

Dubin v Glasser

2021 NY Slip Op 30449(U)

February 17, 2021

Supreme Court, New York County

Docket Number: 159764/2020

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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STEVEN DUBIN

Plaintiff,

- v -

BRIAN GLASSER,

Defendant.

-----X

INDEX NO. 159764/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34,

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Plaintiff moves by order to show cause for a preliminary injunction directing and ordering defendant to cease his nuisance activities in his apartment above plaintiff's apartment, to comply with their cooperative building's house rules, and to refrain from activities that deprive plaintiff of his quiet enjoyment of his home. Defendant cross moves to dismiss the complaint pursuant to CPLR 3211 on the grounds that there is pending proceeding in Housing Court and the complaint fails to state a cause of action.

BACKGROUND

Plaintiff states in his affidavit in support of the order to show cause that that he suffers from late stage cancer and that he purchased his apartment (without stating when) because the building is quiet but that in March 2020 when the pandemic shutdown New York City he became aware of his upstairs neighbor. Plaintiff alleges that defendant causes loud noises at all hours of the day and night because apparently there is no carpeting on the hardwood floors. The worst time according to plaintiff is from 11:00 pm to 8:00 am. Plaintiff speculates that the noise comes from a chair rolling back and forth and some type of machine possibly a shredder. Plaintiff

further complains that there is nowhere in his apartment he can go to escape the noise and that the amount of noise increases after he complains to the doormen in building. Plaintiff acknowledges calling the police to complain about the noise coming from defendant's apartment (NYSCE Doc No 12).

Defendant does not dispute that he has hardwood floors and states that in response to the order to show cause and at the court's suggestion, he purchased a high-quality floor protector to place under his desk chair. Further defendant states he is usually in bed by around 11 pm and therefore not making noise all hours of the night. Finally, defendant admits that he uses a small paper shredder at most twice a day for less than a minute each time but never at night (Defendant's affd NYSCEF Doc No 20 ¶¶ 15 – 17).

Plaintiff's complaint includes causes of action for a declaratory judgment directing defendant to comply with the building's house rules including installing carpeting; an injunction directing defendant to abate the nuisance condition he has created; intentional infliction of emotional distress/harm; and attorneys' fees (NYSCEF Doc No 1).

DISCUSSION

Plaintiff's Order to Show Cause

“A preliminary injunction is an extraordinary provisional remedy which will only issue where the proponent demonstrates (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balance of equities tipping in its favor” (*Harris v Patients Med., P.C.*, 169 AD3d 433, 434 [1st Dept 2019]).

While plaintiff has arguably demonstrated irreparable injury and balancing of the equities in his favor in light of his grave medical condition, he has not demonstrated a likelihood of success on the merits. The “conflicting affidavits (of plaintiff and defendant) raise sharp issues

of fact” warranting denial of preliminary injunctive relief (*Buchanan Capital Mkts., LLC v DeLucca*, 144 AD3d 508, 509 [1st Dept 2016]). Accordingly, plaintiff’s order to show cause for a preliminary injunction must be denied and the temporary restraining order vacated.

Defendant’s Cross Motion to Dismiss

Defendant argues that the case should be dismissed because there is a pending proceeding in Housing Court brought by defendant’s landlord primarily over the issue of whether defendant is required to have floor coverings. Defendant opines plaintiff can protect his interest by participating in that proceeding by either intervening or testifying. However, dismissal based on another action pending is permitted only when the action (or proceeding) is between the same parties (CPLR 3211 [a] [4]). Here, as defendant acknowledges, plaintiff is not a party to the Housing Court proceeding. Accordingly, the complaint will not be dismissed based on the pending Housing Court proceeding.

As to that branch of defendant’s motion seeking dismissal for failure to state a cause of action (CPLR 3211 [a] [7]), plaintiff’s complaint must be afforded a liberal construction, the allegations in it taken as true and plaintiff must be afforded the benefit of every possible favorable inference (*Charles Schwab Corp. v Goldman Sachs Grp., Inc.*, 186 AD3d 431, 435 [1st Dept 2020]).

Defendant argues he is not bound by the building’s house rules requiring 80% of his floors be covered because he is a rent stabilized tenant. Moreover, according to defendant, plaintiff is not a party to defendant’s lease and therefore, even if the lease does require defendant to abide by the house rules requiring 80% of a tenant’s floor to be covered, plaintiff lacks standing to enforce it. Plaintiff responds that defendant’s lease requires him to abide by the rules and regulations promulgated by his landlord, including the 80% rule.

Plaintiff has sufficiently alleged facts asserting rights as a third-party beneficiary to defendant's lease in that there is a binding lease between other parties and at least part of the lease and the concomitant house rules are for plaintiff's benefit and the benefit is sufficiently immediate to him to indicate the assumption by defendant and the landlord of a duty to plaintiff (*accord State of Pub. Employees' Retirement Sys. v Sherman & Sterling*, 95 NY2d 427, 434 – 435 [2000]). Accordingly, plaintiff's first cause of action for a declaratory judgment will not be dismissed.

Without citation to any authority and rather confusingly defendant argues the complaint fails to state a cause of action because it seeks a declaratory judgment and this is duplicative of the cause of action for equitable relief and regardless declaratory relief should not be awarded where other actions can provide adequate relief.

However, the declaratory judgment cause of action (first) is based on the house rules and the injunctive relief cause of action (second) is based on a nuisance theory. Therefore, the two causes of action are not duplicative. To the extent defendant suggests plaintiff can obtain the relief he seeks in Housing Court, as noted above plaintiff is not a party to that proceeding and indeed plaintiff lacks standing to bring a proceeding against defendant in Housing Court because he is not defendant's landlord (*cf Cox v JD Rlty. Assocs.*, 217 AD2d 179, 181 [1st Dept 1995] [observing Civil Court has jurisdiction over landlord tenant disputes]). Moreover, Housing Court does not have jurisdiction to grant the equitable, declaratory and injunctive relief sought by plaintiff (*WHP 20, Inc. v Oktagon Corp.*, 251 AD2d 58, 59 [1st Dept 1998] [observing Civil Court lacks jurisdiction to grant declaratory relief]).

Defendant next argues that the complaint fails to state a cause of action for intentional infliction of emotional distress since there are no allegations suggesting willfulness. The four

elements that must be alleged to state a cause of action for the intentional infliction of emotional distress are “(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress” (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016]). The complaint alleges that defendant has “intentionally interfered with Plaintiff’s quiet enjoyment of his home” (Complaint ¶ 56). This allegation is insufficient to allege that defendant intended to cause severe emotional distress or disregarded a substantial probability of causing such distress. Moreover, the allegations concerning defendant’s conduct (rolling a chair around on a hardwood floor and using a shredder), notwithstanding the complaint’s conclusory statement that defendant’s conduct is so egregious so as to shock the conscience (Complaint ¶ 55), do not rise to the level of extreme and outrageous conduct. Accordingly, plaintiff’s third cause of action for intentional infliction of emotional distress must be dismissed.

Finally, defendant argues that plaintiff’s fourth cause of action for legal fees must be dismissed because there is no basis for awarding plaintiff attorneys’ fees. Plaintiff has not alleged in the complaint an exception to the “American rule” governing attorneys’ fees – “the prevailing litigant ordinarily cannot collect [his] reasonable attorneys’ fees from [his] unsuccessful opponent[.]” to which New York adheres (*Hunt v Sharp*, 85 NY2d 883, 885 [1995]). Accordingly, plaintiff’s fourth cause of action for legal fees must be dismissed.

CONCLUSION

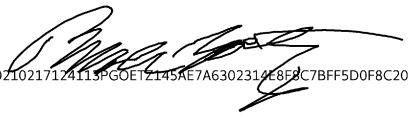
Based on the foregoing, it is

ORDERED that plaintiff’s order to show cause for a preliminary injunction is denied in its entirety; and it is further

ORDERED that temporary restraining order is vacated; and it is further

ORDERED that defendant's cross motion to dismiss is granted to the extent that plaintiff's third cause of action for intentional infliction of emotional distress and fourth cause of action for legal fees are dismissed and is otherwise denied; and it is further

ORDERED that within 20 days of notice of entry of this order, the parties are to email adorin@nycourts.gov to request a preliminary discovery conference.


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2/17/2021
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE