

**Schwob v Bakers Dozen Assoc., LLC**

2014 NY Slip Op 30007(U)

January 6, 2014

Supreme Court, New York County

Docket Number: 154608/2013

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER  
Justice

PART 15

SCHWOB, ROBERT, ETAL  
- v -  
BAKERS DOZEN ASSOCIATES, LLC, ETAL.

INDEX NO. 154608/13  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
see file

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 1/6/14

[Signature]  
**HON. EILEEN A. RAKOWER**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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ROBERT SCHWOB, CHRISTINE SCHWOB,  
and DANIELLE SCHWOB,

Plaintiffs,

Index No.: 154608/2013

- against -

DECISION/ORDER

Mot. Seq. 01

BAKERS DOZEN ASSOCIATES, LLC, a/k/a  
EMM GROUP, FINALE, BOW, and  
BOWERY at SPRING PARTNERS, L.P.,

Defendants.

-----X

HON. EILEEN A. RAKOWER

This is an action for nuisance based, *inter alia*, on noise and vibrations produced by a nightclub located in the basement and ground-floor commercial condominium unit of the Nolita Place Condominium, at 199 Bowery, New York, New York, 10002 (“the Nolita Place Condominium” or “Nolita Place”). Plaintiffs, Robert Schwob and Christine Schwob, own apartment 2D in the Nolita Place condominium (“Apartment 2D” or “2D”), where their daughter, Plaintiff Danielle Schwob (“Ms. Schwob”) (collectively, “Plaintiffs” or “the Schwobs”) resides. Plaintiffs allege that noise and vibrations emanating from the nightclub (“Finale”), and its mechanical equipment create a private nuisance in Apartment 2D. Plaintiffs assert nuisance causes of action against the commercial unit’s tenant, Defendant, Bakers Dozen Associates LLC, a/k/a EMM Group, Finale, Bow (“Bakers Dozen”), and against the commercial unit’s owner, Defendant, Bowery at Spring Partners, LP, for damages, and seek a permanent injunction to prohibit the excessive noise and vibrations that Finale and its mechanical equipment allegedly produce.

Initially, Plaintiffs moved, by way of order to show cause, for a preliminary injunction. A hearing on Plaintiffs' motion for a preliminary injunction was held on June 4, August 28, October 1, 2, 3, and 4, 2013. Testimony elicited at the hearing included Air Pollution Inspector for the New York City Department of Environmental Protection ("DEP"), Richard Valdez, Acoustic Consultant, Alan Fierstein, Plaintiff Danielle Schwob, President of the Board of Managers of Nolita Place Condominium, Richard Halpern, EMM Group Chief Operating Officer, Adam Landsman, and Architectural and Acoustical Consultant, David Kotch.

Defendant in final argument moved, pursuant to CPLR 3212(c), for Summary Judgment on (i) the remainder of Plaintiff's non-injunctive claims subsequent to the Court's hearing on the preliminary injunctive relief being sought in this action, and; (ii) for such other and further relief as this court deems proper.

Plaintiff cross moved for a permanent injunction lowering the volume of music that emanates from the Bar, and directing Defendants to undertake various mechanical repairs and improvements. Specifically, Plaintiffs seek a permanent injunction that lowers the music to 100 decibels across all frequencies, and directs Baker's Dozen to: 1) line the west wall of the cooling tower enclosure with half inch cement board (i.e. Wonderboard) continuing down to the terrace roofing surface; 2) surround the exhaust duct with Wonderboard, not touching the duct, from the terrace roofing surface to a height of 12 feet above the surface; 3) install one inch thick rubber matting on the floor and storage shelves of the mechanical mezzanine; 4) properly install spring isolators supporting all of the mezzanine equipment, including the small pumps, the large floor pumps, and the ceiling-mounted fans; and 5) make any improvements necessary to bring the mechanical equipment within the relevant New York City Mechanical Code Requirements (§§ 926.2.3 [pipes], 926.2.4 [fans], 926.2.5 [pumps], and 926.2.7 [cooling towers]), in accordance with Plaintiff's acoustical consultant's recommendations.

Plaintiffs do not object to a ruling at this stage on the issue of Baker's Dozen's liability with regard to Plaintiffs' nuisance claim, and having any injunctive relief imposed be permanent, rather than preliminary. Plaintiffs oppose Defendant's motion for summary judgment on the remainder of Plaintiff's non-injunctive claims, namely Plaintiff's claim for damages and its claim involving wrongdoing by Defendant Bowery at Spring Partners, LLC ("Sponsor").

## A. Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moniger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42<sup>nd</sup> Street Dev. Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

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) 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. v. Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570, 394 NYS2d 169, 172-174, 362 NE2d 968, 971-972 [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." *Kahona Beach LLC v Santa Ana Rest. Corp.*, 2012 N.Y. Misc. LEXIS 375, \*3-\*4 (N.Y. Sup. Ct. Jan. 24, 2012).

For purposes of bringing a cause of action for private nuisance, "[a]n interference 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.'" *Berenger v. 261 W. LLC*, 93 A.D.3d 175, 183-184 (1st Dep't 2012).

Defendants argue that Plaintiffs' nuisance claim fails as a matter of law because Plaintiffs cannot establish the requisite element of intentionality. Defendants argue that Bakers Dozen had no opportunity to assess the impact of its numerous and ongoing efforts to address Plaintiffs' initial complaints, because Plaintiffs refused to allow testing inside Apartment 2D between February 2013, and June 2013. Defendants argue that this refusal negates any claim that Bakers Dozen knew or should have known that the mechanicals and/or music noise levels were in violation of any statute, or were in fact causing any nuisance whatsoever.

Defendants also argue that noise levels documented by Plaintiff's acoustical consultant and Department of Environmental Protection ("DEP") representative Mr. Valdez are insufficient to establish a prima facie case of common law private nuisance because both Mr. Fierstein's and Mr. Valdez's noise measurements suffered from methodological flaws such that these measurements cannot establish any violation of the New York City Code.

Plaintiffs do not dispute that they refused to allow testing between February and June 2013. Nevertheless, Plaintiffs argue that the element of intentionality is met because Defendants were on notice that the nightclub was emitting excessive noise prior to February 2013. Moreover, Plaintiffs argue that Defendants acknowledged that they needed to make certain repairs or changes in order to achieve Code compliance, and that continuing to play loud music in light of the complaints and the acknowledged need for repairs renders such conduct intentional.

Although Defendant raises legitimate concerns regarding the methodology of Plaintiffs' acoustical consultant, as well as Plaintiffs' refusal to allow testing inside Apartment 2D, it is clear that both parties conducted sound tests from within and without Apartment 2D, and that Defendants were on notice of noise complaints that had been made to the DEP regarding noise resulting from Defendants' nightclub operation. However, as will be discussed below, a finding that noise is excessive is relative to measurements of ambient noise. Thus, there are questions of fact as to whether, based on the sound tests conducted by the parties and the DEP, Bakers Dozen was substantially certain that excessive noise would emanate from the nightclub and/or its mechanical equipment, and Defendants are not entitled to summary judgment on this ground.

#### B. Permanent Injunction

In order to obtain a permanent injunction, a plaintiff must show (1) the violation of a right that is presently occurring or imminent (see e.g. *People v Canal Bd.*, 55 NY 390, 394-395 [1874]), (2) that the plaintiff has no adequate remedy at law (see e.g. *Kane v Walsh*, 295 NY 198, 205-206, 66 N.E.2d 53 [1946]), (3) that serious and irreparable injury will result if the injunction is not granted (see e.g. *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840, 833 N.E.2d 191,

800 N.Y.S.2d 48 [2005]), and (4) that the equities are balanced in the plaintiff's favor (*id.*).

“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 595,596; 789 N.Y.S.2d 505 [2d Dept 2005]). 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 A.D.3d 403, 873 N.Y.S.2d 148 [2d Dept 2009] quoting *Exchange Bakery & Rest. v. Rifkin*, 245 NY 260, 264-265, 157 N.E. 130 [1927]).

The lion's share of Plaintiffs' acoustical consultant's testimony relates to sound tests he performed prior to June 9, 2013, when he submitted a report recommending that Defendant undertake various sound abatement measures. The record establishes that, pursuant to said recommendations, Baker's Dozen implemented various sound abatement measures, mechanical improvements, and repairs, in June and July 2013 (“the July improvements”). It follows that Plaintiffs' acoustical consultant's testimony regarding purported noise violations that occurred *prior* to July 2013—some documented in his reports and some not—does not adequately speak to the likelihood of *future* violations or *ongoing* harm that might warrant an injunction.

The essence of private nuisance is interference with the use and enjoyment of land. *Copart Industries Inc. v. Consolidated Edison Co.*, 41 NY2d 169 (1977). The law “relating to private nuisances is a law of degree and usually turns on the question of fact whether the use is reasonable or not under all the circumstances.” (*Christopher Owners Corp. v Summit Off. Supply*, NYLJ, Feb. 3, 1995, at 26, cols 2, 3 [Sup Ct, NY County], quoting *McCarty v. National Carbonic Gas Co.*, 189 NY 40, 46 [1907]). “What is reasonable can be a question of law or fact, but when it depends upon an inference from peculiar, numerous or complicated circumstances it is usually a question of fact.” (*McCarty v. National Carbonic Gas Co.*, 189 NY 40, 46 [1907]; *Kahona Beach LLC v Santa Ana Rest. Corp.*, 2012 N.Y. Misc. LEXIS 375, \*3-\*4 [N.Y. Sup. Ct. Jan. 24, 2012]).

Here, there are several questions of fact with respect to the reasonableness of the noise and vibrations that Defendants' nightclub and mechanical equipment

currently produce. Defendants have made several changes and improvements to the nightclub's sound system and mechanical equipment in order to assuage Ms. Schwob's subjective discomfort and alleviate Plaintiffs' noise concerns. The July Improvements, for instance, were undertaken largely at Plaintiffs' behest. The July Improvements included placing "limiters" on the Nightclub's stereos, so that the stereos cannot play music above a certain decibel<sup>1</sup> level, or volume, as set by these limiters. The limiters were set to 110 decibels, per Mr. Fierstein's recommendation at that time. The July Improvements also included various soundproofing measures in the 'mechanical mezzanine,' located underneath Apartment 2D. Additionally, Defendants implemented soundproofing measures on the air conditioning ducts located on the low roof, or terrace, outside of Plaintiffs' apartment, during the July Improvements. Plaintiffs' acoustical consultant was given the opportunity to observe these improvements taking place, and in August 2013, Mr. Fierstein, Mr. Kotch, and Mr. Valdez, an agent for the DEP, conducted a joint sound test from inside Plaintiffs' apartment.

At the preliminary injunction hearing, Defendants' expert testified that it would be possible for the nightclub to play music above legal limits at two bass-level frequencies,<sup>2</sup> 63Hz and 80Hz, even after the July Improvements. In this respect, it is undisputed that 63Hz and 80Hz continue to run the risk of exceeding legal limits. However, Plaintiffs seek injunctive relief at a far greater magnitude than merely to curtail music at bass frequencies, let alone at only those bass frequencies that Defendants concede are at issue.

Several sources of sound are complained of, and each of those sources may produce sound at multiple frequencies. The joint sound test conducted in August 2013 does not indicate that, as the limiters are currently set, music emanating from Defendants' nightclub at frequencies other than 63Hz and 80Hz is above code. In

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<sup>1</sup>The decibel (dB) is the universal unit of sound measurement. Decibels are a logarithmic unit, which means that a noise measuring 30 decibels is actually ten times louder than a noise registering at 20 decibels. Decibel levels can be measured using the "A" weighting network, in which case the unit of measurement is the dB(A). Alternatively, decibels may be measured using the "C" weighting network, in which case the unit of measurement is the dB(C).

<sup>2</sup>Bass-level frequencies are low-level frequencies that can cause audible sound and physical vibrations that can be felt. Bass sounds are weighted in the "C" scale, and measured using the dB(C).

fact, Plaintiff's acoustical consultant testified that he declined to perform sound tests during the joint testing session because it was too quiet. Thus, Plaintiffs' own submissions raise questions of fact as to whether the nightclub's music violates<sup>3</sup>, or is likely to violate, the Code, at any frequency "across the board." Accordingly, the drastic remedy of permanent injunction is inappropriate at this time.

