Getty v Tolentino
2021 NY Slip Op 31974(U)
June 8, 2021
City Court of Rye
Docket Number: SC20-087
Judge: Joseph L. Latwin

CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

RICHARD L. GETTY,

Plaintiff,

-against-

MIKE TOLENTINO and LAURA TOLENTINO,

Defendants.

SC20-087

DECISION AND ORDER

Appearances:
Plaintiff by Dan Schiavetta, Jr., Esq., New Rochelle, NY
Defendants *Pro Se*

This case proves that music does not soothe the savage breast.[1]

This is a small claims action brought by the lessee of a cooperative apartment, a musician, against the owners of a vertically adjoining cooperative apartment based upon loud music being played. Plaintiff claims this constituted a nuisance and interfered with plaintiff's ability to profit from an Airbnb deal.

Defendants, one spouse of whom is a musician, counterclaimed claiming that plaintiff played "satanic music"[2] and "construction noises", and excessively rang the door buzzer, and banged on the floor constituting a nuisance that interfered with the defendant's ability to prepare for musical performance and music lessons, resulting in the loss of profit from a sale of the cooperative apartment.

It seems that there is more emotion underlying this case than the legal dispute. The claim was filed November 18, 2020 and the counterclaim filed five

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[1] William Congreve, *The Mourning Bride* [1697]. Oft, misquoted as "music soothes the savage beast",

[2] While the Court is familiar with many genres of music and having heard Offenbach's *Orphee aux enfers* but having never visited Hades, the Court has no idea what in hell "satanic music" is.

days later. The Court conferenced the case on January 25, 2021 and in Court, both sides agreed to mediate the case. The Court entered an Order referring the case to mediation. On February 16, 2021, the Court received an email from the administrator of the mediation service advising that "[o]ne side is adamant that he is not interested in mediation" and the service had not heard back from legal counsel for the other side. With neither side pursuing mediation, the Court scheduled a conference on April 5, 2021 and thereat set a trial date for June 2. A trial was held on that day.

At trial, plaintiff testified that he owns[3] the cooperative unit that he purchased in 2002 for $40,000 (Pl. Ex. 1). In late 2019, early 2020, plaintiff heard noise, guitar playing, singing, and banging emanating from defendants upstairs adjoining unit during the day into the evening up to 8:00 p.m. Plaintiff said he left a note on defendants' door and later called the building management and the police. (Pl. Ex. 2). The police report stated the responding officer heard guitar playing and stomping after exiting the elevator on September 19, 2020 at 5:09 p.m. and defendant said he would stop playing for the night.

Plaintiff said he put the unit on Airbnb for rental in December 20, 2020 to January 11, 2021 for $4,947 net and found a renter that previously stayed in the unit. The potential renter in electronic correspondence raised the issue of noise from the neighbor on a previous stay and said he had to confirm with his wife. An hour and a half later, the potential renter backed out.

Plaintiff made recordings on his phone of the music coming from defendants' unit, but they were not in a form that could be preserved in the record. Plaintiff also testified he tried to sell his unit and hired a broker.

He also said the noise prevented him from conducting Portuguese lessons.

A co-worker from the Metropolitan Opera testified that she had visited the plaintiff's apartment several times in January and February of 2021 and heard the noises. She was interested in renting the plaintiff's unit but decided not to because of the noise.

The owner of unit in the neighboring building and whose daughter

[3] By "owns", the Court understood that it meant ownership of the shares in the cooperative corporation and holder of proprietary lease for the unit.

owns a unit in plaintiff's building testified that she was in her daughter's unit three times in the last year and heard noise and singing coming from defendants' unit.

Defendant's bandmate testified that they practiced Saturdays and Wednesdays from noon to 6:00 p.m. in defendants' unit playing acoustic guitars and listening to music. He heard banging from the ceiling of the unit below and heard the door buzzer ring for two minutes at a time. He also heard loud music and extended "Joker"[4] laughing coming from plaintiff's unit. He witnessed defendant make a recording of the noises coming from plaintiff's unit. The Port Chester police responded, but no summonses were issued. This witness said he wanted to buy the unit from defendants, and made an offer in March of 2020, but there was no written contract because the defendant told him not to buy the unit.

Defendant testified and the parties agreed that the Cooperative Corporation's rules prohibit subletting. The rules do not bar the playing of music. (Def. Ex. F). Defendant said the "Joker" laughing continued for 55 minutes. He also said his bandmate offered $40,000 to buy the unit but he would not have sold it for $60,000.

Due to the COVID-19 pandemic restrictions, he had no music jobs booked and was unable to conduct lessons.

To recover for loss of profits, plaintiff must demonstrate that the defendant either breached a contract or committed a tortious act (*New Life Holing Corp. v Turner Constr. Corp.*, 2014 NY Slip Op 32590(U) [Sup. Ct. New York Co. 2014]). *Dollinger v United Eng'g Servs., PC, n.o.r.*, 2021 NY Slip Op 50516(U)[Mount Vernon City Court, June 3, 2021].

Nuisance

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all men" (Prosser, Torts [4th ed], p 571).

The elements of the tort of private nuisance are (1) an interference, substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with plaintiff's right to use and enjoy land, (5) caused by defendant's conduct, *Copart Industries, Inc. v Consolidated Edison Co. of New York, Inc*., 41 NY2d

[4] Referring to the character from the Batman series recently portrayed by Joaquin Phoenix in the 2019 movie *Joker*.

564, 394 NYS2d 169 [1977]; *Weinberg v Lombardi*, 217 AD2d 579, 629 NYS2d 280 [2nd Dept 1995].

The reasonableness of conduct is measured by reference to the ordinarily reasonable person. *Copart Industries, Inc. v Consolidated Edison Co. of New York, Inc*., *supra*. The temporary noises and annoyances that come with construction projects in urban/developed areas, without more, will not give rise to a nuisance claim. *Celebrity Studios Inc. v Civetta Excavating, Inc.*, 72 Misc2d 1077, 340 NYS2d 694 [Sup Ct. New York Co. 1973]. Apartment-house living in a metropolitan area is attended with certain well-known inconveniences and discomforts. The peace and quiet of a rural estate or the sylvan silence of a mountain lodge cannot be expected in a multiple dwelling. Mutual forbearance and the golden rule should, but unfortunately in many cases do not, act as the yardstick for the conduct of tenants in apartment houses. Reasonable consideration of the comforts of neighbors should be exercised by the occupants. *Twin Elm Mgt. Corp. v Banks*, 181 Misc 96, 97, 46 NYS2d 952 [Mun Ct Queens County 1943](dull, monotonous, repetitious playing of scales on a piano by a young novice piano student and thumping sounds that continued each day for a twelve-hour period throughout the day did not constitute a nuisance.)

Devotion to the development of one's musical abilities is viewed as being of high utility and, when conducted within reasonable parameters, it will usually be held to outweigh the harm or annoyance suffered by those exposed to it. See *Twin Elm Management Corp. v. Banks, supra*. It is generally stated that there are certain inconveniences which people living in populous areas must tolerate. Musical instrument practice commonly falls within this category. It is outside the court's province to differentiate between musical pursuits, and say, for example, that a piano is a legitimate musical instrument and drums are not. See *Douglas L. Elliman & Co. v. Karlsen*, 59 Misc2d 243, 298 NYS2d 594 [Civ.Ct.N.Y.Co.1969]. Each must be equally respected and protected. *People v Cifarelli*, 115 Misc2d 587, 589-90, 454 NYS2d 525 [Crim Ct Queens County 1982].

The Court finds that defendant’s practice of guitar and vocals did not constitute a nuisance as there was no testimony that it continued late into the night nor was there any evidence of defendant’s intent to have any sound enter plaintiff’s dwelling unit.

Interference

The elements of the tort of interference with contract are: (1) the existence of a valid contract, (2) defendant's knowledge of that contract, (3) defendant's intentional procuring of the breach, and (4) damages. *White Plains Coat & Apron Co., Inc. v Cintas Corp*., 8 NY3d 422, 835 NYS2d 530 [2007]. The tort of interference with contract requires the existence of a valid contract between plaintiff and a third party, *Lama Holding Co. v Smith Barney Inc*., 88 NY2d 413, 646 NYS2d 76 [1996]. Defendant's actual knowledge of an existing contract is an essential element of a cause of action for tortious interference, *Associated Flour Haulers & Warehousemen v Hoffman*, 282 NY 173, 181 [1940]; *Roulette Records, Inc. v Princess Production Corp*., 15 AD2d 335, 224 NYS2d 204 [1st Dept], *aff'd*, 12 NY2d 815, 236 NYS2d 65 [1962]. Here, there was no evidence that either party knew of the existence of any valid contract between the other party and a third party. Therefore, no interference with contract has been proved.

The elements of interference with a prospective contract or business relationship are: (1) defendant's knowledge of plaintiff's business opportunity with another party, (2) defendant's intentional interference with that opportunity, (3) defendant's use of wrongful means for the sole purpose of inflicting harm, (4) a showing that the contract or prospective business relationship would have been entered into but for defendant's interference, and (5) resulting damages, *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc*., 87 NY2d 614, 641 NYS2d 581 [1996].

A cause of action for interference with prospective contract or business relationship is closely akin to one for tortious interference with contract, *see* PJI 3:56. It requires proof of more culpable conduct on the part of defendant, *Carvel Corp. v Noonan*, 3 NY3d 182, 785 NYS2d 359 [2004]; *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 641 NYS2d 581 [1996]; & *BGW Development Corp. v Mount Kisco Lodge No. 1552 of Benev. and Protective Order of Elks of the United States of America, Inc*., 247 AD2d 565, 669 NYS2d 56 [2nd Dept 1998]. Specifically, plaintiff is required to show that defendant interfered with a prospective business opportunity either through the use of wrongful means or for the sole purpose of inflicting harm on plaintiff, *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc., supra*.

An interference-with-prospective-contract or business-relationship claim requires that defendant had knowledge of the prospective contract or business relationship, *Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55 [2nd Dept 2006].

Here, there was no proof that either party: (1) had knowledge of the other's business opportunity with another party, (2) intentionally interfered with that opportunity, (3) used wrongful means for the sole purpose of inflicting harm, or (4) that the contract or prospective business relationship would have been entered into but for the other's interference.

Subletting

The parties agree that the cooperative rules prohibit subletting. Plaintiff argues that renting using Airbnb was not subletting.

A sublease is a grant by a tenant of an interest in the demised premises which is less than the tenant's own, retaining to the tenant a reversion. 74A NY Jur 2d Landlord and Tenant § 787. If a tenant retains a reversion in himself, he has made a sub-lease. (*Woodhull v. Rosenth*al, 61 NY 382, 391 [1875], *see, Cooper v. 140 East Assoc.*, 27 NY2d 115, 118, 313 NYS2d 725 [1970]; *Gillette Bros. v. Aristocrat Rest.*, 239 NY 87 [1924]; *Stewart v. Long Is. R.R. Co*., 102 NY 601 [1896]*; Ganson v. Tifft*, 71 NY 48 [1977]. *Bostonian Shoe Co. of New York v Wulwick Assoc.*, 119 AD2d 717, 501 NYS2d 393 [2nd Dept 1986].

Airbnb does not own properties. It acts as an intermediary, a broker between those who want to rent out space and those who are looking for space to rent. Airbnb offers you someone's home as a place to stay. The owner lists his property for rental and a renter will enter information and pay for the use. The stay periods are usually less than one month.

Here, plaintiff proposed using Airbnb to broker the rental of plaintiff's unit for a three to four-week period. Thereafter, plaintiff would have the right to resume possession. This was a proposed sublease. There was no proof of any waiver of that prohibition or any consent to any sublet. It was not permitted by the Cooperatives rules. Plaintiff could have no reasonable expectation to lawfully profit by such a sublease and therefore had no damages.

The burden of proof rests on the party asserting the claim. That means that plaintiff must establish by a fair preponderance of the credible evidence that the claim plaintiff makes is true. Same for defendant's case. The credible evidence means the testimony or exhibits worthy to be believed. A preponderance of the evidence means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. It refers to the quality of the evidence, that is, its convincing quality, the weight, and

the effect that it has on minds. The law requires that in order to prevail on a claim, the evidence that supports the claim must appeal as more nearly representing what took place than the evidence opposed to the claim. If it does not, or if it weighs so evenly that one is unable to say that there is a preponderance on either side, then the question must be decided in favor of the other party. It is only if the evidence favoring the party asserting the claim outweighs the evidence opposed to it that one can find in favor of that party. N.Y. Pattern Jury Instr.--Civil 1:23.

Each party bears the burden of proof of the other's liability and its own damages. Even in the relatively relaxed and informal atmosphere of a small or commercial claims action, each party bears the burden of establishing its case by a preponderance of the evidence. *De Meo v Consolidated Edison Co. of N.Y., Inc*., 32 Misc3d 131(A), 934 NYS2d 33 [App.Term 2nd, 11th & 13th Jud Dists 2011]; *Rodriguez v Mitch's Transmission*, 32 Misc3d 126(A), 932 NYS2d 762 [App.Term 9th & 10th Jud Dists 2011] *& Naclerio v. Adjunct Faculty Assn.*, 1 Misc3d 135[A], NYS2d 625 [App. Term, 9th & 10th Jud Dists 2003]. Each party bears the burden of proving the extent of their damages and the court cannot guess as to the extent of damages. *See, Murphy v. Lichtenberg-Robbins Buick*, 102 Misc2d 358, 424 NYS2d 809 [App. Term, 2nd & 11th Jud Dists 1978]. "Although the amount of such damages need not be proven to exactitude, they must be demonstrated with sufficient certainty, and cannot be speculative" (*Levine v American Federal Group, Ltd.*, 180 AD2d 575, 577 [1st Dept 1992]). *Dollinger v United Eng'g Servs, supra.* Here, neither party has sustained their burden with respect to damages.

In providing the parties with substantial justice according to the rules and principles of substantive law (UCCA 1804, 1807; *see Cosme v Bauer*, 27 Misc3d 130(A), 910 NYS2d 404 [App Term, 9th & 10th Jud Dists 2010]*; Ross v Friedman*, 269 AD2d 584, 707 NYS2d 114 [2nd Dept 2000]; & *Williams v Roper*, 269 AD2d 125 [1st Dept 2000]) and under a fair interpretation of the evidence (*see WRG Acquisition XIII, LLC v. Strasser*, 55 Misc3d 129(A), 55 NYS3d 695 [App Term, 9th & 10th Jud Dists 2020] with this Court having had the opportunity to observe and evaluate the testimony and demeanor of the witnesses and to evaluate the credibility of the witnesses, (*Trimble v Hughes*, 67 Misc3d 143(A) [App Term, 9th & 10th Jud Dists 2020]; *Gupta v Janiesch*, 67 Misc3d 135(A) [App Term, 9th & 10th Jud Dists 2020] (*see also, Vizzari v. State of New York*, 184 AD2d 564 [2nd Dept 1992]; *Kincade v. Kincade*, 178 AD2d 510, 511 [2nd Dept 1991]; & *Rotem v. Hochberg*, 28 Misc3d 127(A), 957 NYS2d 639 [App Term, 9th & 10th Jud Dists, 2010]), the Court finds that neither party has proven their claim or their damages.

Accordingly, it is,

ORDERED and ADJUDGED that the plaintiff's claim and defendant's counterclaim be and the same are hereby dismissed.

June 8, 2021

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JOSEPH L. LATWIN
Rye City Court Judge

ENTERED

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Clerk

Appeals
--An appeal shall be taken by serving on the adverse party a notice of appeal and filing three copies of: (1) the Notice of Appeal with the order or judgment being appealed; (2) the Affidavit of Service; and (3) a Request for Appellate Term Action ("RATA") with the Rye City Court Clerk. The Notice of Appeal shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken. CPLR § 5515.
--Pursuant to UCCA § 1701 "Appeals in civil causes shall be taken to" the appellate term of the supreme court, 9th Judicial District.
-- An appeal as of right from a judgment entered in a small claim or a commercial claim must be taken within thirty days of the following, whichever first occurs:

1. service by the court of a copy of the judgment appealed from upon the appellant.

2. service by a party of a copy of the judgment appealed from upon the appellant.

3. service by the appellant of a copy of the judgment appealed from upon a party. Where service as provided in paragraphs one through three of this subdivision is by mail, five days shall be added to the thirty-day period prescribed in this section. UCCA § 1703(b).

-- The party taking an appeal shall promptly arrange with the Clerk to engage a service to have the record transcribed. The cost of transcription shall be borne by

the appellant.
-- Pursuant to the Rules of the Appellate Term (Part 732), the Record must be perfected within 90 days of the filing of the Notice of Appeal with the Appellate Term.

Exhibits
Exhibits will be held for 30 days by the Clerk. After that time, they may be destroyed, if not picked up or arrangements for their return are not made.