SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 17**

RALPH MASSARO, SARA MASSARO, PHYLLIS WALTERS and DIANE KOLOMICK,

Plaintiffs,

- against -

JAINA NETWORK SYSTEMS, INC., NEMINATH INC., and THE BUILDING DEPARTMENT OF THE INCORPORATED VILLAGE OF WILLISTON PARK,

Defendants.

Index No. 17256/10
Mot. Seq. # 4,5,6
Mot. Date 9.12 & 10.31.11
Submit Date 12.20.11

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Cross Motion	1,2,3
Answering Affidavits	4,5
Reply Affidavit	6,7
Memorandum of Law	8

The plaintiffs collectively move for an order granting summary judgment on their first, second and third causes of action, as well as for an order granting partial summary judgment on their fourth and fifth causes of action (Sequence #004).

Defendant, Jaina Network Systems, Inc. [hereinafter Jaina], cross-moves for an order granting summary judgment dismissing the plaintiffs' first, second and third causes of action (Sequence #005).

Defendant, the Building Department of the Incorporated Village of Williston Park [hereinafter the Village], cross-moves for an order granting summary judgment dismissing the plaintiffs' first, second and third causes of action (Sequence #006).

Defendant Neminath is the owner of the premises located at 235 Hillside Avenue, in Williston Park, New York [hereinafter the subject premises] (*see* Browne Affirmation in Support at Exh. A at ¶5). Said property is presently improved with two buildings, the first of which houses a delicatessen and a Subway sandwich shop fronting Hillside Avenue, and the second of which is located towards the rearmost property line (*id.* at ¶¶8,9). Between 1952 and 2008, this second building allegedly functioned as an accessory building supporting the activities and uses attendant to the first (*id.* at ¶9).

In or about 2008, Neminath and Jaina entered into an agreement whereby Jaina leased the second building from Neminath and utilized same "as an international telephone exchange housing equipment that processes and routes telephone calls overseas" (*id.* at ¶10; *see also* Exh. C at p. 7). Thereafter, Jaina installed two electrical generators, a wood frame utility shed and two HVAC units, all of which were located anywhere between "three feet to one-foot-ten inches from the rearmost property line (*id.* at ¶11; *see also* Exh. C at p.2). It appears that while Jaina originally installed these structures in the absence of the required building permits, the Village ultimately issued same (*id.* at Exh. C at p. 2). Subsequently, in either late 2009 or early 2010, the Village revoked said permits finding that the structures violated the rear yard set back requirements contained in §230-8(G) of the Village Code of Williston Park [hereinafter the Village Code] (*id.* at ¶13). In the face of this revocation, Jaina sought an area variance from the Zoning Board of Appeals [hereinafter ZBA], which, on May 17th and June 14th, 2010, held

hearings in connection therewith (*id.* at Exh. C). During the course of these hearings, plaintiffs' counsel objected to Jaina's variance application and also argued that Jaina's use of the second building was in contravention of §230–4 of the Village Code inasmuch as the lot upon which it was situated was already occupied by another commercial building, to wit: the subway shop and delicatessen (*id.* at Exh. C at pp. 4,7). By written decision dated August 9th, 2010, the ZBA denied the area variance requested by Jaina and stated "the proposed variance is substantial" and "the equipment at issue in its present location produces an undesirable change in the character of the neighborhood and is a detriment to a nearby residential property" (*id.* at Exh. C at p. 8). The ZBA further noted that "the Building Department has not been asked for its interpretation of the Village Code as to whether [Jaina's] use of the Premises, without regard to the HVAC units, generators, and utility shed at issue in this proceeding, are lawful uses under the Village Code. Accordingly, this Board finds that this issue of use is not ripe for its review." (*id.*).

On September 10th, 2010, the plaintiffs moved by order to show cause for a preliminary injunction, whereby the Honorable Daniel R. Palmieri issued a temporary restraining order preventing Jaina from operating the HVAC and generator units (*see* Dorry Affidavit in Support of Cross-Motion at Exh. G). Simultaneously therewith, the plaintiffs filed the underlying complaint wherein the first, second and third causes of action seek declaratory and injunctive relief and the fourth and fifth causes of action each sound in private nuisance (*see* Browne Affirmation in Support at Exh. A). The applications respectively interposed by the moving parties thereafter ensued and are determined as set forth hereinafter.

The Court initially addresses the application interposed by the plaintiffs. In support thereof, counsel revives his assertion that Jaina's continued use of the second building blatantly

contravenes Village Code §230–4(B) and as such the plaintiffs are entitled to judgment on their first cause of action permanently enjoining the defendants' illegal use of the subject premises (*see* Browne Affirmation in Support at ¶¶18,23,24,26,27,28). Counsel additionally contends that since the placement of the generators and HVAC units violates the setback requirements recited in Village Code §230-8(G), the plaintiffs are also entitled to judgment on their second and third causes of action permanently enjoining Jaina and Neminath from maintaining said units (*id.* at ¶¶18, 22,23,28,29).

Finally, as to the fourth and fifth causes of action sounding in private nuisance, counsel asserts that Jaina intentionally operated the HVAC units at decibel levels in excess of 70 thereby violating the relevant noise ordinances and depriving the plaintiffs of the quiet use and enjoyment of their properties (*id.* at ¶¶30, 32,34). To this point, counsel provides, *inter alia*, the affidavit of plaintiff, Ralph Massaro, whose "northerly property line abuts the rear property line"of the subject premises (*see* Massaro Affidavit at ¶2). Mr. Massaro states that "[f]rom the time of their installation in 2008, until Jaina removed the HVAC units and, apparently, disabled the generator in September 2010, my wife and I were unable to use and enjoy our backyard . . . because the constant noise from [the HVAC and generator units] was simply too loud and unpleasant" (*id.* at ¶7). Mr. Massaro further avers that in May of 2010, he "purchased a factory-calibrated sound level meter" and "measured noise at levels of approximately 72-73 decibels when one HVAC unit was running and levels of approximately 78-79 decibels when both HVAC units were in operation" (*see* Massaro Affidavit at ¶12).

The plaintiffs' within application is opposed by defendants Neminath[1], Jaina and the Village, with the latter two defendants cross-moving for summary judgment dismissing the plaintiff's first, second and third causes of action. The Court will initially address the cross-motion interposed by Jaina.

JAINA

In support of the cross-application, counsel for Jaina argues that while the plaintiffs characterize the use of the subject premises by Jaina and Neminath as illegal, they have never properly sought administrative review from either the building department or the ZBA, thereby warranting dismissal of the first, second and third causes of action (*see* Dorry Affidavit at ¶¶31,34,35,36). Counsel further contends that as the HVAC and generators units have been removed from the rear yard of the subject premises, there is no violation, either threatened or probable, with respect to the plaintiffs' property rights and accordingly the issuance of a permanent injunction is patently inappropriate (*id.* at ¶¶18,23,38).

In addition to cross-moving for summary judgment, Jaina particularly opposes those branches of the plaintiffs' application seeking partial summary judgment on the fourth and fifth causes of action sounding in nuisance. In the submitted opposition, counsel for Jaina argues that there are material questions of fact as to whether the noise generated by the subject equipment was substantial in nature and unreasonable in character, thus warranting denial of the plaintiffs'

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[1] The Court notes that by way of an affirmation dated, September 30th, 2011, counsel for Neminath appears to be seeking affirmative relief in the form of summary judgment dismissing the plaintiff's first, second and third causes of action. However, as the notice requirements set forth in CPLR§2215 have not been satisfied, this Court could not entertain the request for relief recited in counsel's affirmation (CPLR §2215). The Court further notes that in opposing the plaintiffs' application, counsel for Neminath expressly adopts those arguments set forth by counsel for Jaina (*see* Krishna Affirmation in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Jaina's Cross Motion).

application (*id.* at ¶¶42,46,49). Counsel particularly challenges the above-referenced Massaro affidavit and argues that the plaintiff's failure to set forth his credentials as to sound measurement renders his conclusions devoid of probative value (*id.* at ¶45).

