Obrecht v BK Beasts LLC
2021 NY Slip Op 33879(U)
August 4, 2021
Supreme Court, Kings County
Docket Number: Index No. 508808/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of August, 2021.

PRESENT:
CARL J. LANDICINO, J.S.C.

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ROBERT WILLIAM OBRECHT, JR, Index No. 508808/2018

Plaintiff,

-against- DECISION AND ORDER

BK BEASTS LLC d/b/a CROSSFIT OUTBREAK EAST WILLIAMSBURG, Motion Sequence #2

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	37-59,
Opposing Affidavits (Affirmations)	64,
Reply Affirmation or Affidavit	68,
Memorandum of Law	60, 67

After a review of the papers and oral argument, the Court finds as follows:

This is an action commenced by Plaintiff, Robert William Obrecht (hereinafter the "Plaintiff") alleging a cause of action for private nuisance and seeking an injunction as against Defendants BK Beasts, LLC (d/b/a Crossfit Outbreak East Williamsburg) (hereinafter the "Defendant"). The Plaintiff contends that he resides in and owns and operates his recording business at a property located at 462 Humboldt Street, Brooklyn, NY (hereinafter the "Subject Premises"). He also contends that the Defendant's operation of its gymnasium business has interfered with his use and enjoyment of the Subject Premises because the Defendant has by its

business operation created a nuisance due to noise created by Defendant's client's use of weights and other exercise equipment at the Defendant's business premises located at 208 Frost Street, Brooklyn, NY (the "Gym").

The Plaintiff now moves (motion sequence #2) for an order, (i) pursuant to CPLR 3212 (a), (c), and (e) granting Plaintiff's motion for partial summary judgment against Defendant on the first and second causes of action (nuisance and injunction respectively) in the Complaint and dismissal of the Defendant's affirmative defenses; and (ii) pursuant to CPLR 3025 (b) granting Plaintiff's motion to amend the caption of the complaint to include the words "a/k/a BK Beasts II LLC d/b/a Crossfit Outbreak East Williamsburg" to the name of the Defendant. The Plaintiff contends that he has provided evidence that the Defendant's actions during the operation of its gymnasium constitutes a private nuisance as a matter of law. The Plaintiff also contends that the court should grant his application to amend the complaint to include BK Beasts II LLC d/b/a Crossfit Outbreak East Williamsburg as an a/k/a for the Defendant insofar as the discovery proffered by the Defendant included an unsigned lease rider that indicated BK Beasts II LLC (d/b/a Crossfit Outbreak East Williamsburg) was the actual tenant.

The Defendant partially opposes the motion and argues that it should be denied. The Defendant argues that the motion should be denied as it improperly relies on the expert affidavit of Alan Fierstein. The Defendant contends that this Court should preclude the affidavit of Alan Fierstein since it was conducted without proper notice to the Defendant. The Defendant argues that without the Fierstein Affidavit, the Plaintiff is unable to meet his *prima facie* burden. Also, the Defendant argues that the Plaintiff's application for a permanent injunction is moot as the Defendant has relocated its business and no longer operates its business adjacent to the Subject Premises.

In response, the Plaintiff argues that his motion should be granted and that the Defendant has misapprehended the notice requirements related to expert affidavits. The Plaintiff contends that the Defendant's position is without merit and that it has presented no substantive opposition to the motion at issue because it has been precluded by Court order as a result of its own apparent failure to provide discovery.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure on the part of the movant to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In general, a business or property owner "owes a duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property." *Broxmeyer v. United Cap. Corp.,* 79 AD3d 780, 782, 914 N.Y.S.2d 181, 184 [2d Dept 2010]. Included in this duty is a duty to prevent against engaging in nuisance activity. *See Gellman v. Seawane Golf & Country Club, Inc.,* 24 AD3d 415, 417, 805 N.Y.S.2d 411, 413 [2d Dept 2005] and *Curry v. Matranga*, 194 AD3d 1011, 144 N.Y.S.3d 594 [2d Dept 2021]; *see also Peck v. Newburgh Light, Heat & Power Co*., 132 AD 82, 83, 116 N.Y.S. 433, 433 [2d Dept 1909]. "The elements of a private nuisance cause of action 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." *Massaro v. Jaina Network Sys., Inc.,* 106 AD3d 701, 703, 964 N.Y.S.2d 588, 591 [2d Dept 2013], quoting *Donnelly v. Nicotra,* 55 AD3d 868, 868, 867 N.Y.S.2d 118, 119 [2d Dept 2008].