Likewise, Plaintiffs do not demonstrate a violation of right that is presently occurring or imminent with respect to noise vibrations emanating from the mechanical mezzanine that would justify imposing the drastic remedy of permanent injunction.

Plaintiffs now argue that the July improvements to the mechanical mezzanine are inadequate. In support of their claim for a permanent injunction to implement Mr. Fierstein's current recommendations for the mechanical mezzanine, Plaintiffs present evidence, in the form of testimony and reports, from Plaintiffs' acoustical consultant. Despite having ample opportunity to perform sound tests, Mr. Fierstein claims to have based his previous recommendations on inaccurate information from Bakers Dozen, and therefore blames Defendants for any inadequacies of the recommendations. Plaintiffs' acoustical consultant, who is not qualified as an expert in mechanical engineering<sup>4</sup>, also testified that the July Improvements implemented in the mechanical mezzanine were not done to his specifications, and that the Improvements that Defendants implemented do not

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<sup>3</sup>Plaintiffs' acoustical consultant testified that the Defendants' noise was "unreasonable" under the Code. The Code prohibits "unreasonable noise," and defines "unreasonable noise" as sound, other than impulsive sound, attributable to any device, that exceeds certain prohibited noise levels, which the Code articulates in terms of noise measuring a given amount dB(A) above ambient levels. § 24-218 (a)-(b) (General prohibitions). Bass-level frequencies, however, are measured in dB(C). Although the Court does not doubt that it is possible to produce "unreasonable" noise at bass-level frequencies, Mr. Fierstein's basis for declaring the bass-level frequencies complained of in this case "unreasonable" per Code, is unclear.

<sup>4</sup>Mr. Fierstein's "expertise" is in the area of acoustics and sound measurement. At the hearing on Plaintiffs' preliminary injunction motion it was established that Mr. Fierstein has never taken any course in mechanical engineering, nor did he ever review his conclusions or recommendations regarding the equipment in the mechanical mezzanine with a mechanical contractor or a mechanical engineer. Mr. Fierstein was not qualified to offer opinions with respect to the mechanical aspects of this case, based on his lack of experience and/or education in this field. (Tr. Aug. 28 p. 34-36).

reflect standard operating procedure for abating noise produced by this type of equipment. As a result, Mr. Fierstein concluded, these soundproofing measures were ineffective, and the mechanical mezzanine continues to produce noise in excess of that which is permitted by Code.

Defendants present countervailing expert testimony and reports. Defendants' expert testified that the improvements appeared atypical because they were innovative, not because they were ineffective. (Tr. Oct. 2 p. 115). Defendant's expert explained that traditional soundproofing techniques would be incompatible with the structure of the Nolita Place building, and that the July improvements to the springs in the mechanical mezzanine were a custom solution to particular problem<sup>5</sup>, not demonstrative of failure to adequately address an issue. Moreover, Mr. Valdez, a DEP agent who conducted sound tests inside Plaintiffs' apartment on August 24, 2013, testified that the vibrations felt through Plaintiffs' floor were caused by music, which Mr. Valdez was able to ascertain because the vibrations stopped when the music paused. In addition, joint sound testing conducted in August 2013 did not indicate that there were excessive vibrations from the mechanical mezzanine.

Accordingly, there are issues of fact with respect to whether the mechanical mezzanine produces noise and/or vibrations inside plaintiff's apartment, and if so, whether those vibrations are excessive, and therefore unreasonable. (*Berenger v. 261 W. LLC*, 93 A.D.3d 175, 183 [1st Dep't 2012] (reversing summary judgment in noise nuisance case; "This documentation raises issues of fact as to whether the noise was excessive and recurring, and therefore, substantial and unreasonable.")).

There are also questions of fact with respect to the reasonableness of the noise that the mechanical equipment located on the low roof, or terrace, outside of Plaintiffs' apartment allegedly produces. The mechanical equipment in question consists of a cooling tower and an exhaust fan.

Section 24-227(a) provides, "[n]o 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

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<sup>5</sup>Defendants also engaged the services of a speciality structural engineer to assist in developing these improvements. (Tr. Oct. 2 p. 113).

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.”

Section 24-232 of the New York City Administrative Code speaks to allowable decibel levels for sound sources operating in connection with any commercial or business enterprise, at designated octave bands, or frequencies. Specifically, § 24-232 provides that no person shall cause or permit a sound source operating in connection with any commercial or business enterprise to exceed the 70dB(C), 61dB(C), and 53dB(C), at 31.5Hz, 63Hz, and 125Hz, respectively, in a residential receiving property. This section does not apply to music. § 24-232(d).

Plaintiff attacks Defendants’ expert’s sound readings based on purported methodological flaws. Mr. Fierstein argues that Mr. Kotch’s sound readings are not accurate because the sound measurements were taken four feet, as opposed to three, from the door, because Mr. Kotch failed to use a windscreen when taking these readings, and because Mr. Kotch did not allow enough time for the meter to record a true ambient level.

Defendants’ expert, in turn, explained that it is not necessary to use a windscreen where, as here, a sound meter uses a windscreen setting to account for the effect of wind. Moreover, Mr. Kotch pointed out that the purpose of the windscreen is to avoid registering sounds due to wind, which would create an artificially high result. Thus, such a failure could only result in an erroneously high sound reading, and would support, rather than controvert, Plaintiffs’ excessive noise claim.

“In a noise nuisance case, however, while sound level is certainly a significant factor, the unreasonableness of an alleged interference with a property owner's rights also requires the evaluation and weighing of multiple other factors . . . . In addition, the character of the neighborhood must also be considered . . . . Whether or not a plaintiff came to the nuisance is also a factor, but of less significance than the level, duration and frequency of occurrences of sound . . . .”  
*Kahona Beach LLC v. Santa Ana Rest. Corp.*, 29 Misc. 3d 1210(A), 1210A (N.Y. Sup. Ct. 2010).

Ambient sound,<sup>6</sup> or background noise, is a significant factor in determining the reasonableness or unreasonableness of an alleged interference in a noise nuisance case. “A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. No one is entitled to absolute quiet in the enjoyment of his property; he may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells.” *People on Complaint of Gershberg v. Arkow*, 204 Misc 635, 639, 124 N.Y.S.2d 704 [NY Magis Ct 1953] (internal citations and quotations omitted). Moreover, in areas where ambient sound levels are high, it can be difficult to isolate other sources of sound in order to determine what, if any, excessive noise a given source of sound produces.<sup>7</sup>

This determination is further confounded in areas where the ambient noise, by itself, exceeds legal limits. One way to determine whether a given sound is unreasonable in an area where the ambient noise, by itself, exceeds legal limits, is to measure whether the sound in question—music, for example—exceeds the ambient level, and if so, by how much. This can be done simply by comparing sound measurements taken with the music on, and with the music off. In this way, the music’s contribution to the overall noise level is isolated from the baseline, ambient level.

Another way to determine whether a given source of sound exceeds ambient levels is called decibel subtraction, or the decibel subtraction technique. The decibel subtraction technique, which Mr. Fierstein testified to at length, is a logarithmic calculation that separates the ambient sound level from the “total sound” level, in order to determine what the noise level would be without the ambient contribution. This noise level, in turn, is considered the “source only” reading.

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<sup>6</sup>The Noise Code defines ambient sound as, “the sound level at a given location that exists as the result of the combined contribution in that location of all sound sources, excluding the contribution of a source or sources under investigation for violation of this code and excluding the contribution of extraneous sound sources.” § 24-203(6).

<sup>7</sup>Sources of ambient noise include “general neighborhood noise,” such as traffic sounds, and arguably some mechanical noise, such as noise produced by a water pump, if the noise is part of a building’s normal operation. (Tr. Oct. 2 p. 118, 139). Noise emanating from other apartments in an apartment building may also contribute to ambient levels.

Decibel subtraction is an approved, but not preferred, operating procedure of the DEP.<sup>8</sup> (Tr. Aug. 28 p. 12; Tr. Oct. 3 p. 24, 31). The DEP has historically assigned a meter tolerance of plus/minus three to sound levels obtained via decibel subtraction. Thus, the DEP training manual provides that after the decibel subtraction calculation is made, this number may be further reduced by up to three decibels before it is properly considered an accurate “source only” reading.

Clearly, Bakers Dozen is required to conduct its business within the confines of the law, including complying with the Noise Code. What is not clear from the factual record before the Court, is whether the Code is violated by each instance of sound or vibrations that Plaintiffs find disturbing.

Plaintiffs argue that the exhaust fan and cooling tower generate noise above the code limits, based on Mr. Fierstein’s calculations using decibel subtraction. Mr. Fierstein’s calculations did not reflect any meter tolerance, however, and there are questions of fact as to whether Mr. Fierstein’s measurements would fall outside the legal limit if calculated pursuant to DEP protocol. (Tr. Oct. 4 p. 19).

The parties present countervailing testimony regarding noise levels inside the Apartment. More significant, the parties present evidence that is inconsistent and ambiguous regarding ambient noise levels, thereby creating an issue as to what, if any, excessive noise the defendants’ sound contributes to the overall ambient level.<sup>9</sup>

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<sup>8</sup>E.g., DEP Violation # 000269385J (1NOV), issued against Defendants, Bakers Dozen Assoc. LLC. This violation arose from a DEP inspection of Plaintiffs’ apartment, in August, 2013. Although not admitted as evidence at the hearing, later submissions by the parties included the Environmental Control Board Decision and Order of Administrative Law Judge Joanne F. Theil, dated December 2, 2013, dismissing the violation, in large part, because the ambient noise readings did not conform to the generally used procedure because Respondents were not asked to turn off the music before the ambient readings were taken.

<sup>9</sup>Even Plaintiffs concede that ambient noise levels are likely to be higher on days when most air conditioners in a 12-story, 67-unit apartment building are running. (Fierstein Aff.). Moreover, sound tests taken in 2012, prior to the Nightclub’s tenancy at Nolita Place, indicate that the ambient noise levels inside many of the Apartments in Nolita Place, even without an operating venue in the basement and ground-floor commercial condominium unit, was similar to the current levels. (Tr. Oct. 3 p. 39).

The factual record is also incomplete with respect to the efficacy of the proposed changes. Plaintiffs do not demonstrate that the air conditioners will make unreasonable noise in the wintertime, for instance, when they presumably will not be in use and plaintiff's terrace door will be closed. In addition, Plaintiffs do not provide any basis to conclude that Mr. Fierstein's current recommendations will be any more successful than his previous recommendations. Plaintiffs do not provide modeling, for instance, a technique that Mr. Kotch testified allows engineers to predict sound levels with "great success." (Tr. Oct. 2 p. 150). Plaintiffs point to Mr. Fierstein's sundry experiences as an expert witness to bolster the credibility of his recommendations. However, Mr. Fierstein's prior record speaks only to his demonstrated ability to find violations, rather than solutions to those violations, as evidenced by his previous recommendations' failure to mollify the Schwobs in the case at bar. Finally, the Schwobs conceded that Mr. Fierstein was not proffered as an expert in mechanical engineering or structural analysis, nor could he offer opinion testimony concerning the mechanicals because of his demonstrated lack of qualifications in this area. (Tr. Aug. 28 p. 36).

### C. Preliminary Injunction

"In order to obtain a preliminary injunction, the plaintiff [is] required to put forth evidence demonstrating (1) a likelihood of success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in its favor" *61 W. 62 Owners Corp. v. CGM EMP LLC*, 77 A.D.3d 330, 334 (1<sup>st</sup> Dep't 2010).

Evidence that noise emanating from a defendant's premises or property prevented a plaintiff from enjoying her apartment, together with expert testimony that the noise levels at issue violated applicable provisions of the New York City Noise Control Code, may satisfy the substantial and unreasonable interference elements of a nuisance claim. *61 W. 62 Owners Corp. v. CGM EMP LLC*, 77 A.D.3d 330, 334 (1<sup>st</sup> Dep't 2010); *JP Morgan Chase Bank v. Whitmore*, 41 A.D.3d 433 (2d Dep't 2007). Where noise is concerned, it is "wholly immaterial to maintaining an action for nuisance at common law whether or not a municipal authority has issued noise ordinance violations." *61 W. 62 Owners Corp. v. CGM EMP LLC*, 77 A.D.3d 330, 334 (1<sup>st</sup> Dep't 2010).

Section 24-231 speaks to permissible decibel levels for commercial music. This section provides, in relevant part:

(a) No person shall make or cause or permit to be made or caused any music originating from or in connection with the operation of any commercial establishment or enterprise when the level of sound attributable to such music, as measured inside any receiving property unit:

(1) is in excess of 42dB(A) as measured with a sound level meter; or

(2) is in excess of 45 dB in any one-third octave band having a center frequency between 63 hertz and 500 hertz (ANSI bands numbers 18 through 27, inclusive), in accordance with American National Standard S1.6-1984; or

(3) causes a 6dB(C) or more increase in the total sound level as measured in decibels in the “C” weighting network provided that the ambient sound level is in excess of 62 dB(C)

Expertise is not required to document noise levels<sup>10</sup>. Likewise, expert evidence not required to establish the substantial and unreasonable interference elements of a nuisance claim. *Stiglianese v. Vallone*, 255 A.D.2d 167 (1st Dep't 1998) (lay plaintiff's journal of noise levels and decibel readings demonstrated that defendants' playing of loud rock music constituted a private nuisance and violated the Code). Nevertheless, where expert evidence is adduced, an expert's qualitative assessment of a condition must be supported by an objective basis, and the “expert must delineate the facts and principles underlying the opinion in a manner which permits the court to evaluate its legal sufficiency. *See, generally*, *Tryon v Square D. Co.*, 275 A.D.2d 567, 570-571, 712 N.Y.S.2d 676 (3d Dept 2000).” *Caronna v.*

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<sup>10</sup>The decibel is measured with a meter that registers sound pressure and displays these readings on a sound level scale. These meters range in quality and price, and can even be downloaded onto a smartphone or other personal electronic device. Nevertheless, there are several factors that may affect sound measurements, or lead to skewed sound meter readings. Distance from the sound's source, for example, plays a role in how the sound is perceived, or registered. To this end, the Code specifies how far away from the noise source readings should be taken. *See, e.g.*, § 24-225(a) (refuse collection vehicles; 35 feet or more from compacting unit); 24-227(a) (circulation devices; three feet from open window or door).

*Macy's E., Inc.*, 6 Misc. 3d 1016(A), 1016A (N.Y. Sup. Ct. 2001) (finding expert opinions insufficient where experts failed to point to competent evidence that supported the opinions or adequately explain to the court the basis of the opinions).

“Although an expert may rely on necessary facts within his or her personal knowledge which are not contained in the record, the expert must testify to those facts before an opinion is rendered so that the [finder of fact] may ‘evaluate the worth of that opinion.’” *Mandel v. Geloso*, 206 A.D.2d 699, 699-700 (3d Dep't 1994) (internal citations omitted). “When an expert opinion lacks factual support and is bolstered only by the expert's qualifications, it carries little probative value . . . and should be rejected . . . for it cannot be weighed intelligently.” *Habern Realty Co. v. Tax Com. of New York*, 102 A.D.2d 302, 308 (1st Dep't 1984) (quoting *Shore Haven Apartments No. 6, Inc. v. Commissioner of Finance*, 93 A.D.2d 233, 236 [1st Dep't 1983] and listing cases).

Here, much of Mr. Fierstein's testimony regarding noise code violations is not adequately supported by objective data. While Mr. Fierstein was able to perform sound tests over longer periods of time, for example, both his reports and testimony reflect only selected snapshots of the data he obtained during these periods. The stated purpose of performing sound tests over a longer period of time is to control for outliers, or extraneous noise that might skew sound level measurements. Biased, or selective, sampling, on the other hand, prevents this form of analysis, as does anecdotal testimony. By contrast, Mr. Kotch provided full explanations, along with complete documentation, of the data that formed the basis of his opinions.

Additionally, Plaintiffs claim that Defendants' sound readings are not reliable because they were taken during the day, rather than at night. Several of Mr. Fierstein's measurements were taken during the day, however, as this appears to have been the agreed upon protocol between the parties so as not to inconvenience Ms. Schwob late at night. (Tr. Aug. 28 p. 82-83). Accordingly, whether or not the ambient or other noise levels significantly fluctuate during the day or at night, this objection does not provide a meaningful basis for differentiating between the accuracy or generalizability of the parties' sound test results.

## 1. Music Volume

Plaintiffs' complaint relating to music volume concerns music at bass-level frequencies. Bass-level frequencies are low-level frequencies that cause audible sound, as well as noticeable vibrations that can be felt. Ms. Schwob testified that music and vibrations emanating from Defendant's nightclub at these frequencies substantially interferes with the use and enjoyment of her apartment. It is undisputed that, as the limiters are currently set, music at 63Hz and 80Hz runs the risk of exceeding legal limits under the Code. Accordingly, Plaintiffs have made the requisite showing for preliminary injunctive relief with respect to music emanating from the Nightclub at 63hz<sup>11</sup> and 80Hz.

With respect to frequencies other than 63Hz and 80Hz, however, the requested relief is overly broad. At the very least, the conflicting expert opinions raise issues of fact regarding the ambient noise level, and relatedly, the reasonableness of any noise that Defendant's music and/or mechanical equipment contributes to the total noise level. *Bradley v. Soundview Healthcenter*, 4 A.D.3d 194 (N.Y. App. Div. 1st Dep't 2004) ("Conflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment"). *Habern Realty Co. v. Tax Com. of New York*, 102 A.D.2d 302, 308 (N.Y. App. Div. 1st Dep't 1984). Accordingly, as discussed above, Plaintiffs do not demonstrate the prospect of irreparable injury if provisional relief concerning bass-level frequencies other than 63Hz and 80Hz, is withheld.

## 2. Mechanical Equipment

In a noise nuisance case, a "plaintiff is not required to seek medical care or move in order to demonstrate injury, but must establish substantial annoyance or discomfort to the ordinary reasonable person, and more than mere discomfort or minor inconvenience." *Kahona Beach LLC v Santa Ana Rest. Corp.*, 2012 N.Y. Misc. LEXIS 375, \* (N.Y. Sup. Ct. Jan. 24, 2012) (internal citations omitted). The noise code "responds to the need for peace and quiet while maintaining New

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<sup>11</sup>Mr. Kotch testified that, in his expert opinion, the limiters should be set to 96.5 at 63Hz, in order to ensure Code compliance at this frequency. Plaintiffs, however, have chosen to seek relief according to their sound measurement consultant's current recommendation—a modification of his earlier recommendation to set the limiters at 110— that the limiters now be set to 100 at "any frequency," and this deliberate choice will not be disturbed.

York's reputation as the City that never sleeps." *Kahona Beach LLC v Santa Ana Rest. Corp.*, 2010 N.Y. Misc. LEXIS 4980, \*10 (N.Y. Sup. Ct. Aug. 26, 2010) (internal citations omitted). To this end, Code compliance is not synonymous with inaudible. (Tr. Oct. 2 p. 130).

As discussed above, Plaintiffs do not establish that injunctive relief is warranted with respect to the mechanical mezzanine, at this time. As far as the mechanical equipment located on the low roof is concerned, a preliminary injunction is not properly issued in light of the considerable factual disputes concerning the level of noise, attributable to Defendants' equipment, inside Plaintiffs' Apartment. *Williams v. Esplanade Gardens, Inc.* 2012 N.Y. Misc. LEXIS 3648 \*11 (N.Y. Sup. Ct. July 30, 2012).

Wherefore, it is hereby


ORDERED that Defendants' motion for summary judgment is denied, in its entirety,

ORDERED that Plaintiffs' cross motion for a permanent injunction is denied, in its entirety,

ORDERED that Plaintiffs' motion for a preliminary injunction is granted to the extent that Defendants are directed to limit the music to 100 decibels at 63Hz and 80Hz.

This constitutes the Order of the Court. All other relief requested is denied.

Dated: January 6, 2014

  
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**HON. EILEEN A. RAKOWER** J.S.C