The Village

As to the application submitted by the Village, counsel asserts that the first cause of action must be dismissed given the plaintiffs' failure to pursue administrative relief from either the building inspector or the ZBA (*see* Defendant's Memorandum of Law at pp. 1-9). Counsel further argues that the damages alleged by the plaintiffs are too conclusory to constitute special damages, and as such the plaintiffs may not circumvent administrative review prior to seeking judicial redress (*id.* at pp.6,7). Finally, counsel argues that inasmuch as the HVAC and generator units have been removed from the rear yard of the subject premises and given that the plaintiffs' second and third causes of action assume the presence of said equipment at this former location, these actions must be dismissed as moot (*id.* at p.9).

Decision

As recited in the Verified Complaint, the plaintiffs' first cause of action seeks an order declaring Jaina and Neminath's operation of two main buildings on a single lot as illegal, permanently enjoining said defendants from the continued use thereof and directing the Village to revoke any certificates of occupancy or certificates of completion issued in connection therewith (*see* Browne Affirmation in Support at Exh. A at ¶24).

As a general rule, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57 [1978]; *Town of Oyster Bay v*

Kirkland, 81 AD3d 812 [2d Dept 2011]). In the absence of extraordinary circumstances, "courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency" (*Tahmisyan v Stony Brook University*, 74 AD3d 829 [2d Dept 2010] quoting *Galin v Chassin*, 217 AD2d 446 [1995]). Notwithstanding these general precepts, the Court of Appeals has held that "[t]he exhaustion rule . . . is not an inflexible one" and "need not be followed . . . when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power" (*Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57, *supra*). Moreover, one who has suffered "special damages as the result of a violation of a zoning ordinance" is entitled to commence a plenary action to enjoin the violation, irrespective of a failure to initially pursue available administrative remedies (*Haddad v Salzman,* 188 AD2d 515 [2d Dept 1992]).

In the matter *sub judice*, the plaintiffs indeed contend that they have collectively sustained special damages and thus can immediately seek judicial intervention. However, even under circumstances where a plaintiff is entitled to eschew the administrative process and forthwith pursue legal action, "[t]he doctrine of primary jurisdiction provides that where the courts and an administrative agency have concurrent jurisdiction over a dispute involving issues beyond the conventional experience of judges . . . the court will stay its hand until the agency has applied its expertise to the salient questions" (*Neumann v Wyandanch Union Free School Dist.*, 84 AD3d 816 [2d Dept 2011] quoting *Flacke v Onondage Landfill Systems, Inc.*, 69 NY2d 355 [1987]; *Haddad v Salzman*, 188 AD2d 515, *supra*). Here, the exposition and ultimate disposition of the issues raised as to the defendants' purported illegal use of the subject premises

clearly fall within the specialized knowledge and experience of the administrative agencies charged to enforce the Village Code (*id.*).

Accordingly, given the particularized nature of the plaintiffs' claims and mindful of the prudential concerns articulated by controlling appellate authority, this Court hereby stays the plaintiff's first cause of action pending determination by the appropriate administrative body (*id.*). In accordance therewith, that branch of the plaintiffs' application seeking an order granting summary judgment on the first cause of action is hereby **DENIED** and those branches of the applications respectively interposed by Jaina and the Village, which seek an order granting summary judgment dismissing the plaintiffs' first cause of action, are similarly **DENIED**.

The court now turns to the plaintiffs' second and third causes of action, both of which seek declaratory and permanent injunctive relief. A review of the complaint indicates that the plaintiffs' prayer for relief is predicated upon the presence of the HVAC and electrical generator units in the rear yard of the subject premises and the excessive noise emanating therefrom (*see* Browne Affirmation in Support at Exh. A at ¶¶26-35). "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction" (*Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595 [2d Dept 2005] at 596). Moreover, injunctive relief is "to be invoked only to give protection for the future . . . [t]o prevent repeated violations, threatened or probable, of the [plaintiffs'] property rights" (*Merkos l'Inyonei Chinuch, Inc. v Sharf,* 59 AD3d 403 [2d Dept 2009] quoting *Exchange Bakery & Rest. v Rifkin,* 245 NY 260, 264-265 [1927]).

