SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

BOARD OF MANAGERS OF MORTON SQUARE CONDOMINIUM, on behalf of all unit owners,

Plaintiff,

- against -

EQR - 600 WASHINGTON, L.L.C., GOTHAM GYM 1, LLC,

Defendants.

INDEX NO. 152677/14

DECISION/ORDER

DONNA M. MILLS, J:

Plaintiff, Board of Managers of Morton Square Condominium, on behalf of all unit owners ("Plaintiff"), brings this action for an order pursuant to CPLR §6301: (I) compelling defendant EQR-600 Washington L.L.C. ("EQR") to abate the noise nuisance emanating from Gotham Gym into Plaintiff's apartment and ordering EQR to immediately return said apartment to a habitable condition; and (ii) compelling defendant Gotham Gym I, LLC ("Gotham" and together with EQR, "Defendants") to remedy the noise nuisance emanating from Gotham Gym into the Plaintiff's apartment.

Defendants oppose Plaintiff's request for a preliminary injunction, or alternatively, if this Court were inclined to issue a preliminary injunction, EQR seeks an order setting an undertaking or bond covering all unpaid past and ongoing use and occupancy for the apartment during the pendency fo this action, plus EQR's damages and costs which may be sustained by EQR by reason of the injunction.

BACKGROUND

Plaintiff is the duly constituted Board of the Condominium, which consists of one hundred forty seven residential units, one commercial unit, and one garage unit, and which is located at 1 Morton Square, New York, NY 10014. Simultaneous with the construction

of the Condominium, an affiliate of the Sponsor, 600 Washington Street, LLC ("600 Washington"), began construction on a rental building located immediately adjacent to the east side of the Condominium. The rental building has an address of 600 Washington Street, New York, NY. Rather than residing at the Condominium, the Condominium's offering plan provides that its superintendent will reside in an apartment at 600 Washington Street pursuant to a lease agreement with the Sponsor affiliate. To that end, on September 13, 2004, the Board entered into a 15 year lease agreement for the apartment with the Sponsor affiliate. 600 Washington was subsequently sold to EQR.

The subject apartment affected by the purported nuisance is occupied by the Condominium's superintendent, James McLea, and his wife, Elizabeth Matej, who have resided therein since Fall 2009. In or around 2012, Gotham Gym opened in a commercial unit at 600 Washington Street pursuant to a lease agreement with EQR. The apartment and Gotham Gym are located adjacent to one another at street level.

On or around January 2014, the Board became aware that unreasonable levels of noise and vibration were emanating into the apartment form Gotham Gym. The plaintiff along with the occupants of the apartment met with representatives of the Defendants to discuss the noise disturbance, however, the noise condition persisted despite the Defendants assurances to take corrective actions.

The Board subsequently engaged an acoustical expert to see if the noise levels violated the New York City Administrative Code. Plaintiff's expert installed and maintained sound equipment in the apartment for the seven day period between February 18, 2004 and February 25, 2014 to capture both the noise entering the apartment and the corresponding vibration on the building structure and concluded that the noise levels in the apartment emanating from the Gotham Gym exceed legal limits set forth in the New York City noise code.

As a result of noise and vibration emanating from Gotham Gym, the occupants of the apartment state in affidavits submitted in support of this action, that they are subjected to endless episodes of noise and vibration, which are physically startling, and which can be heard and felt in each room of the apartment. They further allege that they are awakened each day at 6:00 a.m. by loud banging and vibration as iron plates slam against each other and the floor. This noise they maintain continues throughout the day and often until the gym closes at 10:00 p.m. After no resolution of the noise issues, Plaintiff then commenced this action, suing EQR and Gotham Gym.

DISCUSSION

The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits" (*Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2005]). To obtain a preliminary injunction pursuant to CPLR 6301, plaintiff must demonstrate a probability of success on the merits, an irreparable injury in the absence of an injunction, and a balance of equities in his favor. See *Post v Killian*, 73 AD3d 507, 508 (1st Dept 2010).

The decision of whether to issue a preliminary injunction rests in the trial court's sound discretion (see *Schweizer v. Town of Smithtown*, 19 A.D.3d 682, 682, 798 N.Y.S.2d 99 [2005]; *Honeywell Intl. v. Freedman & Son*, 307 A.D.2d 518, 519, 761 N.Y.S.2d 745 [2003]). The existence of factual questions for a trial does not prevent a party from establishing a likelihood of success on the merits; success need not be a certainty to obtain a preliminary injunction (see *Karabatos v. Hagopian*, 39 A.D.3d 930, 931, 833 N.Y.S.2d 700 [2007]; *Egan v. New York Care Plus Ins. Co.*, 266 A.D.2d 600, 601, 697 N.Y.S.2d 776 [1999]).

To establish a private nuisance there must be an intentional and unreasonable interference by a defendant with a plaintiff's right to use and enjoy the premises he or

she occupies (*Ward v. City of New York,* 15 AD3d 392, 393 [2d Dept 2005]; *Weinberg v. Lombardi,* 217 A.D.2d 579 [2d Dept 1995]). The elements of the cause of action 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" (*JP Morgan Chase Bank v. Whitmore,* 41 AD3d 433, 434 [2d Dept 2007]), quoting *Copart Indus. v. Consolidated Edison Co. of NY,* 41 N.Y.2d 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,* 217 A.D.2d at 579; *but see McCarty v. Natural Carbonic Gas Co.,* 189 N.Y. 40, 47 [1907]) ["What is reasonable is sometimes a question of law and at others a question of fact. When it depends upon an inference from peculiar, numerous or complicated circumstances it is usually a question of fact"]). Residents are not required to seek medical care or move in order to demonstrate injury (*see State ve Fermenta ASC Corp,* 166 Misc.2d 524, 533 [Sup Ct, Suffolk County 1995], *affd in part* 238 A.D.2d 400 [2d Dept 1997]), but must establish substantial annoyance or discomfort to the ordinary reasonable person, and more than mere discomfort or minor inconvenience (*Dugway, Ltd. v. Fizzinoglia,* 166 A.D.2d 836 [3d Dept 1990]).

Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct. *Domen Holding Co. v. Aranovich,* 1 N.Y.3d 117, 769 N.Y.S.2d 785, 802 N.E.2d 135 (2003) (repeated verbal abuse and threats); *see also 61 W. 62 Owners Corp. v. CGM EMP LLC,* 77 A.D.3d 330, 906 N.Y.S.2d 549 (1st Dept.2010) (noise occurring late every night), *mod. on other grounds,* 16 N.Y.3d 822, 921 N.Y.S.2d 184, 946 N.E.2d 172 [2011]; *Broxmeyer v. United Capital Corp.,* 79 A.D.3d 780, 914 N.Y.S.2d 181 (2d Dept.2010) (noise created by the operation of HVAC units); *JP Morgan Chase Bank v. Whitmore,* 41 A.D.3d 433, 838 N.Y.S.2d 142 (2d Dept.2007) (noise from exhaust fans).

In *61 W. 62 Owners Corp.*, the plaintiff tenant submitted the affidavits of nine tenants as to the late-night recurrence of excessive noise from a nearby rooftop bar. 77 A.D.3d at 332, 906 N.Y.S.2d at 551. The plaintiff also produced an affidavit from an acoustical consultant who reported that the decibel levels of the music played at the bar late at night consistently exceeded the noise level permitted by ordinance. 77 A.D.3d at 332, 906 N.Y.S.2d at 551–552. There, the court found that the plaintiff sufficiently established the elements of a claim for nuisance on the merits. 77 A.D.3d at 334, 906 N.Y.S.2d at 553. Similarly, in *Broxmeyer* (79 A.D.3d at 783, 914 N.Y.S.2d at 184) and *JP Morgan Chase Bank* (41 A.D.3d at 435, 838 N.Y.S.2d at 144), the plaintiffs presented evidence that noise generated by the continuing operation of rooftop air conditioning units and/or exhaust fans prevented them from enjoying their apartments.

