

Schwartz v 170 W. End Owners Corp.

2022 NY Slip Op 32166(U)

July 7, 2022

Supreme Court, New York County

Docket Number: Index No. 102124/2015

Judge: Richard Latin

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

PRESENT: HON. RICHARD LATIN PART 46V

Justice

-----X

MARTHA SCHWARTZ

Plaintiff,

- v -

170 WEST END OWNERS CORP.,

Defendant.

-----X

INDEX NO. 102124/2015

MOTION DATE N/A, N/A

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 82, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 134

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, defendant 170 West End Owners Corp.’s motion for summary judgment dismissing plaintiff’s amended complaint and plaintiff’s motion for summary judgment pursuant to CPLR 3212 are determined as follows:

Factual & Procedural Background

This action arises from plaintiff’s allegation that defendant illegally installed and/or manipulated industrial fans on the roof of the building directly above plaintiff’s apartment.

Plaintiff is a tenant in apartment 30E at 170 West End Avenue (the “Building”), a cooperative building governed by defendant. Plaintiff alleges that in 2009 defendant relocated a certain number of industrial fans directly above and/or near her top-floor apartment, in an attempt to force plaintiff out of the building. Moreover, plaintiff alleges that in 2012 defendant manipulated the fans to

direct polluted and freezing air into plaintiff's apartment. Plaintiff testified that she witnessed the fans in different locations by visiting the roof on various occasions both before and after 2009. Plaintiff alleges that the relocation and manipulation of the fans have caused excessive noise, vibrations, and odors in her apartment which continue to this day, and that her health has declined as a result of these conditions.

Plaintiff produced 2012 and 2013 reports by A&A Consulting Engineers based on inspections of plaintiff's apartment. In its 2012 report, it wrote that "it seemed that . . . oversized, noisy and low quality exhaust fans for ventilation purpose [were] installed on the roof top about above this apartment." Plaintiff produced a 2013 report from Angstrom Testing Services, which found "strong" levels of offensive musty/earthy odors and "slight" levels of sewage-related odors in the bathroom. Plaintiff also produced a 2013 report from Acoustilogs, which determined that the noise in the apartment was coming from mechanical equipment and was "unreasonably loud."

Defendant, a cooperative corporation, claims that it never took any action relating to the building or the building equipment to the detriment of plaintiff. Defendant alleges that the industrial fans could not have been relocated. Boris Elyukin, the Building's resident manager and a mechanical engineer, testified that "it is physically impossible to relocate any fan on the roof." Defendant also produced the 2014 report of Anthony Accardo, a licensed professional engineer, who concluded from a site visit that "it would be very difficult to modify the fan locations and I see no evidence that they were relocated." In response to plaintiff's complaints regarding the conditions in her apartment, defendant alleges that, among other repairs, it replaced the exhaust fans and installed vibration eliminators and noise reducers.

On July 17, 2012, plaintiff commenced an action in Housing Court against defendant, ACP Realty Group (“ACP”), and the Department of Housing Preservation and Development. The Housing Court action was resolved pursuant to a Stipulation of Settlement dated June 2, 2015.

Paragraph 3A of the Stipulation of Settlement included a condition that must be satisfied in order to trigger certain obligations on the part of defendant. It stated, “After [plaintiff] removes the carpet in the Apartment, which must be done before respondent [defendant] begins its work under paragraph 5 below, the respondent [defendant] shall make necessary adjustments to the door sweep in the front entrance door to correct air leakage and to facilitate operation of door.” In her deposition, plaintiff was asked whether she had removed the carpet in the apartment, to which she replied “No.”

Paragraph 5 of the Stipulation of Settlement, only to be completed after the condition in Paragraph 3A was satisfied, required defendant “to complete items 3 and 4 located on page 3 of the Lilker Report.” Items 3 and 4 of the Lilker Report included recommendations to install a vibration isolator on the toilet exhaust fan and the kitchen exhaust fan. Paragraph 5 also required defendant to “complete work in the Apartment, including . . . correcting the violations referenced in paragraph 4 herein, and to install and maintain the airflow registers as recommended in items 7 and 8 . . . of the Lilker Report, unless advised otherwise by respondent [defendant’s] professional(s).” Paragraph 4 of the Stipulation of Settlement required defendant and ACP to cure “[a]ny and all violations of the Department of HPD and ECB for the Apartment.”

The Stipulation of Settlement expressly provided in Paragraph 11 that it was “without prejudice to [plaintiff’s] right to commence a plenary action in the proper jurisdiction to seek damages allegedly caused by [defendant and ACP], namely compensatory and punitive damages. All parties reserve their respective rights, claims, and defenses with respect to any such action or proceeding.”

On December 2, 2015, plaintiff commenced this action against defendant and ACP. On March 31, 2017, the Court granted ACP's motion for summary judgment, which was affirmed by the Appellate Division.

On February 27, 2018, plaintiff filed its amended complaint, asserting eight causes of action: (1) nuisance, (2) trespass, (3) violation of the New York City Noise Code, (4) violation of the New York City Building Code and/or New York City Mechanical Code, (5) breach of settlement agreement, (6) negligence, (7) an injunction to enforce the prior settlement agreement, and (8) an injunction to relocate the industrial fans. Defendant interposed an answer asserting among its affirmative defenses: (1) res judicata, collateral estoppel, and law of the case, and (2) the business judgment rule.

In motion sequence number 005, defendant now moves for summary judgment dismissing all claims against it. In motion sequence number 006, plaintiff moves for summary judgment on all causes of action.

Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat a motion for summary judgment, the non-moving party bears the burden to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

I. Res Judicata, Collateral Estoppel, and Law of the Case

As a threshold matter, defendant seeks to dismiss plaintiff's claims based on the preclusionary effect of the Stipulation of Settlement resolving the Housing Court action.

“Res judicata, or claim preclusion, precludes a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties, involving the same subject matter; the doctrine applies even if the later claim is based on a different theory or seeks a different remedy, so long as it arises out of the same transaction” (*Martinez v JRL Food Corp.*, 194 AD3d 488 [1st Dept 2021]). However, the doctrine does not apply where the remedy sought was not available in the prior proceeding, such as where the prior proceeding occurred in a court of limited jurisdiction (*See Rostant v Swersky*, 79 AD3d 456, 457 [1st Dept 2010]; *Singh v New York State Div. of Human Rights*, 186 AD3d 1694, 1695 [2d Dept 2020]). A “stipulation to discontinue an action without prejudice is not subject to the doctrine of res judicata” because it is not a final judgment on the merits (*Maurischat v County of Nassau*, 81 AD3d 793, 794 [2d Dept 2011], citing *Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8 [2008]).

Defendant argues that plaintiff should not be permitted to re-litigate the issues that were resolved in the Housing Court proceeding. According to defendant, all the issues alleged in this action were resolved pursuant to the Stipulation of Settlement. Plaintiff argues that her claims for damages should not be precluded because the Stipulation of Settlement expressly permits her to assert her claims in the instant action. Further, plaintiff argues that her claims for injunctive relief should not be precluded because Housing Court lacks jurisdiction to grant such injunctive relief.

As to plaintiff’s claims for damages (plaintiff’s first, second, third, fourth, fifth, and sixth causes of action), the Stipulation of Settlement was not a final judgment on the merits. Paragraph 11 of the Stipulation of Settlement states that stipulation is “without prejudice” as to plaintiff’s right to bring a later action for damages. Therefore, res judicata does not bar plaintiff’s claims for damages.

As to plaintiff's claims for injunctive relief (plaintiff's seventh and eight causes of action), housing court has limited jurisdiction in equity but may grant injunctive relief for the enforcement of housing standards (*see* CCA 110[a][4]; CCA 203[o]; *see also Broome Realty Assoc. v Sek Wing Eng*, 182 Misc 2d 917, 918 [App Term 1999]). As plaintiff's eighth cause of action — to relocate the industrial fans — seeks an injunction to enforce housing standards, it should be precluded.

Collateral estoppel, or issue preclusion, requires that “(1) the identical issue was necessarily decided in the prior proceeding and is decisive of the present action; and (2) there was a full and fair opportunity to contest that issue in the prior proceeding” (*Zimmerman v Tower Ins. Co. of New York*, 13 AD3d 137, 139 [1st Dept 2004]). “[C]ollateral estoppel is inapplicable if an issue has not been fully litigated, *e.g.*, if there has been a stipulation” (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 371 [1st Dept 2007]). Here, the Housing Court action was resolved by the Stipulation of Settlement. Therefore, collateral estoppel is inapplicable.

The law of the case doctrine is a policy that “addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment” (*People v Evans*, 94 NY2d 499, 502 [2000]). Here, the Court's March 31, 2017 order granting summary judgment to original co-defendant ACP does not preclude plaintiff's action against defendant. That order predated the filing of the amended complaint and the completion of discovery. Moreover, ACP stands in a different position as defendant in relation to plaintiff. Thus, the law of the case doctrine is inapposite.

Accordingly, defendant's motion for summary judgment as to plaintiff's seventh cause of action is granted. As to the remainder of plaintiff's claims, defendant is not entitled to dismissal of plaintiff's claims based on the doctrines of *res judicata*, collateral estoppel, and law of the case.

II. Business Judgment Rule

Defendant also seeks to dismiss plaintiff's claims based on the application of the business judgment rule to defendant's conduct.

The proper standard for judicial review of a cooperative board's decisions is the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537 [1990]). "So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's" (*id.* at 538). However, the rule permits review of improper decisions, such as when the board deliberately singles out individuals for harmful treatment (*id.* at 540).

Here, plaintiff alleges that defendant relocated and manipulated the industrial fans above plaintiff's apartment with the intention of causing such unbearable conditions so as to force plaintiff to vacate her apartment. Defendant contends that it never relocated and/or manipulated the fans. As there remains a question of fact as to defendant's good faith and whether plaintiff was deliberately singled out for harmful treatment, defendant's decisions do not merit protection of the business judgment rule at this stage.

Accordingly, defendant is not entitled to dismissal of plaintiff's claims based on the application of the business judgment rule.

III. Nuisance

Plaintiff's first cause of action alleges nuisance based on the relocation of the fans and the manipulation of the fans and exhaust system, causing excessive noise, vibrations, and noxious air in plaintiff's apartment.

The elements of a claim for 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" (*61 W. 62 Owners Corp. v*

CGM EMP LLC, 77 AD3d 330, 334 [1st Dept 2010], *affd as mod and remanded* 16 NY3d 822 [2011], citing *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977)). “Although nuisance is often discussed in terms of intentional conduct, such a claim is actionable upon proof that the defendant’s invasion was either intentional, negligent or reckless, or otherwise involved abnormally dangerous activities” (*DelVecchio v Collins*, 178 AD3d 1336, 1337 [3d Dept 2019] [internal quotation marks and alterations omitted]).

At issue in plaintiff’s nuisance claim is whether defendant acted or failed to act as it relates to the conditions in plaintiff’s apartment. Defendant argues that it did not – and physically could not– relocate the industrial fans. Defendant relies on the testimony of Elyukin that it was “impossible” to relocate the fans and the statement of Accardo that it would be “very difficult” to move the fans. Moreover, defendant claims that it attempted to resolve every complaint regarding the conditions in the apartment. Plaintiff testified that the fans were in fact moved, relying on her visual inspection of the roof both before and after 2009. Moreover, plaintiff alleges that the excessive noise, vibrations, and odors have not been cured to date. Neither defendant nor plaintiff has met its prima facie burden. As there remain questions of fact as to whether defendant relocated and/or manipulated the fans to plaintiff’s detriment and whether defendant failed to act in responding to plaintiff’s complaints, summary judgment on the issue of nuisance is not appropriate.

Accordingly, both defendant and plaintiff’s motions for summary judgment as to plaintiff’s first cause of action are denied.

IV. Trespass

Plaintiff’s second cause of action alleges that noise, vibrations, and noxious air from the fans constitute a trespass.

“The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission” (*Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013]; *see also Children's Magical Garden, Inc. v Marom*, 2021 N.Y. Slip Op. 32814[U], 4 [N.Y. Sup Ct, New York County 2021]). While any intrusion, however insignificant, may constitute an entry for the purpose of establishing a trespass, such intrusion must generally be physical or tangible (*see Ivory v Intl. Bus. Machines Corp.*, 116 AD3d 121, 130 [3d Dept 2014]). Intangible intrusions, such as noise pollution, vibrations, and blocked natural light are generally “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.” (*MacArthur Properties, LLC v Metro. Transportation Auth.*, 61 Misc 3d 1204[A] [Sup Ct 2017], *affd* 164 AD3d 1165 [1st Dept 2018], citing *Ivory*, 116 AD3d at 130).

Here, plaintiff claims that she has experienced excessive noise, intense vibrations, and noxious fumes in her apartment as a result of defendant’s actions in allegedly relocating and manipulating the fans. Even when the facts are viewed in the light most favorable to plaintiff, such intangible entry is insufficient to establish trespass.

Accordingly, defendant’s motion for summary judgment as to plaintiff’s second cause of action is granted, and plaintiff’s corresponding motion for summary judgment on this cause of action is denied.

V. Code Violations

Plaintiff’s third cause and fourth causes of action allege that defendant violated the New York City Noise Code, New York City Building Code, and New York City Mechanical Code.

It is the general rule that if a statute “does not explicitly provide for a private cause of action, recovery may be had under the statute only if a legislative intent to create such a right of

action is ‘fairly implied’ in the statutory provisions and their legislative history” (*Albright v Metz*, 217 AD2d 123, 128-129 [3d Dept 1995], *affd* 88 NY2d 656 [1996], citing *Brian Hoxie's Painting Co., Inc. v Cato-Meridian Cent. School Dist.*, 76 NY2d 207, 211 [1990]).

There is no private right of action explicitly provided and fairly implied from the alleged code violations (*see e.g. Gold v 22 St. Felix LLC*, 2020 N.Y. Slip Op. 32258[U], 3 [N.Y. Sup Ct, Queens County 2020]). Moreover, plaintiff’s causes of action for code violations are duplicative of its other claims

Accordingly, defendant’s motion for summary judgment as to plaintiff’s third and fourth causes of actions is granted, and plaintiff’s corresponding motion for summary judgment on these causes of action is denied.

VI. Breach of Settlement

Plaintiff’s fifth cause of action alleges that defendant breached the Stipulation of Settlement by failing to make certain repairs and cure violations.

Plaintiff alleges that defendant failed to cure Department of HDP and ECB violations pursuant to Paragraph 4 of the Stipulation of Settlement and failed to complete various items described in the Lilker Report pursuant to Paragraph 5 of the Stipulation of Settlement.

Paragraph 3A of the Stipulation of Settlement required that plaintiff remove the carpet in her apartment before certain obligations by defendant would be triggered, including those in Paragraphs 4 and 5. When asked in her deposition whether she had removed the carpet, plaintiff replied that she had not. As the condition precedent has not been satisfied, the claim for breach of settlement is not ripe.

Accordingly, defendant's motion for summary judgment as to plaintiff's fifth cause of action is granted, and plaintiff's corresponding motion for summary judgment on this cause of action is denied.

VII. Negligence

Plaintiff's sixth cause of action alleges that defendant was negligent in its relocation and/or manipulation of the industrial fans.

The elements of a negligence claim are a duty owed by the defendant to the plaintiff, a breach of that duty, and injuries proximately caused as a result of that breach (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). As with the discussion of plaintiff's nuisance claim above, neither defendants nor plaintiff have established for the purpose of summary judgment whether the fans were relocated and/or manipulated and whether defendant successfully responded to plaintiff's complaints regarding the conditions in the unit. As there remain questions of fact, summary judgment is inappropriate as to plaintiff's negligence claim.

Accordingly, both defendant and plaintiff's motions for summary judgment as to plaintiff's sixth cause of action are denied.

VII. Injunctions

Plaintiff's seventh cause of action seeks an injunction to enforce the Stipulation of Settlement. Since defendant has established it is not in breach of the Stipulation of Settlement at this time, plaintiff is not entitled to an injunction to enforce it.

Accordingly, defendant's motion for summary judgment as to plaintiff's seventh cause of action is granted, and plaintiff's corresponding motion for summary judgment on this cause of action is denied.

Accordingly, it is

ORDERED that the branch of defendant’s motion for summary judgment (sequence number 005) dismissing plaintiff’s second, third, fourth, fifth, and seventh causes of action is granted; and it is further

ORDERED that the branch of defendant’s motion for summary judgment dismissing plaintiff’s eighth cause of action, for an injunction to enforce the Stipulation of Settlement, is granted without prejudice to seek a new injunction should defendant be in breach of the Stipulation of Settlement; and it is further

ORDERED that the branch defendant’s motion for summary judgment dismissing plaintiff’s first and sixth causes of action, namely plaintiff’s nuisance and negligence claims, is denied; and it is further

ORDERED that plaintiff’s motion for summary judgment (sequence number 006) is denied in its entirety.

The motions are denied in all other respects this constitutes the decision and order of the Court.

July 7, 2022

DATE



RICHARD LATIN, 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