by defendants. Following a DEP inspection at Halpern's apartment on August 3, 2007, Notice of Violation and Hearing No. 251236K was issued against Ramen Setagaya under § 24-227(a) of the Noise Control Code (Title 24, Chapter 2 of the Administrative Code of the City of New York). Ramen Setagaya has acknowledged a violation of this subsection by paying $672 in fines after a DEP hearing on November 26, 2007. (See Amended Complaint, Exh. 3).

On September 27, 2007, DEP conducted another inspection at Halpern's apartment and this time issued Notice of Violation and Hearing No. 251477L against Pan Asian under § 24-227(b) of the Administrative Code. Pan Asian stated in its answer to the original complaint that the installer of the exhaust and HVAC systems had retrofitted the circulation devices to bring them into compliance with the Code, however, a third DEP inspection at Halpern's apartment on February 7, 2009, led to the issuance of Violation No. 00253172J against Pan Asian, under § 24-227(a) of the Administrative Code.

This action was commenced in December 2007, and contains a single cause of action for private nuisance based on the noise emanating from the defendants circulation devices and the unsightly equipment on the roof.

Pan Asia now moves for summary judgment dismissing the complaint against it, arguing that § 24-227 of the Administrative Code does not apply as the circulation devices at issue.

Section 24-227 provides that:

> (a) No person shall operate or permit to be operated a circulation device in such a manner as to create a sound level in excess of 42 dB(A) when measured inside a receiving property dwelling unit. The measurement shall be taken with the window or terrace door open at a point three feet from the open portion of the window or terrace door..
>
> (b) *On and after the effective date of this section*, when a new circulation device is installed on any building lot or an existing device on any building lot is replaced, the cumulative sound from all circulation devices on such building lot owned or controlled by the owner or person in control of the new device being installed or the existing device being replaced shall not exceed 45dB(A), when measured as specified in subdivision a of this section. *For a period of two years after the effective date of this section, this subdivision shall not apply to the replacement of a circulation device that was installed on any building lot prior to the effective date of this section by a device of comparable capacity.*
>
> (c) Except as otherwise provided in subdivision b of this section, *with respect to circulation devices installed on any building lot prior to the effective date of this section, the sound level limit of 42 dB(A) referred to in subdivision a of this section shall apply to each individual device except that if the cumulative sound from all devices owned or controlled by the same person on a building lot exceeds 50dB(A), when measured as specified in subdivision a of this section, the commissioner may order the owner or person in control of such devices to achieve a 5dB(A) reduction in such cumulative sound level within not more than 12 months after the issuance of such order.*

(emphasis supplied).

Pan Asian argues that since it is undisputed that the circulation devices were installed in November 2006, or before § 24-227 became effective on July 1, 2007, the first and last violations under subsection (a) are a "nullity," and that the lawful action under § 24-227(c) would have been for the commissioner to issue an order to the restaurant to reduce the cumulative noise emanating from the devices within 12 months. Further, it argues that the remaining violation under § 24-227(b) is inapplicable because the language of the subsection

makes it clear that it only applies to new circulation devices installed or replaced after the effective date of the section.

Plaintiffs counter that the violation notices that the DEP has issued pursuant to § 24-227(a) and § 24-227(b) are *prima facie* evidence of an ongoing private nuisance that entitles them to compensation. They also argue that even though some or all of the circulation devices at issue were installed before July 1, 2007, (the effective date of the law containing § 24-227(a)), this subsection, by its plain wording, and in context with § 24-227(b) and (c), applies to all circulation devices, not just those installed on or after July 1, 2007.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Pan Asian has not made a prima facie showing entitling it to judgment as a matter of law. First, contrary to Pan Asian's position, it cannot be said on this record that the Administrative Code provisions are inapplicable as a matter of law. First it would appear that the two-year exemption under § 24-227(b) applies only to the replacement, and not to the installation of circulation devices, like the ones apparently at issue. In addition, the language of § 24-227(c) relied on by Pan Asia does not require the commissioner to allow the violator twelve months to remedy a noise condition caused by more than one device, but rather, grants him the

discretion to do so.

In any event, to the extent it can be argued that the provisions of the Administrative Code were not violated based on the date of the installment of the circulation devices, such argument does not preclude plaintiffs from successfully stating a claim for private nuisance, which does not require the violation of an ordinance. See 61 West 62 Owners Corp., v. CGM EMP LLC, 77 A.D.3d 330, 335 (2d Dept. 2010), modified on other grounds, 16 NY3d 822 (2011)(finding that "it is wholly immaterial to maintaining an action for nuisance at common law whether or not DEP, or any municipal authority, has issued noise ordinance violations") .

The elements of the common-law cause of action for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) and 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." Copart Indus. Inc. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d 563, 570 (1977). Except for the issue of whether the plaintiff has the requisite property interest, each of the other elements is a question for the jury, unless the evidence is undisputed. Weinberg v. Lombardi, 217 A.D.2d 579 (2d Dept 1995).

Here, plaintiffs have the requisite property interests in their third-floor apartments to maintain a claim of private nuisance. Moreover, the record shows that there are issues of fact regarding whether the exhaust and HVAC systems adversely affected plaintiff's enjoyment of their property. In addition, the notices of violations showing noise levels above that permitted under the Administrative Code support a finding of nuisance, irregardless of whether the provision is inapplicable based on the date of the installation of the devices.

Thus, even if Pan Asian were able to make prima facie showing entitling it to summary judgment based a finding that the relevant Administrative Code provisions were not violated,

plaintiffs would have controverted this showing by demonstrating that "the noise adversely affected the enjoyment of their apartment houses." See Broxmeyer v. United Capital Corp., 79 A.D.3d 780, 783 (2d Dept 2010).

In view of the above, it is

ORDERED that Pan Asian's motion for summary judgment is denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11 room 251, 60 Centre Street, New York, NY, on August 18, 2011, at 3:00pm.

DATED: July 9, 2011

J.S.C.