

CID Assoc., LLC v Almaas

2021 NY Slip Op 30669(U)

March 5, 2021

Supreme Court, New York County

Docket Number: 151704/2021

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

CID ASSOCIATES, LLC

INDEX NO. 151704/2021

- v -

MOT. DATE

DOROTHEE WIDER ALMAAS

MOT. SEQ. NO. 002

The following papers were read on this motion to/for preliminary injunction

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). _____

Replying Affidavits

ECFS DOC No(s). _____

This action, which was commenced by plaintiff-landlord via summons with notice, seeks wide-ranging relief from injunctions to ejectment. Plaintiff owns the building located at 101 St. Marks Place, New York, New York (the "Building"). Defendant is a long-term tenant of Apartment 19 at the building pursuant to a rent stabilized lease.

At its core, the landlord seeks to alleviate the complaints of other tenants at the building stemming from defendant's alleged disruptive behavior, including: [1] playing loud music and allowing loud noises to emanate from the apartment and causing a disturbance to other tenants in the Building at all hours of the evening and early morning; [2] banging furniture and other objects on the apartment floor and walls; [3] causing other tenants to wake up in the middle of the evening and not be able to properly sleep; [4] harassing Building residents; and [5] engaging in other unspecified "dangerous, menacing and erratic [b]ehavior." Plaintiff further complains that the defendant has failed to timely pay rent due under the lease. As conceded by plaintiff's counsel at oral argument held on the record on 3/2/21, this action has been brought in Supreme Court because plaintiff is unable to obtain relief in housing court associated with defendant's alleged conduct at this juncture due to Covid-19-related measures designed to protect tenants impacted by the pandemic.

In support of the motion, plaintiff has provided sworn affidavits from its manager, its superintendent, as well as four current tenants and/or occupants of the Building, and two former tenants thereof. The superintendent, Pllumb Cekaj, states in relevant part:

Defendant causes music to blare at extremely high levels at all hours of the night and early morning, and will scream at the top of her lungs. Defendant will also allow objects to bang on the floor and walls, while also slamming her door. Defendant's conduct is clearly done to intimidate, harass and disturb the other tenants in the Building.

Dated: 3/5/21



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFERENCE

The tenants in the Building often contact me in the middle of the night due to noise complaints being made against Defendant.

The tenants state the Defendant is making too much noise that it interrupts their sleep and causes them to lose the peaceful enjoyment of their apartments.

Maria Teresa Cacho Estefania, the current tenant of Apartment 14, states in relevant part:

Defendant deliberately allows loud noises, consisting of: (a) extremely loud music; (b) screaming; and (c) banging on the floors and doors to emanate from Apartment 20 and cause a disturbance to the other tenants in the Building. The conduct always occurs late in the evening and continues into the early morning hours.

Defendant causes myself and my husband to wake up in the middle of the night at least two to three each week.

I do not keep a log of the nights that my sleep is disturbed and interrupted by Defendant because the conduct is constant and occurs every week.

Robert Miller, who is married to Estefania and is also current tenant of Apartment 14 confirms his wife's account in another sworn affidavit. Plaintiff has also submitted the sworn affidavit of Bridget Cushing, a current tenant of Apartment 20 who moved into the building in August 2020. Cushing explains that her apartment faces the defendant's apartment. She further states in relevant part as follows:

On the first night I took occupancy of Apartment 20, Defendant blasted music at an excessive level from 8:00 p.m. to 5:00 a.m. Defendant's conduct was deliberate and meant to send a message to me that she can do whatever she wants and does not care what her behavior costs her neighbors.

Since taking occupancy, Defendant has continued to blast loud music, scream loudly in her Apartment, constantly bang and slam her door, and cause a nuisance at least two to three times every week.

Defendant's conduct has only gotten worse in recent months.

Defendant's conduct forces me to get no sleep on multiple evenings and has greatly diminished my ability to use of Apartment 20 for the purpose I rented it for, specifically to sleep, rest and have a place to live.

Due to Defendant's conduct, I am forced to walk quietly in Apartment 20 so that Defendant does not realize that I am home. If Defendant is not aware that I am home, then she does not create loud, objectionable noises.

When Defendant is aware that I am in Apartment 20 she will constantly slam her door loudly as a threat. These acts cause me to fear for my safety as I do not know if Defendant intends to come to my apartment.

Defendant has also been observed by myself videotaping Apartment 20's entry door. It appears that Defendant is trying to goad me into an altercation where she will videotape only the part of the incident where I am wrong. I have avoided her during these moments and have made multiple calls to 3-1-1 and the NYPD. Even when the NYPD arrives, I do not feel safe, as Defendant will try to seek ret-

tribution by making loud noises and screaming at me once they leave the Building.

I have also refrained from having friends and family visit me at Apartment 20. On one occasion, in October 2020, I had a friend visit and Defendant constantly was banging on my door and scaring me and my friend. When my friend left, we noticed the offensive sign on Defendant's door telling my friend to "Get the F__K Away". I took the photograph of the sign and sent it to Plaintiff.

On at least two or three evenings each month, the objectionable conduct becomes more violent and loud. On these nights there is no way that I can sleep and I fear that the anxiety induced on these evenings will cause more sleepless nights.

Defendant is a danger to this Building and to everyone who lives here

Plaintiff has provided a sworn affidavit from Alexandra Papadopolulos, the current occupant of Apartment 25, who has lived in the Building as a roommate of Sheila O'Neal, the tenant of Apartment 25. Apartment 25 is located directly above the defendant's apartment. Papadopolulos states in relevant part:

Since the first day that I have lived in the Building, I have had the displeasure of having to deal with Defendant. Residing in the apartment above Defendant is a living hell, as I never know whether she will have a violent episode on any given night.

...

As Apartment 25 is directly above Apartment 19, I often feel my floors start to shake from the insanely loud music played by Defendant.

Defendant's conduct is deliberate and intended to cause unease and harm to the other tenants in the Building. Defendant will purposefully play extremely loud music for twenty to thirty second sessions and then go completely silent for five to ten minutes. This conduct will go on from 10:00 p.m. to 3:00 a.m. multiple times every week.

...

Defendant has also caused me to avoid having any guests in Apartment 25. In July 2020, I had a friend visit me at Apartment 25. Defendant immediately began to blast loud music when she knew I had company. When my guest asked Defendant to lower her music, Defendant responded by harassing my guest and throwing garbage outside my door. When cleaning up the garbage I saw shards of glass that had broken off a bottle and were all over the floor, creating a dangerous condition

...

Due to Defendant's constant loud noise and harassment, I have contacted 3-1-1 on at least eight occasions.

On two of the eight occasions, the NYPD appeared in the Building.

Upon the police leaving the Building, Defendant's conduct always gets worse and she always gets extremely angry. These are the times that I am most concerned for my own safety.

Plaintiff has provided affidavits from two former tenants, Jesse Schwartz and Sarah Story, who claim that they vacated the apartment due in whole or in part to the defendant and her conduct.

Meanwhile, in her affidavit submitted in opposition to the motion, defendant admits that she “love[s] music, especially reggae.” She further states:

I have a vinyl collection and play it on a turntable because I find that has better sound than any other way of listening to music. Some times I invite my friends to my home to celebrate special occasions and we sing along to the music. In 2020 we did not have much to celebrate except my birthday on September 15 and when Joe Biden won the presidency.

Most of the times when I play music or watch a movie my neighbors do not have any problem with it. I have no way of knowing if they are annoyed or even home to hear it unless they ask me to turn it down. Generally whenever my neighbors have knocked on my door to ask me to turn down the music, I feel bad for disturbing them and turn it off or down.

Otherwise, defendant claims she does not recognize the names of some of the people who submitted affidavits in support of plaintiff’s application, points out that the tenant who lives in Apartment 25 did not submit an affidavit and wonders “why the noise bothers Ms. O’Neil’s roommate but not her.” Defendant further states:

I like to get to know my neighbors, so I wish that the other tenants who submitted affidavits, Mr. Schwarz, Ms. Cushing, Ms. Story, and Mr. Miller, had just talked to me civilly instead of calling the police, 311, and the landlord. I would have happily participated in mediation if they had calmly requested that so that we could find a solution that works for everyone without the threat of a judgment aimed at me.

Discussion

A preliminary injunction is a drastic remedy and should not be granted unless plaintiff can demonstrate “a clear right” to such relief (*City of New York v. 330 Continental, LLC*, 60 AD3d 226 [1st Dept 2009]). On a motion for preliminary injunctive relief, plaintiff must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in its favor (see *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; see also *1234 Broadway LLC v. West Side SRO Law Project*, 86 AD3d 18 [1st Dept 2011]).

A cause of action for private nuisance requires a showing that the defendant’s 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 Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564 [1977]; see *Hutcherson v. Hill*, 161 AD3d 495 [1st Dept 2018]; *Domen Holding Co. v. Aranovich*, 1 NY3d 117 [2003]).

A landlord may terminate a rent stabilized tenancy due to a nuisance condition. The Rent Stabilization Code, 9 NYCRR § 2524.3, provides as follows:

Without the approval of the DHCR, an action or proceeding to recover possession of any housing accommodation may only be commenced after service of the notice required by section 2524.2 of this Part, upon one or more of the following grounds, wherein wrongful acts of the tenant are established as follows:

...

(b) The tenant is committing or permitting a nuisance in such housing accommodation or the building containing such housing accommodation; or is maliciously, or by reason of gross negligence, substantially damaging the housing accommodation; or the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety.

While a finding of a violation of the New York City Noise Control Code is not necessary to demonstrate a *prima facie* cause of action for private nuisance (see *61 West 62 Owners Corp. v. CGM EMP LLC*, 77 AD3d 330 [1st Dept 2010]), its provisions are instructive. NYC Administrative Code § 24-218 provides in relevant part as follows:

(a) No person shall make, continue or cause or permit to be made or continued any unreasonable noise.

(a-1) No person shall make, continue or cause to permit or be made or continued any unreasonable noise:

(1) for any commercial purpose or during the course of conducting any commercial activity; or

(2) through the use of a device, other than a device used within the interior living space of an individual residential unit, installed within or upon a multiple dwelling or a building used in part or in whole for non-residential purposes.

(b) Unreasonable noise shall include but shall not be limited to sound, attributable to any device, that exceeds the following prohibited noise levels:

(1) Sound, other than impulsive sound, attributable to the source, measured at a level of 7 dB(A) or more above the ambient sound level at or after 10:00 p.m. and before 7:00 a.m., as measured at any point within a receiving property or as measured at a distance of 15 feet or more from the source on a public right-of-way.

(2) Sound, other than impulsive sound, attributable to the source, measured at a level of 10 dB(A) or more above the ambient sound level at or after 7:00 a.m. and before 10:00 p.m., as measured at any point within a receiving property or as measured at a distance of 15 feet or more from the source on a public right-of-way.

(3) Impulsive sound, attributable to the source, measured at a level of 15 dB(A) or more above the ambient sound level, as measured at any point within a receiving property or as measured at a distance of 15 feet or more from the source on a public right-of-way. Impulsive sound levels shall be measured in the A-weighting network with the sound level meter set to fast response. The ambient sound level shall be taken in the A-weighting network with the sound level meter set to slow response.

This action has been commenced by summons with notice, and there is no complaint at this juncture. Thus, it is unclear what precise legal theories plaintiff will assert and what remedies plaintiff will

seek in this action. The court finds that plaintiff is attempting to assert a cause of action for ejectment based upon nuisance against the defendant.

On this record, there are six affidavits from current and former tenants of the building who live in close proximity to the defendant attesting to her objectionable and disruptive conduct spanning a significant period of time and particularly occurring late at night. These affidavits are consistent in their descriptions of defendant's conduct. Plaintiff's own employees state based upon their personal knowledge that they have received numerous complaints about defendant's behavior. Numerous 311 complaints have been made, and the NYPD has been involved on multiple occasions.

For her part, defendant does not deny listening to music. Indeed, she implicitly admits that sometimes, when she plays music or watches a movie, her neighbors do have a problem with it. The court is troubled by defendant's further admission that "[g]enerally whenever my neighbors have knocked on my door to ask me to turn down the music, I feel bad for disturbing them and turn it off or down." This statement concedes that defendant has been repeatedly asked to turn her music down. Defendant's use of the word "generally" is cause for concern because it may imply that there are times when she does not feel bad for disturbing her neighbors or doesn't turn down her music. Nonetheless, the fact that defendant admits she has been repeatedly asked by her neighbors to turn down her music highlights an ongoing problem and a potential nuisance.

Defendant further admits to having knowledge that tenants have contacted 311 and the NYPD to complain of noise she has caused. Contrary to defendant's contention, there is no legal requirement that plaintiff or its tenants talk to her "civilly" nor mandate that the parties proceed to mediation which defendant claims she "would have happily participated in [] if they had calmly requested that..." While mediation may be fruitful at this juncture, a topic which was explored by the court on the record during oral argument, it is defendant who is obligated by law not to cause or maintain a private nuisance in the first instance.

However, as defense counsel points out, plaintiff has failed to serve a predicate notice on defendant. Indeed, no such notice is annexed to plaintiff's moving papers. Part of plaintiff's *prima facie* case in this action seeking ejectment is that the defendant has been served with a valid notice required by 9 NYCRR § 2524.2. That provision states in relevant part:

Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession.

A landlord's failure to serve this predicate notice or otherwise comply with 9 NYCRR § 2524.2 mandates dismissal of an action seeking possession (*see i.e. Hirsch v. Stewart*, 63 AD3d 74 [1st Dept 2009]; *see also Prana Growth Fund I, L.P. v Lazala*, 8 Misc 3d 667 [Sup Ct NY 2005]). Since plaintiff has failed to serve the requisite notice on defendant in compliance with the rent stabilization code, it has necessarily failed to demonstrate a likelihood of success on the merits at this juncture.

Accordingly, the motion for injunctive relief must be denied. This result gives the court pause, because as the court has laid out in this decision, defendant's conduct if proven could very well result in her ejectment from the apartment. The court is optimistic that defendant, a long-term rent stabilized tenant, can reach an amicable resolution of this action. That may involve concessions on defendant's part as simple as lowering the volume of the audio devices she is using or wearing headphones at night, options which defendant may want to consider to avoid further litigation. Apartment dwelling in New York City does not come without compromises such as hearing reasonable noise from one's neighbors, among other sources. However, defendant cannot engage in behavior that constitutes a private nuisance without impunity.

The balance of the motion seeking relief for defendant's alleged nonpayment constitutes an impermissible end-run around the moratorium on evictions due to non-payment and is therefore denied.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that plaintiff is directed to file and serve a complaint within 120 days; and it is further


ORDERED that defendant is directed to answer as per the CPLR; and it is further

ORDERED that the parties are directed to submit a letter advising as to the status of this action on or before August 3, 2021 by filing on NYSCEF and emailing a courtesy copy to Nicole Little, Esq. at NTLITTLE@nycourts.gov. No in-person appearances are required on this date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3/5/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.