Galkin v Plaza 400 Owners Corp.
2014 NY Slip Op 32964(U)
November 14, 2014
Supreme Court, New York County
Docket Number: 151960/2014
Judge: Donna M. Mills
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0SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

FLORENCE GALKIN,
Plaintiff,

-against-

PLAZA 400 OWNERS CORP.,
Defendant.

INDEX NO. 151960/2014
Motion Sequence 001
DECISION & ORDER

DONNA MILLS, J.:

Plaintiff Florence Galkin moves, by order to show cause for a preliminary injunction, to have defendant Plaza 400 Owners Corp. (the Cooperative) hire professionals to determine the source of, and take any means necessary to eliminate, alleged noise and vibrations in her apartment.

Factual Background

Plaintiff lives in apartment 37P at 400 East 56th Street, a residential building owned by the Cooperative. She is 88 years old, has lived in the building since 1975, and has a proprietary lease (Galkin affirmation, exhibit 1) (the Lease) with, and holds shares in, the Cooperative.

She claims that, since October 2013, she has been "hear[ing] excessive and unreasonable noises and feel[ing] excessive and unreasonable vibrations in the middle of the night that abruptly awaken me from my sleep." Galkin aff, ¶ 9. These noises and vibrations "have a banging quality to them." *Id.* In January 2014, another set of noises and vibrations allegedly arose, with a "cycling" character." *Id.*, ¶ 11. She complained to the Cooperative periodically, and the building's superintendent inspected her apartment "during the day a few times." *Id.*, ¶ 14. Since the building's service elevator abuts her apartment, its use was curbed in the early

morning hours, without eliminating the noise. *Id.*, ¶¶ 15-16.

Plaintiff hired Acoustilog, Inc. (Acoustilog), an acoustic engineering firm, to record sounds in her bedroom from January 8 to January 17, 2014. According to its report, Acoustilog used "a high-quality calibrated microphone to pick up the sound, and a digital audio recording system for uniform frequency response." Galkin aff, exhibit 3 (Acoustilog Report 1). Acoustilog found a "63 Hertz noise," a "low frequency hum of some sort of equipment [that] is prevalent most of the time." *Id.* at 2. This hum "occasionally pulsates." *Id.* When the pulsating 63 Hertz noise reached its loudest level, it became "definitely audible." *Id.* at 3. Acoustilog also detected an "80 Hertz noise" that did not pulsate, "but it does definitely drop out and then turns on and off." *Id.* at 4. Acoustilog Report 1 attributes the 80 Hertz noise to "some machine that is cycling or turning on and off." *Id.* "[V]ery little vibration" was detected, but the report speculates that "a defective or excessively-vibrating heating unit in an apartment above or below could cause the noise." *Id.* at 5. Acoustilog Report 1 concludes that plaintiff is apparently "disturbed by some type of mechanical equipment noise at night. It is likely that this noise is inside the building, it may be caused by a heating unit in a nearby apartment, or by pumps as far away as the basement." *Id.* at 7. Acoustilog Report 1 recommends testing neighboring apartments and common building equipment as the source of the noise.

On January 27, 2014, plaintiff forwarded a copy of Acoustilog Report 1 to the Cooperative and asked for an immediate response. *Id.*, exhibit 4. A summons and complaint were filed on March 5, 2014, asserting causes of action for breach of contract, breach of the warranty of habitability, and nuisance.

Discussion

Accoustilog returned to plaintiff's apartment several more times to measure sounds. It

made recordings from February 4 to February 10, 2014 (Galkin aff, exhibit 7 [Acoustilog Report 2]); from May 29 to June 3, 2104 (*id.*, exhibit 8 [Acoustilog Report 3]); on June 18, 2104 (*id.*, exhibit 9 [Acoustilog Report 4]); and, on June 27, 2104 (*id.*, exhibit 11 [Acoustilog Report 5]). Additionally, at the request of plaintiff's counsel, Rand Engineering & Architecture, DPC (Rand) visited plaintiff's apartment on June 27, 2014 to try to locate and identify the complained-of noise. *Id.*, exhibit 10 (Rand Report).

Acoustilog Report 2 found that a "low-frequency hum of some sort of equipment is prevalent most of the time." In addition, the latest "recordings demonstrate that you appear to be disturbed by some type of outside equipment noise at night. It is possible that a nearby construction site is getting dumpster pickups or deliveries." Acoustilog Report 3 stated that the "low-frequency hum produced by unknown equipment . . . comes in regularly-spaced pulses, approximately 24 seconds apart." This "could not be caused by outdoor traffic or human-made sources." Acoustilog Report 4 noted that "the noise level in the living room (which is not your main complaint) is definitely affected by the AC unit in your 2nd bedroom." This confirms that "it is likely that the [low frequency] noise comes from the HVAC units in neighboring apartments." The Cooperative's acoustic consultant, Bob Lee (Lee), was present for Acoustilog Report 4.

Lee was again present for Acoustilog Report 5, along with the building's superintendent and a Rand representative, who reported separately. This visit focused on premises nearby to plaintiff's apartment. No noise was detected in apartments 37O, 38P, 36O and 36P. No one answered the door at 38O. Also, no unusual sounds were found in the 40th floor mechanical room, according to Acoustilog Report 5. The Rand Report made essentially the same findings, eliminating the HVAC units, the exhaust risers in the adjoining apartments, and the appliances

operating in the adjoining apartments. Rand "suspect[s] that the noises heard in Apartment 37P are emanating from the building chimney enclosure," where a new stainless steel chimney liner was installed with the installation of new boilers, in October 2013.

Defendant produces an extract from plaintiff's deposition on July 2, 2014, where she discusses the tinnitus that she has had for some indefinite period of time, a low buzzing, which "would disappear, come and go." Barry affirmation, exhibit 1, at 175. She said that "it was occasional, it wasn't consistent and I even have it now again." *Id.* at 171. Later, she stated that "I don't now have it, as I'm here now, I don't have it." *Id.* at 174. She said that she had not had it in weeks. *Id.* at 175. In her affidavit, plaintiff claims that she has "spent several nights in hotels since late October, 2013, and do[es] not wake up to noise when sleeping outside the Apartment." Galkin aff, ¶ 29.

Both parties produce short extracts from different portions of the July 8, 2014 deposition of Nora Weeks (Weeks), the Cooperative's property manager. *Id.*, exhibit 2 (Weeks tr 1); Galkin aff, exhibit 13 (Weeks tr 2). Weeks testified that she did not believe that plaintiff was making up her complaints. Weeks tr 2 at 127. Weeks stated that "any one of the operations that were being undertaken downstairs in the basement could cause noise," but that she doubted that those noises could reach the 37th floor. *Id.* at 88. Weeks also testified that, in 2002, plaintiff complained of a shaking in her apartment. Weeks tr 1 at 44. More recently, Weeks said that the Cooperative changed elevator usage and conducted extensive maintenance on the building's ductwork in order to alleviate the noise and vibrations that plaintiff complained of. *Id.* at 54. Weeks claimed that she hired an engineer, in 2007, to find the source of noise and vibrations detected by plaintiff then. *Id.* at 55. Unfortunately, the transcript then skips several pages to Weeks' response that the engineer made no recommendations for any change to plaintiff's apartment. *Id.* at 59. If the

Cooperative's engineer produced a report, it is not produced or referenced.

The allegations that constitute the complaint go back no further than October 2013. No mention is made by either party of the events of 2002 and 2007, when plaintiff notified the Cooperative of unwelcome noise and vibrations. Plaintiff makes the overly broad charge that the "Cooperative has continued to refuse to inspect, address, and eliminate the noise problem." Not only did Weeks testify to the hiring of an engineer in 2007 to deal with plaintiff's complaints, Acoustilog Report 4 and Acoustilog Report 5 reported that Lee, an acoustic consultant engaged by the Cooperative, was present during the examination of the premises. Additionally, counsel for the Cooperative attended the inspections of plaintiff's apartment and the surrounding premises conducted on June 18, 2014 and June 27, 2014. Barry affirmation, ¶¶ 3-4. Plaintiff also acknowledged that the use and schedule of the building's service elevator were changed in an attempt to meet her concerns. It is rhetorical excess to state that "the Cooperative has callously disregarded Ms. Galkin's health and safety by neglecting its responsibility to inspect, locate, and eliminate the noise and vibrations." Plaintiff's memorandum of law at 2.

Plaintiff admits that "[n]either Rand Engineering nor Acoustilog were able to conclusively establish the source of the noise . . . ." *Id.*, ¶ 14. After visiting the building on June 18, 2014, Acoustilog concluded that "it is likely that the [low frequency] noise comes from the HVAC units in neighboring apartments." Acoustilog Report 4. When it returned with Rand, on June 27, 2014, nine days later, Acoustilog was only able to discount adjoining apartments as the source of the noises. It suggested, alternatively, that there were many "possible noise sources," including pool pumps, building air conditioners, building fans, boilers, piping, apartment air conditioners, ceiling fans, air purifiers, medical equipment, and "mechanical units in nearby buildings." Acoustilog Report 5. It failed to mention the recently-renovated chimney enclosure,

[* 6]

the target of Rand's speculation as a result of the same visit.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005). "The determination to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court." *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643 (2d Dept 2006). Plaintiff cites several instances where the courts have granted relief under circumstances which she claims are similar to her own. For instance, *Second on Second Café, Inc. v Hing Sing Trading, Inc.* (66 AD3d 255 [1st Dept 2009]) (Defendant-landlord directed to permit plaintiff-restaurant to install, at its own expense, a new exterior exhaust vent on the roof of the building); *Chrysler Corp. v Fedders Corp.* (63 AD2d 567 [1st Dept 1978]) (Corporate defendant directed to set aside future dividends until proper recipients determined); *Mite v Pipedreams Realty*, 190 Misc 2d 543 (Civ Ct, Bronx County 2002) (Landlord directed to conduct emergency rodent extermination).

Plaintiff argues that she is likely to succeed on the merits in this action. Her breach of contract claim is based on the Lease, which provides that the defendant "at its expense keep in good repair all of the building including all of the apartments, and its equipment and apparatus," except those items for which occupants are expressly responsible. Lease, ¶ 2. Since, according to plaintiff, "the boiler system and the chimney flue are a likely cause of the unreasonable and frequent noise . . . , she is likely to prove that the Cooperative had breached its obligation to keep its equipment and apparatus in good repair." Plaintiff's memorandum of law at 4.

Plaintiff's breach of warranty of habitability claim relies upon Real Property Law § 235-b (1), which provides that, in every lease for residential premises,

> "the landlord or lessor shall be deemed to covenant and warrant that the premises so leased . . . 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."

Plaintiff contends that "unreasonable and frequent noises cause the apartment to no longer be fit for the uses reasonably intended by the landlord and the tenant," citing *Sussex Apartments, LLC v Choi* (2003 NY Slip Op 51126 [U] [App Term 2nd & 11th Dist 2003]), where the court found a breach of the warranty of habitability when noise from a boiler went uncorrected for over a year.

Plaintiff maintains that the conditions for a claim of private nuisance are present here, "(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 (1977); *see 61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330 (1st Dept 2010), *affd as mod* 16 NY3d 822 (2011) (the late-night recurrence of excessive noise from a nearby rooftop bar is adequate grounds for a claim of private nuisance).

Plaintiff states that the noises and vibrations in her apartment are detrimental to her health, preventing her from getting a full night's rest. This is a special concern given her age. Courts have found that sleep-disturbing noise causes irreparable harm. *See 61 W. 62 Owners supra; JP Morgan Chase Bank v Whitmore,* 41 AD3d 433 (2d Dept 2007) (noise generated by exhaust fans on roof and deck, disturbing condominium unit owner's sleep, constituted private nuisance); *55th St. Realty Corp. v Socolow*, 36 NYS2d 12, 14 (City Ct, Bronx county 1942) ("An apartment in which the occupants cannot sleep because of noise and vibration is not merely 'inconvenient', it is detrimental to health").

[* 8]

Plaintiff believes that the equities balance in her favor. She has "a right to a peaceful apartment, in which she can go to sleep at night without constantly being startled by noise." Plaintiff's memorandum of law at 8. The Cooperative, on the other hand, is only being asked to meet its contractual obligations, in her view.

Conclusion

Plaintiff's application for injunctive relief is denied. There are two prongs to her request, the hiring of professionals to determine the source of alleged noises and vibrations in her apartment, and the elimination of these noises and vibrations. The Cooperative has hired Lee, an acoustic consultant, and he has been present on several occasions when plaintiff's professionals have sought the source of the offending noises and vibrations. While there have been disputes about the timing and content of other recent examinations, there is no evidence of the Cooperative's unwillingness to cooperate in solving the problem at hand. To some degree, the Cooperative has been hindered in attempting to solve the problem by the lack of specificity in defining it, based on plaintiff's own experts' reports. Acoustilog's reports cycle through a variety of possible causes for the noises and vibrations without resolution. They serially suggest "a heating unit in a nearby apartment, or by pumps as far away as the basement" (Acoustilog Report 1); "a nearby construction site is getting dumpster pickups or deliveries" (Acoustilog Report 2); "unknown equipment" (Acoustilog Report 3); "the HVAC units in neighboring apartments" (Acoustilog Report 4); and a list of many "possible noise sources" (Acoustilog Report 5). Acoustilog's visit on June 27, 2014 actually seemed to discount almost all of its earlier suggestions. Rand visited at the same time and pointed to "the building chimney enclosure," not previously cited by Acoustilog.

The vagueness surrounding the origin of the noises and vibrations makes it especially

difficult to insure their elimination, the second prong of plaintiff's motion. Further, the probability of success on the merits is far from certain under such clouded conditions. The parties have agreed, in conference with court on October 16, 2014, to additional discovery, which may better focus the dispute. Under these circumstances, plaintiff's motion is denied.

Accordingly, it is

ORDERED that plaintiff Florence Galkin's motion to have defendant Plaza 400 Owners Corp. hire professionals to determine the source of and take any means necessary to eliminate the alleged noise and vibrations in her apartment is denied.

DATED: November 14, 2014

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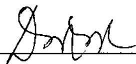

J.S.C.

DONNA M. MILLS, J.S.C.