

**Hirschhorn v Board of Mgrs. of 169 Hudson St.
Condominium**

2019 NY Slip Op 30202(U)

January 21, 2019

Supreme Court, New York County

Docket Number: 650717/18

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

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

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JASON HIRSCHHORN,

Plaintiff,

-against-

Index No. 650717/18

BOARD OF MANAGERS OF 169 HUDSON
STREET CONDOMINIUM, JENNIFER
RIGAMER VORHOFF, and NICHOLAS
ROBBERT VORHOFF,

Defendants.

-----X
DAVID B. COHEN, J:

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence No. 001, defendants Jennifer Rigamer Vorhoff and Nicholas Robbert Vorhoff move, pursuant to CPLR 3211 (a) (7), for an order dismissing the third and fourth causes of action alleged in the complaint. Those causes of action, respectively, allege a private nuisance and seek injunctive relief. In motion sequence No. 002, defendant Board of Managers of 169 Hudson Street Condominium (Board) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the action, as against it. The causes of action alleged against the Board are breach of contract, breach of fiduciary duty, and seek injunctive relief.

The complaint alleges, in sum, that loud noises and vibrations emanate from the Vorhoffs' apartment, which is situated directly above plaintiff's apartment in the condominium building (Condominium), located at 169 Hudson Street in Manhattan, and that, despite repeated complaints to the Board, the Board has taken no action. Plaintiff's complaint is supported by an

affidavit and a supplemental affidavit from Alan Fierstein, the president of Acoustilog, Inc. The supplemental affidavit, which was submitted after the Vorhoffs' motion to dismiss was filed, contradicts Mr. Fierstein's initial affidavit in the following respects: (1) the initial affidavit states that the noise heard in plaintiff's apartment was attributable to "the people in Apartment 6N"; the supplemental affidavit attributes the noise to "someone and/or something in Apartment 6N"; and (2) the supplemental affidavit states that the noise cannot be attributed to the structure of the building, whereas the initial affidavit attributed some of the noise to the vibration of the structure of the building. Mr. Fierstein does not explain these contradictions. A sworn statement that contradicts an earlier sworn statement raises only "a feigned issue," and is not entitled to credibility. *Abraido v 2001 Marcus Ave. LLC*, 126 AD3d 571, 571 (1st Dept 2015); *see also Celaj v Cornell*, 144 AD3d 590, 590 (1st Dept 2016); *Eion Michael Props., LLC v 102 Bruckner Blvd. Realty, LLC*, 143 AD3d 622, 622 (1st Dept 2016). Accordingly, the court will disregard Mr. Fierstein's supplemental affidavit. Moreover, plaintiff's May 4, 2018 affidavit, in which he states that he does not know the source of the noise to which he objects, contradicts multiple earlier statements that he made to the Vorhoffs, that the noise of which he was complaining was caused by people walking or running in their apartment. *See Moore*, reply aff, exhibit A at 2 ("I can hear all steps . . . [i]t can be unbearable at times."); exhibit B at 1 ("It's not voices or music or anything out of the norm you hear in NY. It's running."); exhibit C at 1 ("I'm sitting here now hearing running up and down the apartment. Down here it's like construction"). In sum, plaintiff has failed to show that the noise of which he complains is not attributable to the normal incidence of apartment dwelling.

A party alleging a private nuisance must show “(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s property right to enjoy land, (5) caused by another’s conduct in acting or failure to act.” *Copart Indus. v Consolidated Edison Co. of NY*, 41 NY2d 564, 570 (1977). To the extent that Mr. Fierstein initially attributed some of the noise heard in plaintiff’s apartment to the vibration of the building, plaintiff failed to allege that defendants caused the noise about which he was complaining. *See Brown v Blennerhasset Corp.*, 113 AD3d 454, 454 (1st Dept 2014) (no causation shown, where, there too, Mr. Fierstein attributed objectionable noise to the structure of the building). Also, the complaint fails to allege facts showing that the noise was unreasonable. Other than unspecified references to “banging,” the only noises identified in the complaint are those of steps and of children running. As a matter of law, the allegation of such noises does not support a cause of action alleging a private nuisance. *Brown v Blennerhasset Corp.*, 113 AD3d at 454 (noises “incidental to normal occupancy, including heavy footsteps” not actionable); *see also Carroll v Radoniqi*, 105 AD3d 493, 494 (1st Dept 2013) (plaintiff lacking knowledge of specific renovation work being performed in abutting cooperative unit unable to sustain claim of private nuisance).

The claim for injunctive relief is denied because, seeking monetary damages from both the Vorhoffs and the Board, plaintiff acknowledges that such damages would make him whole. *JSC VTB Bank v Mavlyanov*, 154 AD3d 560, 560 (1st Dept 2017), citing *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 541 (2000).

The complaint must also be dismissed as against the Board. The Condominium by-laws provide that “The Board has no liability to Unit Owners in the management of the Condo, except for willful misconduct or bad faith.” Mazolla, aff, exhibit 3, Article III, § 12. It is undisputed,

that once apprized that plaintiff had a complaint about noise from his upstairs neighbor's apartment, the Board investigated, and ascertained that that apartment was in compliance with the Condominium's "carpet rule," which requires that 75 per cent of an apartment's flooring be covered by a carpet. The by-laws provide that, while the Board has the right to "enjoin, abate or remedy" the breach of any provision of the Condominium declaration, or the by-laws, any such remedy "may be exercised . . . in the sole discretion of the Board." *Id.*, Article XI. Finally, insofar as is relevant here, Article XV, § 8 provides that unit owners are responsible for ensuring that their units comply with all applicable laws. Accordingly, the fact that the Board took no action on plaintiff's complaint of noise, beyond verifying that that the Vorhoffs' apartment complied with the carpet rule, does not constitute a breach of contract.

The complaint repeatedly alleges that the Board engaged in self-dealing, but it alleges not a single fact to support that allegation, other than to note that Ms. Vorhoff is the president of the Board. The unstated inference, that the other Board members failed to act to plaintiff's satisfaction, because of their deference to Ms. Vorhoff, does not suffice to support this cause of action.

The cause of action alleging that the Board violated its fiduciary duty to plaintiffs, by failing to act against the Vorhoffs, must be dismissed, because the Board, as distinguished from the individual members of the Board, owes no fiduciary duty to unit owners. *Argyrides v River Terrace Apts., LLC*, 2014 WL 255712 (Sup Ct, NY County 2014), citing *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 (1st Dept 2009) (co-op board has no fiduciary duty to shareholders) and *Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 (1st Dept 2012)

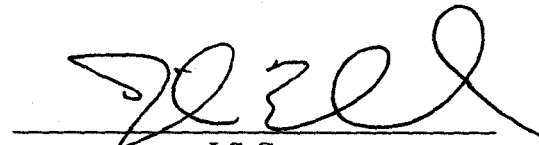
(corporation has no fiduciary duty to its shareholders); *see also Fletcher v Dakota, Inc.*, 99 AD3d 43 (1st Dept 2012) (same).

Accordingly, it is hereby

ORDERED that, in motion sequence No. 001, the motion of defendants Jennifer Rigamer Vorhoff and Nicholas Robbert Vorhoff to dismiss the complaint, as to them is granted, and the third and fourth causes of action in the complaint are dismissed with costs as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that in motion sequence No. 002, the motion of defendant Board of Managers of 169 Hudson Street Condominium to dismiss the complaint, as to it, is granted, and the first, second and fourth causes of action alleged in the complaint are dismissed with costs as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs.

Dated: January 21, 2019



J.S.C.

HON. DAVID B. COHEN
J.S.C.