

OceanhouseNYC, LLC v 140 W. St. (NY), LLC

2021 NY Slip Op 31451(U)

April 28, 2021

Supreme Court, New York County

Docket Number: 656345/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 656345/2020

OCEANHOUSENYC, LLC, PRASHANT LAL,

MOTION DATE 04/27/2021

Plaintiff,

MOTION SEQ. NO. 003

- v -

140 WEST STREET (NY), LLC ,BENJAMIN SHAOUL,
VERIZON NEW YORK INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion to/for DISMISS

The motion by defendant Verizon New York Inc. ("Verizon") to dismiss the complaint is granted in part and denied in part.

Background

Plaintiffs live in a mixed used condo building (a building with both commercial and residential units). The building used to be exclusively occupied by defendant Verizon New York Inc. ("Verizon") but now houses both Verizon and residential apartments. Verizon contends that it sold the top 22 floors of the building (which used to be administrative offices) to developers, knowing that they would convert these spaces to residential apartments.

Plaintiffs claim that the noise from a certain bank of elevators (the "C" bank) makes it unbearable to live in their apartment. Plaintiffs also complain about the machine room for the elevators, which they allege is excessively noisy and is located directly under their apartment. They insist there is substantial interference with the quiet use and enjoyment of their apartment.

Plaintiffs contend that the noise and vibrations violate all relevant building and noise codes.

They allege that the family's two daughters cannot use their bedrooms because of the noise.

Plaintiffs bring five causes of action against Verizon for nuisance, an alternative cause of action based on nuisance (eighth cause of action), trespass, violations of the New York Noise and Building Codes and injunctive relief.

Verizon moves to dismiss these causes of action and points out that the elevators at issue were built in the 1920s, which means that the 2014 New York Building Code is not applicable. Verizon questions how it could be held liable for nuisance claims when it has simply continued to operate its commercial units. It emphasizes that it has not acted unreasonably. Verizon maintains that injunctive relief is not available where monetary damages are available.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).

On a “motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Nuisance Claims (Seventh and Eighth Causes of Action)

The seventh cause of action alleges that the use of the elevator banks without any soundproofing or vibration reducing technology merits an injunction barring defendant, including Verizon from using the C bank of elevators. The eighth cause of action in the amended complaint makes similar allegations and seeks monetary damages instead of injunctive relief based on the alleged nuisance.

“The elements of a common-law claim for a private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act. Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct” (*Berenger v 261 W. LLC*, 93 AD3d 175, 182, 940 NYS2d 4 [1st Dept 2012] [internal quotations and citation omitted]).

Verizon claims that the interference, if any, is not unreasonable. It argues that plaintiffs purchased a residential apartment that sits directly above the commercial elevator machine room, meaning that the knew there would be noise. Verizon acknowledges that there were pre-approved plans to move this machine room, but the remaining defendants (the “Developers”) ultimately decided not to do so. Verizon also argues that any agreements made in the purchase agreement or offering plans redounds to the Developers, not with Verizon.

In opposition, plaintiffs contend that they have stated a valid cause of action for a nuisance. They point to two acoustic reports that they claim shows the elevator-created noise is both unreasonable and excessive.

The Court denies this branch of the motion. At the motion to dismiss stage, the Court is unable to find as a matter of law that the noise generated by the elevator is reasonable. The fact

is that plaintiffs claim in the amended complaint and in the affidavit of defendant Lal in opposition (NYSCEF Doc. No. 132) that the noise is so loud that they cannot use two of the home's bedrooms.

On a motion to dismiss, the Court must take as true the allegations alleged by the plaintiffs and those allegations depict an extremely loud condition that has severely affected their use of the apartment. Verizon's assertion that plaintiffs should have known living above an elevator machine room would be loud or that this is what it means to live in Manhattan does not compel a different outcome. Those arguments do not justify dismissing these causes of action at this stage of the litigation.

The Court is well aware of Verizon's point that it should have nothing to do with this case—it was not originally named as a defendant and, according to Verizon, it was not part of any representations made to plaintiffs about elevator noise. But the claim here is nuisance and plaintiffs have successfully alleged the elements of that cause of action. Plaintiffs purportedly purchased an \$8.5 million apartment that they claim they cannot fully utilize because it is too loud.

Trespass -Ninth Cause of Action

“The essence of trespass to real property is injury to the right of possession, and such trespass may occur under the surface of the ground. A person need not have title to the property, but must simply have sufficient property rights to maintain an action for trespass”

(Bloomingdales, Inc. v New York City Tr. Auth., 13 NY3d 61, 66, 886 NYS2d 663 [2009]).

Verizon argues that a trespass cannot be viable where there is no entry onto the property. It asserts that a trespass does not derive from light, noise or vibrations on another's property.

