CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

GOLDMAN ET AL,

Petitioner-Landlord

-against-

JOHN FLYNN
35 East 30th Street, Apt. 4C
New York, New York 10016

Respondent-Tenant

"JOHN DOE" and "JANE DOE"

Respondents-Undertenants

HON. SABRINA B. KRAUS

DECISION & ORDER

Index No.: L&T 78287/2014

BACKGROUND

This summary holdover proceeding was commenced by **THE EXECUTORS OF THE ESTATES OF OF SOL GOLDMAN AND LILLIAN GOLDMAN,** and **CO-TRUSTEES OF THE LILLIAN GOLDMAN MARITAL TRUST** (collectively "Petitioner") against **JOHN FLYNN** (Respondent), the rent controlled tenant of record of 35 East 30th Street, Apt. 4C, New York, New York 10016 (Subject Premises), based on the allegation Respondent has engaged in nuisance behavior.

PROCEDURAL HISTORY

Petitioner issued a Notice of Termination (Notice) dated July 8, 2014, asserting that

Respondent had violated a "substantial obligation" of his tenancy by engaging in conduct including causing or allowing excessive noise to emanate from the Subject Premises, from his television, at late hours, and by modifying electrical equipment in the common areas of the building, resulting in the issuance of a violation.

The Notice references two prior nuisance proceedings, brought under Index Numbers 75214/2010, which resulted in a probationary stipulation, and 66763/2012, which was discontinued.

Annexed to the Notice are several documents. The first is a letter dated June 23, 2014, and is labeled *Noise Complaint, Second Warning*. The letter referenced provisions in the proprietary lease and house rules, and advises Respondent that complaints have been made about his playing the television extremely loud, past 10 pm, over the past few weeks. The letter asks Respondent to stop such conduct.

Two other letters, dated June 30, 2014 and July 2, 2014, are also annexed to the Notice, and threaten to assess Respondent $150 per incident as a fine. Also annexed is a DOB violation from April 1, 2014, wherein the Coop Board of the Subject Building was fined $1600 for "unapproved/unsafe/unsuitable electrical equip, apparatus, materials, devices, appliances or wiring in use. Bsmt electrical room: defective open wiring are 1W use armored cables are not properly terminated fuse box A."

The petition is dated September 15, 2014, and the proceeding was initially returnable October 1, 2014. Respondent appeared *pro se*, and the proceeding was adjourned to October 30, 2014, for Respondent to obtain counsel.

On October 23, 2014, counsel appeared for Respondent, and on October 30, 2014, Respondent moved for leave to file a late answer. The motion was granted, per stipulation, and the answer was deemed served and filed. The answer asserts eight affirmative defenses and a counterclaim. The defenses include: defective notice of termination; failure to serve a notice to cure; that Respondent is entitled to an opportunity to cure pursuant to RPAPL 753(4); that the conduct has already been cured; that Respondent is 72 years old, disabled and therefore should be entitled to a permanent stay on issuance of the warrant as long as alleged conduct does not reoccur; retaliatory eviction; and that Petitioner gives inferior electrical service to renters than to shareholders residing in the building.

On December 17, 2014, Respondent moved for summary judgment and dismissal of the petition, based on his allegation that the predicate notice was defective and failure to serve a notice to cure. The motion was denied by the court (Katz, J) on January 22, 2015, pursuant to an order holding that the predicate notice was not fatally defective and restoring the proceeding to the calendar on February 24, 2015.

Respondent served a demand for a verified bill of particulars, dated November 12, 2014. Petitioner issued a bill dated March 5, 2015.

On April 15, 2015, Respondent moved for on order compelling Petitioner to respond to the bill of particulars, seeking an order of preclusion and seeking leave for discovery. Petitioner served a supplemental Bill, and the motion was withdrawn without prejudice, pursuant to a stipulation, on May 5, 2015.

On June 22, 2015, the proceeding was transferred to the Expediter's Part for assignment to a trial judge. The transfer order noted that the proceeding was discontinued against "John Doe," and that "Jane Doe" had appeared on said date and required a mandarin interpreter.

On July 16, 2015, the proceeding was assigned to Part R for trial and the trial commenced. The trial continued and concluded on July 20, 2015, and the proceeding was adjourned to July 30, 2015, for the submission of post trial memoranda. On July 30, 2015, the court reserved decision.

FINDINGS OF FACT

Petitioner is the proprietary lessee of the Subject Premises pursuant to a stock certificate dated March 31, 1996 (Ex 10) and a proprietary lease executed on the same date (Ex 17). Preliminary letters for the executors were issued January 14, 2008 (Ex 18). There is an MDR filed for the building, valid through September 1, 2015 (Ex 16). There are 38 units in the building, 32 out of the 38 are occupied by shareholders and six are subject to rent regulation.

The first witness to testify for Petitioner was Talat Pustina (TP), the Super for the building. TP testified that in 2013 or 2014, Respondent knocked on his door at 3 am asking him to open the electrical box for the building. TP told Respondent that the request was not appropriate at that hour, and that TP had children. TP testified that this type of request from Respondent happened on several occasions from 2 am to 4 am, either by intercom or by Respondent knocking on TP's door. Last year, TP disconnected Respondent's intercom to limit Respondent's ability to continue this behavior. The last time Respondent came to TP's door at a late hour regarding electrical issues was November 2014.

TP testified that Respondent had accessed the electrical box for the building on more than one occasion and had changed fuses. On two separate occasions, Respondent took the fuse for another apartment, one time 9A and another time 6A, and plugged it into the fuse for the Subject Premises. TP discussed this with Respondent, who acknowledged unilaterally accessing the electrical box and changing fuses. Respondent told TP that the fuse for the Subject Premises was burnt, and that's why he made the change. TP testified that the change Respondent made had the effect of cutting electricity to the apartments 9A and 6A. The court did not find TP to be a credible witness and his claim that the electricity was cut off to the other two units is not otherwise supported by the record.

Only TP and Con Ed have authority to access the electrical box. TP has since locked the electrical box to prevent Respondent from accessing it.

The next witness to testify for Petitioner was Catharine Genzlinger (CG). CG lives directly above Respondent in apartment 5B and 5C, which have been combined. CG is a shareholder in the building, and has lived there for approximately seven years.

CG testified credibly that Respondent has a sound system that is very loud with a deep base, and that he often watches TV from 1 am to 3 am. Many nights CG is awoken by vibrations from the sound system connected to Respondent's TV. CG testified that this occurs one to three times per week, including three times the week before the trial. At times, the noise goes on for hours. CG has complained to Respondent and states, sometimes Respondent is apologetic and other times, Respondent denies the noise is coming from the Subject Premises. CG

acknowledged that Respondent often down the volume of the television in response to complaints.

The constant sleep interruption is difficult for CG, who is employed and often needs to be up by 7 am for work. CG lives in the apartment with her husband, who often travels for work. CG will not directly confront Respondent regarding noise issues, and will only call to complain if her husband is present. The court found CG to be a very credible witness.

Jordan Schweon (JS), the husband of CG, also testified for Petitioner. JS also testified that Respond has a surround sound system that he uses to watch television between 1 am and 4 am. JS testified that Respondent first got the system in 2010, and played it full blast resulting, in 2010, in the first altercation between JS and Respondent. JS went down to see where the noise was coming from. JS testified that Respondent does lower the volume after JS requests him to do so, even if the conversation is heated. JS often complained to management about the noise. JS testified that conversations where he asks Respondent to lower the volume are generally civil, and often Respondent will often say he did not realize how late it was. JS has also called the police to complain about the noise, on well over a dozen occasions. JS acknowledged that there are sporadic periods where Respondent is quiet.

JS testified that Respondent's late playing of the loud television has occurred approximately two times per week for the past six years. JS offered to buy Respondent headphones for use for the TV between the hours of 11 pm and 7 am.

Claudia Shacter-DeChabert (CSD) also testified for Petitioner. CSD lives in apartment 4B, right next to the Subject Premises. In February 2014, there was a flood in the Subject

Premises, and CSD started to smell mold in her apartment over the weeks following the flood. Several months later the floors in CSD's apartment started to buckle, and CSD had them replaced.

Sometime after that, Respondent began to curse at CSD under his breath when he saw her in the hallway. Things escalated to the point where CSD is afraid to share an elevator with Respondent or be in the hallway with him.

In September 2014, CSD was walking into the building, and Respondent called her a "cunt." CSD went to her apartment using the stairs, and Respondent came off the elevator, and as CSD was trying to get into her apartment, Respondent called her a "cunt" again. Respondent approached her and used his hand to attempt to push open the door for CSD's apartment. CSD threatened to call the police, Respondent said he didn't care if CSD called the police. CSD sent an email to management on the date of the incident (Ex 1), but did not call the police or file a complaint with the police.

CSD is afraid of Respondent. It was clear from her testimony that she was shaken by her encounters with Respondent. Now CSD tries to steer clear of Respondent, and there have been no further incidents between Respondent and CSD. CSD is also a share holder and proprietary lessee in the Subject Building.

The next witness for Petitioner was Ruth Vallecillo (RV). RV is a managing agent for the Coop Board of the subject building. RV testified that she had received noise complaints regarding Respondent and had sent Respondent five letters regarding these complaints from May 20, 2014 through September 22, 2014 (Exs 3-7).

RV discussed a DOB violation issued pertaining to the electricity for the building, which RV asserts was issued because Respondent filed a complaint and because Respondent interfered with the building electrical system. Subpoenaed documents from the ECB hearing were submitted into evidence (Ex 14). They show that DOB issued a violation against the Coop Board on April 1, 2014, for which a fine of $1600 was paid on May 22, 2014. The violation is described as unapproved or unsafe electrical equipment or wiring in use, that armored cables were not properly terminated, and that the overcorrect protection device was of an improper size (NOV Ex 14). There was a hearing at ECB on May 22, 2014, where it was asserted that the condition was hazardous and required immediate correction. RV appeared and testified that the Coop Board had hired an electrician who had corrected the condition.

The court takes judicial notice of related documents on the DOB website, which show that Respondent filed two complaints with DOB in 2014 regarding electricity at the subject building.

Respondent called in a complaint on March 26, 2014, Complaint # 1368185. Respondent asserted that the electric system for all the shareholders in the building had been upgraded and that the units for shareholders had 30 - 100 amps, but that service to the Subject Premises was limited to15 amps, and was inadequate for his needs, which included sufficient electrical power for an air conditioner and an oxygen tank. In response to Respondent's complaint, DOB attempted to inspect the condition on March 31, 2014, but was unable to gain access. The inspector returned on April 1, 2014, and issued the violation attached to the Notice of Termination.

Respondent made a second complaint on June 20, 2014 , Complaint number 137452, an inspection was conducted by the same inspector on June 25, 2014, who found that no violations was warranted for the complaint at the time of the inspection, as a violation had already been issued based on the prior complaint.1

Betrenus Gonzalez (BG) was called as a witness presented by Petitioner. BG is a postal worker who delivers mail to the subject building. On July 11, 2015, Respondent physically assaulted BG, after an altercation about access to the mail, in the lobby of the Subject Building. Respondent ripped the shirt underneath of BG's uniform and attempted to literally rip it of her back. Respondent exposed BG's undergarments in doing so. Respondent also screamed curse words, insults and racial epithets at BG during the course of the assault, including "black bitch" and "fat." As a result of the attack, the police were called to the building. The attack was captured by video and a copy of the video was admitted into evidence (Ex 13). A summons for Respondent was issued by the Postal Inspectors as a result of the assault.

At the close of Petitioner's case, Respondent moved for dismissal based on failure to state a cause of action, which motion was denied by the court.

Monica Sheng (MS) a/k'a Xiuwen Sheng, was then first witness called by Respondent, and testified with the assistance of the Mandarin Interpreter. MS married Respondent in 2013 (Ex A), and has resided in the Subject Premises for over 15 years. MS testified that she recalled only one or two occasions when the residents of apartment 5C called and asked Respondent to

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1 The information is found on DOB website at http://a810-bisweb.nyc.gov/bisweb/OverviewForComplaintServlet?requestid=2&vlcompedlkey=0001759175. Copies of the documents have been added to the file and marked as Court exhibits aa and bb for reference.

lower the volume of the television, and that Respondent substantially lowered the volume. When asked

MS was present when Respondent attacked the postal worker and testified to her observations of the incident. On the video MS is seen as struggling to physically restrain Respondent from continuing the attack on the postal worker. MS described the incident as "trivial."

Respondent also testified. Respondent is 72 years old and not currently employed. Respondent has resided in the Subject Premises since 1972. Respondent testified that he suffers from various health problems, including limited capacity of his lungs and recurring bladder cancer. Respondent uses an oxygen tank and said tank requires electricity. Respondent testified that in the event of a power outage, the oxygen tank would last up to a day and a half. Respondent pays rent of $471.82 per month.

Respondent acknowledged receiving complaints from his upstairs neighbor about the noise from the television. Respondent testified that he can't tell when the TV is too loud. Respondent acknowledges that he has a surround sound system that he uses for watching movies. Respondent testified that the system can be disconnected with the push of a button. Respondent testified he has received about 10 calls from the upstairs neighbors complaining in the last seven to eight years.

Respondent acknowledged that he has gone to the basement and replaced fuses in the electrical box. Respondent testified that he does this when the fuse for the Subject Premises blows. Respondent denied doing anything that affected the electrical service of other

apartments in the building and states that the door to the area where the electric box is kept is now locked and Respondent is no longer able to access it.

DISCUSSION

§ 2204.2(a)(2) provides for an eviction proceeding to be commenced against a rent control tenant where the tenant is committing or permitting a nuisance by conduct which substantially interferes with the comfort and safety of the landlord, other tenants or occupants of the building.

§ 2204.2(a)(1) provides for an eviction proceeding to be commenced against a rent control tenant for breach of a substantial obligation of tenancy, after written service of a notice to cure.

The Notice herein does not refer to either section, despite the statutory requirement to recite the applicable section in the predicate notice (§2204.3(b)). Pursuant to Judge Katz' January 22, 2015 decision and order, which is law of the case, the Notice is deemed to be for nuisance and "sufficient on its face."

> To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land. The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of the land and the freedom from annoyance. However not every annoyance will constitute a nuisance. Nuisance imports a continuous invasion of rights - "a pattern of continuity or recurrence of objectionable conduct"

(*Domen Holding Co. v Aranovich* 1 NY3d 117, 123-124 *citations omitted*).

No strict quantitative test exists establishing how many incidents warrant a finding of nuisance. Rather the court must weigh both the quantitative and qualitative aspects of the particular set of facts in evaluating whether the high threshold of proof required for eviction has been met.

(*405 East 56th Street LLC v Morano* 19 Misc3d 62, at 64).

The court finds that Petitioner failed to establish by a preponderance of credible evidence the allegations in the pleadings. The predicate notice herein basically asserted two types of conduct engaged in by Respondent, playing his television too loud, and interfering with the electrical equipment in the building.

Regarding the loud television playing, only residents from one apartment, out of the 38 in the building were disturbed. No other tenants testified at trial regarding the loud television playing. The tenants from the apartment above acknowledged that Respondent was generally civil if they complained, and complied with their requests to lower the volume of the television. Generally, where noise has been found to establish nuisance, the noise disturbed multiple residents in the building [*see eg Broadcom West Development Co v Best* 23 Misc3d 1140(A); *Roaj Realty Inc. v Ortega* 2002 NY Slip Op 50214(U); *Carnegie Park Associates v Graff* 2003 NY Slip Op 51198(U)]. In this case, Respondent's testimony regarding the television was credible. The court finds on occasion Respondent had his television on loud at a late hour, but always promptly reduced the volume when asked to do so, and that no tenant other than the tenant above him ever complained about the noise from his television. This type of conduct may constitute a breach of substantial obligation of tenancy claim, if continued beyond service of a notice to cure, but the evidence at trial does not support a finding that it "substantially threatens the health, safety and comfort of other building occupants (*405 East 56th Street LLC v Morano* 19 Misc3d 62, at 64)."

Additionally, the lack of sufficiency in Petitioner's case is born out by the pleadings. For example, in the Supplemental Verified Bill of Particulars Petitioner asserts that shareholders

from two different apartments were disturbed by the loud television, including CSD. But there was no testimony elicited from CSD at trial that she was ever disturbed by Respondent's television, although she lives right next door to the Subject Premises. Additionally in the original Bill of Particulars, Petitioner alleged that the late TV occurred only for a period of weeks.

Similarly, while the evidence showed that Respondent did change a fuse in the electrical box on more then one occasion, Petitioner failed to establish that the DOB violation was the result of any conduct by Respondent, other than to call DOB to complain about the insufficiency of the electricity. Respondent should not have removed or changed fuses. However, the evidence did not show that this was a continuous or ongoing conduct. In fact, it is undisputed that said conduct ceased when Petitioner locked the electrical box and prevented Respondent from accessing it further. Moreover, Petitioner failed to present any credible evidence that Respondent's changing the fuses had any impact on any of the residents in the Subject Building.

The truly disturbing evidence of Respondent's conduct, as presented by Petitioner at trial, was the physical assault of the postal worker and the menacing of CSD. This conduct was violent and put both the postal worker and the neighbor in reasonable fear for their safety. The conduct is extreme, unwarranted and the type of conduct which does support a claim of eviction for nuisance.

The problem is that the Notice did not include any allegations of this type of conduct, nor is it related to the conduct upon which the Notice is predicated. No menacing or antisocial/violent behavior is alleged. The purpose of notice requirements are "...thwarted when

the landlord is permitted to introduce evidence of acts and conduct other than that stated in the notice and petition as grounds for eviction ... (*Rapport v Connell* 52 Misc2d 1016)." New allegations unrelated to the type of conduct alleged in the pleadings can not be used to make out a *prima facie* case [*Wonforo Associates v Maloof* 2002 NY Slip Op 50316(U)].

While such conduct is vaguely referenced for the first time in the Bill of Particulars, where Petitioner asserted that "In addition, the Respondent engaged in a continuing course of conduct **TO DATE** interfering substantially with the comfort of other building occupants and flooding out other apartments." This is the first notice to Respondent that his comments to CSD were a basis of this proceeding. However, there was no evidence offered by Petitioner at trial that Respondent was responsible for the alleged flood in CSD's apartment that occurred in February 2014. Additionally, the import of CSD's testimony was not that Respondent had caused the flooding, but the menacing conduct by Respondent.

There is no legal basis to allow Petitioner to rest its *prima facie* case on conduct not raised in the Notice and unrelated to the conduct asserted therein [*JH Taylor Construction v Liguori* 5 Misc3d 74].

CONCLUSION

Based on the foregoing the petition is dismissed. The dismissal is without prejudice to a new nuisance proceeding based on menacing and assault, or upon a breach of substantial obligation of tenancy proceeding regarding the loud television at late hours, if such conduct continues.

This constitutes the decision and order of the Court.2

Dated: New York, New York
August 10, 2015

Sabrina B. Kraus, JHC

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Parties may pick up exhibits, within thirty days of the date of this decision, from Window 9 in the clerk's office on the second floor of the courthouse. After thirty days, the exhibits may be shredded, in accordance with administrative directives.