In the instant matter, the record establishes that both the HVAC and generator units have been removed from the rear yard of the subject premises. Moreover, plaintiffs' counsel concedes

that said structures have been removed and the attendant noise has indeed abated. Thus, based upon the record as developed herein, there is an absence of evidence as to any threatened or probable violations of the plaintiffs' property rights. Accordingly, those branches of the plaintiffs' application seeking an order granting summary judgment on the second and third causes of action are hereby **DENIED**, and those branches of the applications respectively interposed by Jaina and the Village, which seek an order granting summary judgment dismissing the plaintiffs' second and third causes of action, are hereby **GRANTED**.

Finally, and as noted above, the fourth and fifth causes of action both sound in private nuisance in connection to which the plaintiffs seek partial summary judgment thereon (*see* Browne Affirmation in Support at Exh. A at ¶¶42-51). In order to grant summary judgment, "it must clearly appear that no material and triable issue of fact is presented" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004] quoting *Glick v Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). It is well settled that the proponent of a motion seeking summary judgment must demonstrate a *prima facie* showing of entitlement to judgment as a matter of law by providing evidentiary proof, in admissible form, sufficient to establish the absence of material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). An award of summary judgment is not appropriate "where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*id.*).

If a sufficient *prima facie* showing is demonstrated, the burden shifts to the non-moving party to come forward with competent evidence to demonstrate a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment

"[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004], *supra* quoting *Anderson v Liberty Lobby, Inc.*477 US 242 [1986]).

Of particular relevance herein are the elements constituting a claim sounding in private nuisance, which are comprised of the following: "(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" (*Berenger v 261 West LLC*, 2012WL 310499 [2d Dept 2012] quoting *Copart Industries v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564, 570 [1977] ."[E]xcept 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 Lonbardi*, 217 AD2d 579 [2d Dept 1995]; *Gedeny Commons Homeowners Association, Inc. v Davis*, 85 AD3d 854 [2d Dept 2011]; *Broxmeyer v United Capital Corp.*, 79 AD3d 780 [2d Dept 2010].

Here, in supporting the plaintiffs' claims that the sound levels were substantial in nature, counsel relies principally, although not exclusively, upon the afore-referenced affidavit of Ralph Massaro. While Mr. Massaro indeed concludes that Jaina operated the HVAC and generator units in excess of 70 decibels, nowhere therein does he provide a proper basis upon which his opinions are predicated. Particularly, in opining as to the sound levels, Mr. Massaro does not in any respect set forth his professional credentials in the area of acoustics and sound measurement (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, *supra*). Thus, having carefully reviewed the submissions of the parties and viewing the facts in a light favorable to the non-moving party, this

Court finds that there are material questions as to Mr. Massaro's competence to properly render the opinions articulated in the supporting affidavit (*id.*; *Zuckerman v City of New York*, 49 NY2d 557, *supra*). Therefore, as the plaintiffs' have failed to establish their entitlement to judgment as a matter of law, those branches of the plaintiffs' application, which seek an order granting partial summary judgment on the fourth and fifth causes of action sounding in nuisance, are hereby **DENIED**.

Based upon the foregoing, it is,

ORDERED, that the Plaintiffs' Motion for Summary Judgment on the complaint is **DENIED** in its entirety; and it is further,

ORDERED, that the summary judgment applications respectively interposed by Jaina and the Village, are hereby **DENIED** as to the Plaintiffs' first cause of action, and **GRANTED** as to the Plaintiffs' second and third causes of action.

This constitutes the decision and order of the court. All applications not specifically addressed herein are denied.

Dated: February 17, 2012

ENTERED

FEB 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

Attorney for Plaintiff
Christian Browne, PC
1050 Franklin Avenue, Ste.402
Garden City, NY 11530

Atty for Defendant Jaina
Akhilesh Krishna, Esq.
127-21 Liberty Avenue
Richmond Hill, NY 11419

Atty for Defendant Bldg Dept
Ackerman Levine Cullen
Brickman Limmer, LLP
1010 Northern Blvd., Ste. 400
Great Neck, NY 11021