[* 1]

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

PRESENT: Hon. [illegible] PART 11

Justice

Williams

- v -

Esplanade Gardens Inc

INDEX NO. 113139/11

MOTION DATE 3-1-12

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 decided in accordance with the annexed Memorandum Decision + Order.

FILED

JUL 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 23, 2012

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: PART 11

----------X

ANNETTE WILLIAMS,

plaintiff

-against-

ESPLANADE GARDENS INC., DONALD WHITAKER, PAULINE WHITAKER and RONALD WHITAKER,

Defendants

----------X

Index No. 113139/11

JOAN A. MADDEN, J.:

In this action arising out of a dispute between a cooperative corporation and a tenant regarding noise complaint, plaintiff Annette Williams ("Williams") moves, by order to show cause, for a preliminary injunction, (i) directing that defendant Esplanade Gardens, Inc. ("Esplanade") to "commence or reinstate all appropriate actions, or proceedings for the removal of the defendants, Donald Whitaker ("D. Whitaker"), Pauline Whitaker ("P. Whitaker"), and Ronald Whitaker and all other occupants of Apartment 9I" (ii) enjoining defendants D. Whitaker, P. Whitaker and R. Whitaker "from engaging in any nuisance activity, misconduct, acts, omissions, misfeasance, malfeasance and nonfeasance, which have or would have an adverse and detrimental effect upon the life, healthy, safety, comfort and peaceful habitation of the plaintiff," and (iii) granting such further relief as the court deems just, proper, equitable, and appropriate. Defendants oppose the motion, which is denied for the reasons below.

Williams is a lawful residential tenant of the cooperative building located at 700 Lenox Avenue, Apartment 8I, New York, New York (hereinafter "the Building"). Defendant Esplanade is the owner of the Building. D. Whitaker is the tenant of record of Apartment 9I and resides there with his wife, P. Whitaker and his son, R. Whitaker

(together "the individual defendants" or "the Whitakers"). Williams and the individual defendants have resided at their respective apartments since 1968.

In this action, Williams alleges that since January 17, 2011, the individual defendants have engaged in a pattern of conduct, which has caused or allowed excessive noise and disturbances to emanate from their apartment and disturb, annoy, and harass her such that it interferes with her rights, comfort, and peaceful enjoyment of her apartment. Williams commenced the action by way of summons and verified complaint, which seeks legal and equitable relief for four causes of action: (i) a permanent injunction against the individual defendants requiring them to cease the acts and omissions depriving Williams of the peaceable and actual use of her apartment, (ii) attorneys' fees as against Esplanade, (iii) breach of the implied warranty of habitability and the lease against Esplanade based on its failure to abate "the nuisance", (iv) a permanent injunction against Esplanade requiring it to commence or reinstate appropriate proceedings against the individual defendants to enforce their lease obligations.

Williams now moves for a preliminary injunction, enjoining the individual defendants from making excessive noise and disturbances and seeking their removal from the Building. In support of her motion, Williams submits her affidavit, in which she states that the individual defendants have continued their offensive behavior, and describing the persistent and excessive noise allegedly coming from their apartment. She also submits a letter from Detective Roosevelt Johnson to the individual defendants, which was sent in response to Williams' complaints and asks them to reduce the level of noise in their apartment.

Williams also submits a notice of default and intention to terminate lease dated April 4, 2011, which was sent by Esplanade to the individual defendants, and which lists

incidents of noise disturbances on a nearly daily basis beginning on January 17, 2011 and continuing through April 3, 2011. She further submits (i) a notice of hearing dated April 28, 2011, which notified the Whitakers that at a hearing would be held before Division of Housing Supervision of the Department of Housing Preservation and Development ("HPD") relating to the noise disturbances, and (ii) a written stipulation that was entered into by the Whitakers and Esplanade in which Esplanade agreed to withdraw the HPD proceeding, if the Whitakers agreed to carpet their bedrooms and provide a carpet runner in the halls and to install a padded toilet seat or other system designed to reduce the noise produced by lowering the seat.

Additionally, Williams submits a typewritten log commencing May 9, 2011 through November 9, 2011, in which she recorded nearly daily the dates, times, and descriptions of the individual defendants' allegedly offensive conduct. Williams describes the noises she alleges emanate from the Whitaker's apartment as loud hammering, excessive thumping, dragging of furniture, dropping objects on the floor, heavy walking, heavy objects rolling across the floor, barking, and continuous tapping.

In opposition, the individual defendants submit a "unified affidavit" in which they state that P. Whitaker and D. Whitaker are elderly and D. Whitaker suffers from many infirmities, and that R. Whitaker is a gainfully employer 53 year-old man. The Whitakers deny the noises described by Williams are emanating from their apartment and allege that Williams engages in rageful, uncivil behavior towards them, such as making threats to their safety, claiming imaginary noises, taunting them, calling the police repeatedly for no reason, and engaging in loud screaming. Additionally, the Whitakers state that Williams' log undermines her credibility since the log contains almost a hundred entries of "barking" or "loud barking" and the Whitakers do not own a dog or any other animals.

The Whitakers also submit individual affidavits of five neighbors, which support their contention that they are peaceful, model tenants and do not engage in annoying, disturbing or harassing behavior, and certain of these neighbors specifically deny hearing the noises of which Williams complains coming from the Whitakers' apartment. The Whitakers additionally submit photos showing that they carpeted their apartment and replaced their toilet seat cover with a padded model in accordance with the stipulation agreement from the HPD proceeding.

In opposition to the motion, Esplanade submits the Whitakers' unified affidavit and photos showing that the Whitakers complied with the stipulation agreement. Esplanade argues that the action of its cooperative board are protected by the business judgment rule, which "prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes (citations omitted).'" Levandusky v. One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 538 (1990), 40 W. 67th St. v. Pullman, 296 A.D.2d 120, 126 (1st Dep't 2002). Esplanade also asserts that it responded to Williams' complaints in good faith and in the interests of the corporation. Additionally, Esplanade maintains that it did not breach the warranty of habitability or occupancy agreement for Williams' apartment since there is no noise emanating from the Whitaker's apartment that is so excessive and there is no evidence that Williams was deprived of the essential functions of her apartment.

In reply, Williams submits the affidavit of Golda Hawthorne, who visited her apartment on two occasions and purports that she heard the noises emanating from the Whitaker's apartment. Hawthorne alleges that on both occasions, upon entering Williams' apartment, she heard a mechanical device similar to a barking dog, which

came from the Whitaker's apartment and lasted the entirety of her stay. Hawthorne states that the barking noise followed her as she moved throughout the apartment, and that she has not been back to Williams' apartment because of the noise.

DISCUSSION

A preliminary injunction is a drastic remedy, and thus should not be granted unless the movant demonstrates "a clear right" to such relief. City of New York v. 330 Continental, LLC, 60 AD3d 226, 234 (1st Dep't 2009); Peterson v. Corbin, 275 AD2d 35 (2d Dep't 2000), lv dismissed, 95 NY2d 919 (2000). Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunction relief, and (3) a balancing of the equities in the movant's favor. CPLR 6301; Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 NY3d 839 (2005); Aetna Ins. Co. v. Capasso, 75 NY2d 860 (1990). If any one of these three requirements is not satisfied, the motion must be denied. Faberge Intern., Inc. v. Di Pino, 109 AD2d 235 (1st Dep't 1985). Moreover, "[p]roof establishing these [requirements] must be by affidavit and other competent proof with evidentiary detail." Scott v. Mei, 219 AD2d 181, 182 (1st Dep't 1996).

As for the first prong, whether Williams is likely to succeed on the merits, the court must examine whether she has shown that the noise she complains of constitutes a breach of the implied warranty of habitability and lease agreement and/or whether the noise constitutes a nuisance which deprives her of the use of her home.

Under Real Property Law § 235-b, "every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented...are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not

be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." Section 235-b was not intended to make a landlord the "guarantor of every amenity customarily rendered in the landlord-tenant relationship" but instead is "designed to give rise to an implied promise on the part of the landlord that both of the demised premises and the areas within the landlord's control are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term." Park W. Mgmt. Corp., v. Mitchell, 47 N.Y.2d 316, 327, cert. denied, 444 US 992 (1979). The warranty is an implied covenant made by landlords in every residential lease and rental agreement, including proprietary leases issued by cooperatives. Suarez v. Rivercross Tenants' Corp., 438 N.Y.S.2d 164 (1st Dep't 1981).

A breach of the warranty of habitability has occurred "[i]f, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide..." Park W. Mgmt. Corp., 47 N.Y.2d 316, 328. In addition, under the warranty, the landlord warrants that "there are no conditions that materially affect the health and safety of the tenants." Id. at 317. Examples of such conditions include "insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation...or similar services which constitute the essence of the modern dwelling unit." Id. at 328.

To establish a breach of warranty of habitability based on a noise violation, a plaintiff must show that the alleged noise was "so excessive that the [plaintiff was] deprived of the essential function that a residence is supposed to provide." Armstrong v. Archives, L.L.C., 46 A.D.3d 465 (1st Dep't 2007) citing Kaniklidis v. 235 Lincoln Place Hous. Corp., 305 A.D.2d 546 (2nd Dep't 2003). There should be adequate proof of a continuous violation of the noise codes. Mantica R Corp. NV v. Malone, 106 Misc. 2d

953, 956 (N.Y. Civ. Ct. 1981). A plaintiff's showing that many complaints were made is not alone sufficient to establish a breach of the warranty of habitability. Armstrong v. Archives, L.L.C., 46 A.D.3d 465. In addition, a landlord's notice of cure reciting the dates and substance of noise complaints against the offending tenant does not constitute a conclusive admission or proof that the alleged noise rose to the level of a breach of the warranty of habitability. Id.

Here, a preliminary injunction is not properly issued in light of the considerable factual disputes concerning the level of noise in the Whitaker's apartment. O'Hara v. Corporate Audit Co, Inc., 161 AD2d 309 (1st Dep't 1990)(preliminary injunction not warranted where conflicting affidavits present sharp issues of fact); NCN Co., Inc. v. Cavanagh, 215 AD2d at 737 (same). In particular, while Williams submits evidence, including her affidavit, noise log and a letter from the police department to the individual defendants tending to support her claim of excessive noise, this evidence is controverted by the affidavits from the defendants and the individual defendants' neighbors, some of whom specifically state that the noise complained of by Williams is not emanating from the individual defendants' apartments. Moreover, the affidavit of Golda Hawthorne, is insufficient to resolve this factual dispute. Thus, as the evidence is insufficient to establish that the alleged noises from the Whitakers' apartment are so excessive as to deprive her of the essential function of her apartment, injunctive relief is not warranted based on the claim against Esplanade asserting a breach of the implied warranty of habitability. Moreover, although Williams alleges in the verified complaint that Esplanade breached the lease with her, she fails to submit a copy of the lease, or specify the provision of the lease that has been breached.

Next, to the extent that the complaint may be fairly read as alleging that the noise constitutes a private nuisance, the material issues of fact in dispute preclude a grant of a preliminary injunction on this theory. 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, at the very least, the evidence submitted by defendants creates disputes of fact as to whether the noise caused a substantial and unreasonable interference with Williams' right to use her apartment. See Kaniklidis v. 235 Lincoln Housing Corp., 305 AD2d at 547 ; Bernard v. 345 East 73rd Owners Corp., 181 AD2d 543 (1st Dept 1992).

Accordingly, as Williams has not shown that she is likely to succeed on the merits, she is not entitled to an injunction, and the court need not reach whether she has demonstrated irreparable harm, or if the equities weigh in her favor.

In view of the above, it is

ORDERED that Williams' motion for a preliminary injunction is denied; and it is further

ORDERED that the parties shall appear in Part 11, room 351, on August 30, 2012 at 9:30 am for a preliminary conference.

DATED: July 23 2012

J.S.C.

FILED

JUL 30 2012

NEW YORK
COUNTY CLERK'S OFFICE