

80 CPW Apts. Corp. v Nathan
2020 NY Slip Op 33767(U)
November 9, 2020
Supreme Court, New York County
Docket Number: 157994/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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80 CPW APARTMENTS CORP.,

Index No. 157994/2019

Plaintiff

- against -

DECISION AND ORDER

EDWARD NATHAN,

Defendant

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LUCY BILLINGS, J.S.C.:

Plaintiff residential cooperative corporation moves to amend its complaint to add a claim for an injunction prohibiting defendant proprietary lessee from occupying or residing in his apartment, C.P.L.R. § 3025(b), and for a preliminary injunction to that effect. C.P.L.R. §§ 6301, 6311(1). Plaintiff withdrew its previous motion for a preliminary injunction providing access to defendant's apartment to remove personal property from the apartment and clean it.

I. BACKGROUND

After discovering unsafe and unsanitary conditions in defendant's apartment, plaintiff notified defendant of its demand that he cure these conditions by July 31, 2019. Upon defendant's failure to address plaintiff's concerns adequately, plaintiff

commenced this action for an injunction providing access to defendant's apartment, damages, and attorneys' fees. Plaintiff now concedes that, since defendant ultimately removed his excessive personal property and cured the unsafe and unsanitary conditions, plaintiff has incurred no damages. Thus the only remaining claim in this action is for attorneys' fees.

Plaintiff now seeks to transform this action toward an entirely different objective, alleging that defendant intentionally flooded his apartment, verbally harassed cooperative building staff by yelling at them and calling them derogatory names, and created unreasonable noise emanating from his apartment. Plaintiff claims this conduct violated defendant's proprietary lease provisions and the cooperative's House Rule 5, incorporated in the lease, that defendant would keep his apartment's interior in good repair, promote the cooperative building's purposes, and not interfere with other building residents' rights, comfort, or convenience.

II. PLAINTIFF'S MOTION TO AMEND ITS COMPLAINT

Leave to amend a complaint is freely granted unless the amendment would surprise or otherwise prejudice the opposing party, Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d 403, 411

(2014); Global Liberty Ins. Co. v. Tyrell, 172 A.D.3d 499, 500 (1st Dep't 2019); Y.A. v. Conair Corp., 154 A.D.3d 611, 612 (1st Dep't 2017), or the amendment lacks merit. C.P.L.R. § 3025(b); Avail 1 LLC v. Acquafredda Enters. LLC, 184 A.D.3d 476, 477 (1st Dep't 2020); Brook v. Peconic Bay Med. Ctr., 172 A.D.3d 468, 469 (1st Dep't 2019); Jean-Baptiste v. 153 Manhattan Ave. Hous. Dev. Fund Corp., 124 A.D.3d 476, 477 (1st Dep't 2015); Onetti v. Gatsby Condominium, 111 A.D.3d 496, 497 (1st Dep't 2013).

Defendant maintains that plaintiff's proposed amendment, to include a claim for an injunction against defendant residing in his apartment, after the original action already has been resolved but for plaintiff's claim for attorneys' fees, would prejudice him. Atlas MF Mezzanine Borrower, LLC v. Macquarie Tex. Loan Holder LLC, 181 A.D.3d 488, 489 (1st Dep't 2020); Cafe Lughnasa Inc. v. A&R Kalimian LLC, 176 A.D.3d 523, 523-24 (1st Dep't 2019); Brook v. Peconic Bay Med. Ctr., 172 A.D.3d at 470; Sutton Apts. Corp. v. Bradhurst 100 Dev. LLC, 160 A.D.3d 508, 509 (1st Dep't 2018). Plaintiff may pursue its new claims, based on entirely new occurrences, in an independent action. Chichilnisky v. Trustees of Columbia Univ. in City of N.Y., 49 A.D.3d 388, 389 (1st Dep't 2008).

Even if plaintiff's amended complaint would not amount to

prejudice, however, plaintiff's failure to support its motion with a proposed amended complaint verified on personal knowledge or other admissible evidence warrants denial of its motion.

Avail 1 LLC v. Acquafredda Enters. LLC, 184 A.D.3d at 477; McBride v. KPMG Intl., 135 A.D.3d 576, 580-81 (1st Dep't 2016); Greentech Research LLC v. Wissman, 104 A.D.3d 540, 541 (1st Dep't 2013); Glatt v. Mariner Partners, Inc., 66 A.D.3d 440, 441 (1st Dep't 2009). "Although the standard for amending a pleading is less exacting than in moving for summary judgment, there must still be an affidavit of merit or an offer of evidence similar to that supporting a summary judgment motion" Schulte Roth & Zabel. LLP, 28 A.D.3d 404, 405 (1st Dep't 2006). Thus, plaintiff need not prove its proposed claims at this stage, but must support them with admissible evidence. Avail 1 LLC v. Acquafredda Enters. LLC, 184 A.D.3d at 477; McBride v. KPMG Intl., 135 A.D.3d at 580-81; Sullivan v. Harnisch, 100 A.D.3d 513, 514 (1st Dep't 2012); MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dep't 2010).

First, plaintiff's proposed amended complaint is unverified. Therefore plaintiff relies on its property manager's affidavit reciting provisions of defendant's proprietary lease to support the additional claims. Yet plaintiff never presents the lease,

so all the property manager's attestations based on the lease are hearsay. People v. Joseph, 86 N.Y.2d 565, 570 (1995); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014). See B.P. AC Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Residential Credit Solutions, Inc. v. Gould, 171 A.D.3d 638, 642 (1st Dep't 2019); Clarke v. American Truck & Trailer, Inc., 171 A.D.3d 405, 406 (1st Dep't 2019); Adriana G. v. Kipp Wash. Hgts. Middle Sch., 165 A.D.3d 469, 470 (1st Dep't 2018).

Second, plaintiff's property manager does not base his account of defendant's conduct on personal knowledge. The property manager relies on incident reports, but fails to lay a foundation for their admissibility as the cooperative corporation's business records. C.P.L.R. § 4518(a); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012). Even if the incident reports were admissible, absent defendant's proprietary lease, plaintiff fails to show either that the lease prohibits defendant's reported conduct or, even if the lease does prohibit the conduct, that the lease authorizes the remedy plaintiff seeks for such conduct, banning defendant from his

apartment, particularly absent any notice to cure the conduct.

III. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Absent admissible evidence supporting the merits of plaintiff's proposed claims, plaintiff fails to demonstrate a likelihood of success on their merits, East Riv. Fifties Alliance, Inc. v. City of New York, 178 A.D.3d 492, 493-94 (1st Dep't 2019); CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 168 A.D.3d 567, 568 (1st Dep't 2019); LGC USA Holdings, Inc. v. Taly Diamonds, LLC, 121 A.D.3d 529, 530 (1st Dep't 2014); Levkoff v. Soho Grand-W. Broadway, Inc., 115 A.D.3d 536, 537 (1st Dep't 2014), a principal requirement for a preliminary injunction. C.P.L.R. §§ 6301, 6312(a); Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005); Stoner v. Atlantic Realty Apts., LLC, 154 A.D.3d 552, 553 (1st Dep't 2017); IME Watchdog Inc. v. Baker, McEvoy, Morrissey & Moskovitz, P.C., 145 A.D.3d 464, 465 (1st Dep't 2016); Thorton v. New York City Bd./Dept. of Educ., 125 A.D.3d 444, 445 (1st Dep't 2015). The injunction plaintiff seeks is all the more unwarranted because it seeks the ultimate injunctive relief sought in the amended complaint, instead of an injunction to maintain the status quo or to provide urgent, imperative, or gravely necessary relief in extraordinary circumstances, which defendant's alleged conduct does not

demonstrate. Spectrum Stamford, LLC v. 400 Atl. Tit., LLC, 162 A.D.3d 615, 616-17 (1st Dep't 2018); Moltisanti v. East Riv. Hous. Corp., 149 A.D.3d 530, 531 (1st Dep't 2017); LGC USA Holdings, Inc. v. Taly Diamonds, LLC, 121 A.D.3d at 530.

Although it is unnecessary to evaluate the remaining requirements for a preliminary injunction, East Riv. Fifties Alliance, Inc. v. City of New York, 178 A.D.3d at 493; Shawe v. Elting, 161 A.D.3d 585, 587 (1st Dep't 2018), plaintiff also fails to show irreparable harm. Atlas MF Mezzanine Borrower, LLC v. Macquarie Tex. Loan Holder LLC, 181 A.D.3d at 489; Moltisanti v. East Riv. Hous. Corp., 149 A.D.3d at 531; IME Watchdog Inc. v. Baker, McEvoy, Morrissey & Moskovitz, P.C., 145 A.D.3d at 466; LGC USA Holdings, Inc. v. Taly Diamonds, LLC, 121 A.D.3d at 530. To the extent that the flooding of defendant's apartment caused damage outside his cooperative unit, that damage is compensable by monetary relief. CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 168 A.D.3d at 568; Moltisanti v. East Riv. Hous. Corp., 149 A.D.3d at 531; LGC USA Holdings, Inc. v. Taly Diamonds, LLC, 121 A.D.3d at 530; Goldstone v. Gracie Terrace Apt. Corp., 110 A.D.3d 101, 105-106 (1st Dep't 2013). Plaintiff specifies no injuries, let alone on personal knowledge, from defendant's yelling or name calling at cooperative building staff or his loud noise.

See Onetti v. Gatsby Condominium, 111 A.D.3d at 497. To the extent that plaintiff is suffering injury from the verbal harassment or noise, in balancing the equities, the remedy plaintiff requests, to ban defendant from residing in his apartment, is extreme. CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 168 A.D.3d at 568; Goldstone v. Gracie Terrace Apt. Corp., 110 A.D.3d at 106. See Suttongate Holdings Ltd. v. Laconn Mgt. N.V., 159 A.D.3d 514, 515 (1st Dep't 2018). Plaintiff may seek a remedy through a holdover proceeding. R.P.A.P.L. § 711(1). See Moltisanti v. East Riv. Hous. Corp., 149 A.D.3d at 531; IME Watchdog Inc. v. Baker, McEvoy, Morrissey & Moskovitz, P.C., 145 A.D.3d at 466.

IV. CONCLUSION

For the reasons explained above, the court denies plaintiff's motion both to amend the complaint, C.P.L.R. § 3025(b), and for a preliminary injunction. C.P.L.R. §§ 6301, 6312(a). Given the guardian ad litem's services required to defend this meritless motion, defendant may offset the compensation for these services against plaintiff's remaining claim for attorneys' fees. C.P.L.R. § 1204; Haynes v. Haynes, 83 N.Y.2d 954, 956-57 (1994); Kelly G. v. Circe H., 178 A.D.3d 533, 536 (1st Dep't 2019); Mars v. Mars, 19 A.D.3d 195, 196-97 (1st

Dep't 2005); Simone-Smith v. Edwinn, 204 A.D.2d 210, 210-11 (1st
Dep't 1994). See Matter of Lyles, 250 A.D.2d 488, 489-90 (1st
Dep't 1998).

DATED: November 9, 2020

Lucy Billings

LUCY BILLINGS, J.S.C.

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