The Gotham Gym defendants argue that their continuous lawful operation of their business must be weighed against the apartment residents' alleged discomfort, with the court weighing the reasonableness of the noise alleged to be a nuisance in light of all of the circumstances. Despite what appears to be Gotham Gym's contention, plaintiff has no obligation to tolerate any violation of the noise code. Indeed, it is Gotham Gym that is required to operate their business within the confines of the law. 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, including the duration of the allegedly offending sound, the times at which it is made, whether the condition is recurring, and if so, with what frequency (*see Futerfas v. Shultis,* 209 A.D.2d at 763). Clearly sounds that are reasonable midday, may not be so after midnight (*see Matter of Twin Elm Management Corp. v. Banks,* 181 Misc. 96 [Mun Ct, Borough of Queens, 2d Dist 1943] [12 hours of piano practice found not to be a nuisance where there was no showing that the piano playing was

exceptionally loud or performed at unreasonable hours]), and 10 minutes of disturbance on rare occasions is not the same as 10 minutes of disturbance hourly. In addition, the character of the neighborhood must also be considered, as what is acceptable in an industrial area may not be acceptable in a residential area. 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 (*cf. McCarty,* 189 N.Y. at 50), and of little, if any, significance concerning a violation of the law (*see Graceland Corp. v. Consolidated Laundries Corp.,* 7 A.D.2d 89, 93 [1st Dept 1958], *affd* 6 N.Y.2d 900 [1959]).

Here, the affidavits from the occupants of the subject apartment adjacent to the gym, detailed the daily assault on the quiet enjoyment of their apartment. This evidence, together with expert testimony that the noise levels violated applicable code provisions, satisfied the elements of a private nuisance claim. As such, the plaintiff demonstrated a likelihood of success on the merits on its private nuisance cause of action (*see Poughkeepsie Gas Co. v. Citizens' Gas Co.,* 89 N.Y. 493; *Arcamone–Makinano v. Britton Prop., Inc.,* 83 A.D.3d at 624, 920 N.Y.S.2d 362; *61 W. 62 Owners Corp. v. CGM EMP LLC,* 77 A.D.3d 330, 906 N.Y.S.2d 549, 16 N.Y.3d 822, 921 N.Y.S.2d 184, 946 N.E.2d 172). The plaintiff also demonstrated the prospect of irreparable injury if the preliminary injunction was withheld (*see Arcamone–Makinano v. Britton Prop., Inc.,* 83 A.D.3d at 624, 920 N.Y.S.2d 362). Furthermore, the balance of the equities tipped in the plaintiff's favor.

Recognizing that a preliminary injunction may adversely affect the rights of a defendant pending the determination of the action, CPLR 6312(b) provides:

> "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which

may be sustained by reason of the injunction".

Should it be "finally determined" that the plaintiff was not entitled to a preliminary injunction, CPLR 6315 provides that "[t]he damages sustained by reason of a preliminary injunction may be ascertained upon motion." The fixing of the amount of an undertaking is a matter within the sound discretion of the Supreme Court, and its determination will not be disturbed absent an improvident exercise of that discretion (see *Ujueta v Euro-Quest Corp.*, 29 AD3d 895 [2d Dept 2006]).

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction enjoining the unreasonable noises and vibration emanating from Gotham Gym to the apartment is granted; and it is further

ORDERED that the amount of the undertaking required to be filed by plaintiff, pursuant to CPLR 6312(b), is set in the amount of $10,000.00; and it is further

ORDERED that plaintiff shall file an undertaking in the specified amount on or before November 3, 2014; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on November 7, 2014, at 10:00 AM.

Dated: 10/1/14

ENTER:

DONNA M. MILLS, J.S.C.
J.S.C.