Turning to the merits of the Plaintiff's application made pursuant to CPLR 3212, the Court finds that the Plaintiff has met its *prima facie* burden in relation to his cause of action for nuisance.[1] In support of its application, the Plaintiff relies on an affidavit from the Plaintiff, an affidavit from architect Walter C. Maffei, an affidavit from sound engineer Alan Fierstein, the deposition of Adam Sturm on behalf of the Defendant, documents related to sound measurements taken at the Plaintiff's residence and other related documents. In his affidavit the Plaintiff stated that "[f]rom the time the Gym first opened, I was able to feel vibrations and hear crashing, impact noise from the direction of the Gym." The Plaintiff also stated that "[r]epresentatives of Cross-fit were

[1] The Court finds that since it is uncontroverted that the Defendant no longer conducts its business adjacent to the Subject Property the Plaintiff's application for summary judgment on its cause of action for an injunction is denied as it is now academic.

completely aware that the noise was excessive and that it was disturbing me on a daily basis and preventing me from doing my recordings work."

In addition, the Plaintiff contended that "[o]vertime, the sound of barbells dropping within the gym became more frequent and disturbing, eventually to the point where I was at time woken in the morning and was unable to use the recording studio in the building." The Plaintiff thereafter detailed the various times he contacted the Defendant and indicated that no changes were instituted by the Defendant to abate the alleged nuisance (see Plaintiff Affidavit, NYSCEF Doc. 39). As part of his affidavit, Alan Fierstein stated that he is a sound technician and obtained sound measurements at the Subject Premises. Mr. Fierstein stated that he measured the sound coming from the Defendant's business while located at the Subject Premises and reviewed his findings in relation to the NYC Noise Control Code. He found that "[t]he noise during both rounds of testing is not only too loud, but it is very sporadic and unpredictable." He concluded that "the sound created by dropping weights in the Gym is substantial and unreasonable and significantly interferes with the use and enjoyment of Mr. Obrecht's property both as a residence and as a recording studio." He also concluded that "the noise levels at low frequencies created by dropping weights persistently violate 24-218(a) of the New York City Noise Control Code and are unreasonable *per se*." (See Fierstien Affidavit, NYSCEF Doc. 40). See *JP Morgan Chase Bank v. Whitmore*, 41 AD3d 433, 434, 838 N.Y.S.2d 142, 144 [2d Dept 2007]. As a result, the Plaintiff has met his *prima facie* burden on his first cause of action for nuisance.[2] *See Massaro v. Jaina Network Sys., Inc.,*

[2] The Court also grants the Plaintiff's application to strike the Defendant's affirmative defenses. Pursuant to CPLR 3211(b) a party may seek to dismiss a defendant's affirmative defenses on the ground that they are not properly stated or have no merit. See *Edwards v. Walsh*, 169 AD3d 865, 870, 94 N.Y.S.3d 629, 634 [2d Dept 2019]; *Mazzei v. Kyriacou*, 98 AD3d 1088, 1089, 951 N.Y.S.2d 557, 559 [2d Dept 2012]. The Court notes that the Defendant does not otherwise oppose or address the Plaintiff's application made pursuant to CPLR 3211(b).

106 AD3d 701, 703, 964 N.Y.S.2d 588, 591 [2d Dept 2013]; see also *Aristides v. Foster*, 73 AD3d 1105, 1106, 901 N.Y.S.2d 688, 690 [2d Dept 2010].

In opposition, the Defendant has failed to raise a triable issue of fact that would prevent the court from granting the Plaintiff's motion. Defendant raises CPLR 3120(2). Disclosure as it relates to inspections is addressed by CPLR 3120, which provides in pertinent part that:

> 1. After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum:
> (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served; or
> (ii) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.
> 2. The notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection, copy, test or photograph, or of the entry upon the land or other property and, in the case of an inspection, copying, testing or photographing, shall set forth the items to be inspected, copied, tested or photographed by individual item or by category, and shall describe each item and category with reasonable particularity.

The Defendant's reliance upon this section is mislaid, as it would have required the Defendant to notice the Plaintiff if the Defendant wanted to inspect Plaintiff's property. Nothing prevented the Defendant from doing this during discovery and there is no indication that the Defendant sought an inspection. In addition, and in any event, the Court finds that Mr. Fierstein's affidavit and testimony is admissible given that "there is no basis for concluding that a court must reject a party's submission of an expert's affidavit or affirmation in support of, or in opposition to, a timely motion for summary judgment solely because the expert was not disclosed pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness, or prior to the making of the motion." *Rivers v. Birnbaum*, 102 AD3d 26, 39, 953 N.Y.S.2d 232, 241 [2d Dept

2012]; see also *Cruz v. 1142 Bedford Ave., LLC*, 192 AD3d 859, 145 N.Y.S.3d 77, 80 [2d Dept 2021]; *Cobham v. 330 W. 34th SPE, LLC*, 164 AD3d 644, 645, 83 N.Y.S.3d 537, 539 [2d Dept 2018]. In *Salcedo v. Weng Qu Ju*, the Court held that it was an abuse of discretion to refuse "to consider the plaintiff's expert affidavit submitted in opposition to the respondents' motion for failure to comply with CPLR 3101(d)(1)(i)." *Salcedo v. Weng Qu Ju*, 106 AD3d 977, 978, 965 N.Y.S.2d 595, 597 [2d Dept 2013]. In *Yampolskiy v. Baron* the Court held that an expert's affidavit should be considered if "there was no evidence that the failure to disclose the experts was intentional or willful, and there was no showing of prejudice to the plaintiff." *Yampolskiy v. Baron*, 150 AD3d 795, 796, 53 N.Y.S.3d 677, 679 [2d Dept 2017]. In the instant matter, the Defendant has not provided any evidence that the failure to have previously disclosed Mr. Fierstein's findings was intentional or that there was prejudice to the Defendant.

The Court also grants the Plaintiff's application to amend the complaint to include the words "a/k/a BK Beasts II LLC d/b/a Crossfit Outbreak East Williamsburg" to the name of the Defendant. In general, "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit." *Degregorio v. Am. Mfrs. Mut. Ins. Co.*, 90 A.D.3d 694, 695, 934 N.Y.S.2d 457, 460 [2nd Dept, 2011], quoting *Sinistaj v. Maier*, 82 A.D.3d 868, 869, 918 N.Y.S.2d 196, 198 [2nd Dept, 2011]. "Additionally, '[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt.'" *Lucido v. Mancuso*, 49 A.D.3d 220, 227, 851 N.Y.S.2d 238, 243 [2nd Dept, 2008], *quoting Sample v. Levada*, 8 A.D.3d 465, 779 N.Y.S.2d 96 [2nd Dept, 2004].

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #2) is granted to the extent as follows:

a) The Plaintiff's application seeking partial summary judgment on its cause of action for nuisance is granted. The matter will proceed on the issue of damages.

b) The Plaintiff's application seeking to strike the Defendant's affirmative defenses is granted without opposition.

c) The Plaintiff's application to amend the complaint is granted. The amended pleading is deemed served and the Defendant shall have 30 days from entry of this Decision and Order to serve and file an amended answer. The caption shall now read:

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ROBERT WILLIAM OBRECHT, JR, Index No. 508808/2018

Plaintiff,

-against-

BK BEASTS LLC d/b/a CROSSFIT OUTBREAK EAST WILLIAMSBURG, a/k/a BK BEASTS II LLC, d/b/a CROSSFIT OUTBREAK EAST WILLIAMSBURG

Defendants.

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d) The application seeking summary judgment on the cause of action for an injunction is denied as academic, and all other relief requested and not addressed herein is denied.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK FILED 2021 AUG 17 AM 9:46

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