In opposition, plaintiffs contend that a cause of action for trespass is cognizable here because Verizon has interfered with the use of the property. They emphasize that the conditions are permanent rather than temporary.

The Court dismisses this cause of action. “[C]ourts have precluded trespass claims where the entry or intrusion was intangible, such as the occurrence of vibrations, shading of a plaintiff’s property, or a permeating odor or vapors of gasoline. Generally, intangible intrusions, such as by noise, odor, or light alone, are treated as nuisances, not trespass because they interfere with nearby property owners’ use and enjoyment of their land, not with their exclusive possession of it” (*Ivory v Intl. Bus. Machines Corp.*, 116 AD3d 121, 129-30, 983 NYS2d 110 [3d Dept 2014] [internal quotations and citations omitted]).

Plaintiffs did not cite any binding case law for the proposition that vibrations and excessive noise constitute a trespass. Rather, as asserted above, plaintiffs have stated causes of action based on nuisance.

Tenth Cause of Action- Violations of NYC Building and Noise Codes

Verizon claims that that plaintiffs failed to allege which of the four building codes they seek relief under. It insists that the elevators and the machine room are subject to the 1968 Building Code because they are original installations from the 1920s. Verizon maintains that the 2014 Building Code sections cited by plaintiffs concerning vibration isolation pads and the placement of machinery rooms near dwelling units are inapplicable to the instant circumstances.

Verizon admits that it is unclear whether the Noise Code applies to the instant situation but argues that plaintiffs were required under the Noise code to exhaust administrative remedies with the Environmental Control Board before bringing this cause of action.

Plaintiffs contend in opposition that when a building is converted to residential use, they are governed by the Building Code in effect at the time of the conversion. They maintain that this makes the 2014 Building Code the applicable statutory scheme.

The Court denies this branch of the motion to dismiss. The Multiple Dwelling Law (“MDL”) § 84 (entitled Construction standards for the control of noise) provides, in part that “Any construction of a multiple dwelling commenced after January first, nineteen hundred seventy shall comply with the standards promulgated pursuant to this section in effect at the time of commencement of such construction.”

The instant circumstances present a unique situation in which a building was converted to *partial* residential use. But the Court finds that plaintiffs have stated a valid cause of action because the building was converted from entirely commercial to a mixed used building. The purpose of the Building Code is to ensure protections for residents and the residential portion of this building was constructed when the 2014 Building Code was in effect. Although the Court understands Verizon’s point that its elevators have been in use since the 1920s, the fact is that *according to Verizon* it decided to sell the upper 22 floors with the knowledge that residential units would be constructed. On this motion to dismiss, Verizon cannot have it both ways; it cannot decide to sell floors to be converted to multi-million dollar residential units and then claim that the newly constructed units should be subject to the Building Code from 1968. That makes little sense in these circumstances.

Moreover, Verizon did not cite any binding case law for its proposition that plaintiffs cannot bring a cause of action under the Noise Code without first resorting to some administrative procedure. Nothing in that statutory scheme requires that administrative remedies be pursued (or exhausted) prior to bringing a cause of action.

Eleventh Cause of Action Injunctive Relief

Verizon claims that this cause of action should be dismissed because it is duplicative of the nuisance claim and seeks the exact same relief. It also argues that New York does not recognize an independent cause of action for injunctive relief.

Although plaintiffs insist that they can seek injunctive relief, they do not address whether this specific cause of action can be maintained.

The Court dismisses this cause of action. As Verizon points out, injunctive relief cannot form the basis of an independent cause of action (*Calderon v Kenga Roo Realty LLC*, 171 AD3d 515, 516, 95 NYS3d 817(Mem) [1st Dept 2019]).

However, the Court emphasizes that plaintiffs are entitled to seek injunctive relief in connection with its other causes of action. As plaintiffs point out, they are entitled to seek relief in the alternative and courts have held that injunctive relief can be appropriate in similar situations (*see 61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 335, 906 NYS2d 549 [1st Dept 2010] [granting a limited preliminary injunction on defendant from playing loud music at its bar]).

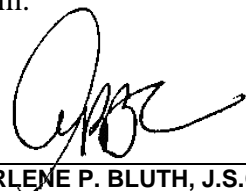
The Court observes that it did not grant plaintiffs' motion for a preliminary injunction barring use of the C bank of elevators and the machine room (NYSCEF Doc. No. 127). But that does not mean that more limited injunctive relief would not be appropriate, especially as the case moves forward with discovery.

Accordingly, it is hereby

ORDERED that the motion by defendant Verizon New York Inc. ("Verizon") to dismiss is granted only to the extent that the ninth (trespass) and eleventh (injunctive relief) causes of

action are severed and dismissed and denied as to the remaining causes of action, and Verizon shall answer pursuant to the CPLR.

Already Scheduled Remote Conference: July 7, 2021 at 2 p.m.



4/28/2021

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE