

<b>J &amp; P Realty, L.L.C. v Schevill</b>
2020 NY Slip Op 31399(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 651811/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

-----X

J & P REALTY, L.L.C.,

Plaintiff,

- v -

DEBORAH SCHEVILL, MARIANNE SPINELLI

Defendants.

-----X

INDEX NO. 651811/2020

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for PRELIMINARY INJUNCTION.

The motion by plaintiff for a preliminary injunction barring defendant Schevill from smoking in her apartment and in common areas or smoking in such a way as to cause secondhand smoke to permeate the building is denied in part and granted in part. Schevill is prohibited from smoking in common areas (this part of the motion was unopposed) but she may continue to smoke in her apartment, with the door closed, until further determination by the Court.

**Background**

Plaintiff is a landlord and defendants are two of its tenants who live in separate apartments on separate floors; both have lived in the building for over three decades. Because of Covid-19, people are home all day and all night. Defendant Schevill smokes, and she does not deny that she smokes in her apartment. Plaintiff states that since the “shelter in place” order took effect, it received multiple complaints from defendant Spinelli about smoke permeating her

home. Spinelli insisted that the smoke was coming from defendant Schevill's apartment; Spinelli lives on the floor above Schevill but *not* directly above.

While acknowledging that Schevill is not the only smoker in the building and that she is allowed to smoke in her apartment because the terms of her lease cannot be changed, plaintiff contends that Schevill refused to refrain from smoking in her apartment despite a Covid-19 building-wide policy that prohibits smoking in apartments or in common areas, and despite being asked politely. Plaintiff submits an affidavit from the live-in super who states that she smells smoke emanating from Schevill's apartment and Schevill has refused the super's attempts to enter and inspect it (NYSCEF Doc. No. 6, ¶¶ 10, 11). The super also contends that she can smell smoke in the hallway where Spinelli's apartment is located (the floor above) but that Spinelli has also refused to let her into Spinelli's apartment to assess the smell and ascertain possible ways to alleviate it (*id.* ¶¶ 16-17).<sup>1</sup>

In opposition, Schevill claims that she wasn't served properly and admits that she is smoking in the building. She complains that requests from the building to cease smoking are tantamount to harassment. Schevill insists her smoking does not bother anyone in the building.

In reply, plaintiff points out that it served Schevill in accordance with the order to show cause and observes that when it reached out to Schevill about her smoking she directed them to talk to her attorney. Plaintiff then drafted an order to show cause which directed service on this attorney. According to plaintiff, this attorney initially discussed the case with plaintiff's attorney before asserting that a conflict of interest prevented continued representation of Schevill.

Plaintiff also attaches an affidavit from a non-party tenant (Ms. Smith) who lives in a building located directly next door. She claims her kitchen window directly faces the building

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<sup>1</sup> At oral argument, counsel for plaintiff noted that the super had gained access to Spinelli's apartment after this case was commenced.

where defendants live (NYSCEF Doc. No. 21 ¶ 3) and contends that since she has started working from home, her apartment is now inundated with smoke and she complained to the super (the same super for defendants' building) (*id.* ¶¶ 4-9).

Faced with a nonsmoking tenant who keeps complaining that the landlord isn't doing anything to stop the smoker and a smoking tenant who is allowed to smoke and claims the landlord is harassing her, the plaintiff brought this case.

### Service

As an initial matter, the Court rejects Schevill's claim that she was not properly served. The fact is that when the landlord tried to address the instant situation with her, she responded that any future communication should be sent to her attorney and named him specifically (NYSCEF Doc. No. 4 at 19). Plaintiff then drafted an order to show cause that directed service to be completed by emailing that specific attorney and the Court agreed that this was the best and safest method of service given the current public health crisis. Plaintiff contends that the specific attorney spoke with plaintiff's attorney about a possible buyout after the order to show cause was served and later withdrew as counsel for Schevill because of a possible conflict.

There is no basis to find that service was improper under these circumstances. Schevill made it clear that she wanted the landlord to go through her attorney and suggested that the landlord's communication constituted harassment (*id.*). She cannot then complain when a case is commenced and service is effectuated on the person to whom she told the landlord to speak. In addition, after that attorney said he wasn't going to represent Ms. Schevill in this litigation (only after first requesting a buyout), plaintiff emailed the papers directly to her. Of course, email is one of the safest methods of service during the Covid-19 crisis and Ms. Schevill was well aware

of the litigation, presumably instructing her then-attorney to seek a buyout. Even if the Court were to consider the untimely cross-motion to dismiss by Schevill, it would be denied because service was completed in compliance with the order to show cause and it satisfies due process.

### **Preliminary Injunction**

“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, 800 NYS2d 48 [2005] [citing CPLR 6301]). “Entitlement to a preliminary injunction depends upon probabilities, any or all of which may be disproven when the action is tried on the merits” (*Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212, 216, 889 NYS2d 793 [1st Dept 2009] [internal quotations and citation omitted]).

“A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing” (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23, 924 NYS2d 35 [1st Dept 2011])

“[O]ne is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities” (*Copart Indus., Inc. v Consol. Edison Co. of New York, Inc.*, 41 NY2d 564, 569, 394 NYS2d 169 [1977])

The Court denies the preliminary injunction because plaintiff failed to demonstrate a probability of success on the merits on the papers submitted here. The first cause of action is for nuisance and plaintiff failed to submit sufficient evidence showing a likelihood of success on this

claim. Plaintiff cannot show that the smoke is so pervasive or unreasonable that it merits the issuing of injunctive relief nor can it show that the smoke is emanating from Schevill's apartment (there are other smokers in the building). Moreover, there is no affidavit or any submission from defendant Spinelli regarding the effect of the purported smoke or how she "knows" that all the smoke she complains about is from Schevill. Spinelli's unsworn emails (attached by plaintiff) are not sufficient to establish that a preliminary injunction is warranted.

Central to the Court's decision is plaintiff's admission, in a letter sent from its attorney to Schevill on April 17, 2020, that "I recognize that you have every right to smoke within your apartment as the 'No Smoking' policy came into effect long after you moved into the apartment" (NYSCEF Doc. No. 4 at 17). And courts have held that smoking in one's own apartment, standing alone, does not necessarily state a cause of action for nuisance (*Ewen v Maccherone*, 32 Misc 3d 12, 14-15, 927 NYS2d 274 [App Term, 1st Dept 2011] [dismissing condo owners' nuisance claim arising out of a neighbor's 'excessive smoking' and emphasizing that there was no condominium rule or bylaw that prevented smoking in one's own apartment]).

Because Schevill is undisputedly allowed to smoke in her own apartment, plaintiff had to show a probability of success on the merits that Schevill's smoking constitutes a nuisance. Although the super's affidavit (and Schevill's affidavit) establish that defendant Schevill is smoking, that does not mean that the smoke complained about is coming exclusively from Schevill or that it is so pervasive that it constitutes a nuisance. For instance, the super does not claim the smoking is so bad that she is unable to walk through the hallways, that Schevill is the only smoker on her floor, that there are no smokers on Spinelli's floor (and how she knows that). And without anything directly from Spinelli, the Court is left with an alleged condition that the landlord says is the reason another tenant is complaining. But complaints from that other tenant

contained only in emails cannot support the imposition of a preliminary injunction. In fact, plaintiff attached emails showing it asked Spinelli for an affidavit and she refused (NYSCEF Doc. No. 28 at 11-12).

And the affidavit from Ms. Smith (in the neighboring building) does not save plaintiff's requested relief. She is unable to identify where the smoke is coming from and there is no evidence demonstrating that the condition she complains about is emanating from Schevill and only Schevill. That may be what the super (who apparently is the super in both buildings) believes, but that is not enough to establish whether the smoke is coming from Schevill or another tenant in either of these buildings.

The Court stresses that plaintiff's submissions do not justify a hearing. A hearing is necessary "when the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, and the defendant raises issues of fact with respect to such elements" (*1234 Broadway LLC*, 86 AD3d at 23-24). Plaintiff did not meet the elements required for the issuance of a preliminary injunction; therefore, the Court need not consider whether Schevill raised an issue of fact.

The evidence plaintiff presented shows that the super believes Schevill is smoking, something she is allowed to do in her apartment. The super may even believe that Schevill is smoking near her open window and tried to connect Ms. Smith's complaint (in the building next door) to Schevill's smoking. That super's affidavit is the only first-hand knowledge about the conditions in the building. It does not show the smoking is unreasonable or pervasive or that the conditions complained about by Spinelli are caused by Schevill. And, as stated above, the resident of the adjacent building has no idea from where the smoke is coming.

## Summary

Simply put, there isn't enough evidence for the Court to impose the drastic remedy of a preliminary injunction on these papers. The Court declines to restrict an activity that the plaintiff admits Schevill is allowed to engage in and hasn't shown is so unreasonable as to constitute a nuisance. The Court recognizes that defendant Spinelli is clearly upset about the condition and that this issue is likely exacerbated by the fact that all parties are staying home. And the evidence shows that the landlord tried to resolve the issue by communicating with both parties before coming to court. Clearly, the landlord had no choice but to bring the instant lawsuit after Schevill told it to talk to her attorney rather than reach some sort of agreement and Spinelli continues to complain.

To be clear, the Court is not making a finding that plaintiff's case completely lacks merit or that the complaints from Spinelli are not genuine. But the Court must decide in this motion whether to impose an extraordinary provisional remedy. The Court can only do that if the movant meets its burden to show entitlement to that relief. The papers submitted here show that the landlord has received numerous complaints about a condition, but there is no direct evidence about the scope, severity or origin of that issue.

Accordingly, it is hereby

ORDERED that the motion, brought by order to show cause, for a preliminary injunction is granted only to the extent that Schevill is barred from smoking in the common areas of the building and denied as to the other requested relief (meaning she may continue to smoke in her apartment with the door closed), and the temporary restraining order issued by this Court on April 29, 2020 is hereby vacated; and it is further

ORDERED that the cross-motion filed by defendant Schevill to dismiss is denied.

Conference: July 28, 2020 at 10 a.m. The parties are directed to check the docket to confirm whether an in-person or virtual appearance will take place. The parties are free, of course, to do a preliminary conference order themselves and upload it for the Court's approval.

5/14/2020

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: