

Santoro v Rosabianca
2022 NY Slip Op 32751(U)
August 10, 2022
Supreme Court, New York County
Docket Number: Index No. 656216/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

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SABRINA SANTORO and ANTONIO MICALIZZI,

Plaintiff,

- v -

INDEX NO. 656216/2021

MOTION DATE 07/27/2022

MOTION SEQ. NO. 001

LUIGI ROSABIANCA, JOHN DOE NOS. 1-10, BOARD OF MANAGERS OF CIPRIANI CLUB RESIDENCES AT 55 WALL CONDOMINIUM and FIRTSERVICE REALTY, NYC, INC.

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for JUDGMENT - DEFAULT

In this action seeking permanent injunctive relief upon claims for breach of contract, nuisance, and trespass, the plaintiffs, Sabrina Santoro and Antonio Micalizzi, owners of a Manhattan condominium unit, allege that the tenants of a neighboring unit owned by defendant Luigi Rosabianca have caused excessive noise and odors to emanate from his unit and that defendants Board of Managers of Cipriani Club Residences at 55 Wall Condominium ("Board") and First Service Realty, Inc. ("Building Manager") have not sufficiently addressed their complaints. The Board and Building Manager answered the complaint. The plaintiffs now move pursuant to CPLR 3215 for leave to enter a default judgment against defendants Rosabianca and John Does 1-10, the fictitious name afforded his tenants. The motion is denied.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting ...some firsthand confirmation of the facts

forming the basis of the claim must be proffered.” Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a prima facie case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). As such, “[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default.” Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992). CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27].” Joosten v Gale, 129 AD2d 531, 535 (1st Dept. 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., supra.

Initially, the court notes that plaintiffs submit affidavits of service alleging that Rosabianca and the John Does were served with the summons and complaint at 55 Wall Street, by service upon a concierge even though Rosabianca does not reside there and they do not identify any of the John Doe tenants. No judgment can be entered against an unidentified party. In any event, even assuming service was effective, the motion must be denied as the plaintiffs fail to submit proof of the facts constituting the claims. See CPLR 3215(f).

In support of the motion, the plaintiffs rely on the unverified complaint, an affirmation of counsel and an affidavit of each plaintiff. An unverified complaint is “utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215.” Beltre v Babu, 32 AD3d 722, 723 (1st Dept. 2006). Since counsel claims no personal knowledge of the underlying facts, the affirmation of the counsel is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). Nor is the affidavit of Micalizzi with exhibits sufficient to meet the plaintiffs’ burden on the motion since, even if accurate, his allegations fall short of establishing a claim of breach of contract, nuisance or trespass, as set forth below.

Plaintiff Micalizzi alleges that on various dates between 2018 and 2019 he and plaintiff Santoro, his wife, experienced noise disturbances and noxious odors emanating from Rosabianca’s unit. Micalizzi recounts that on August 12, 2018, he was awoken in the middle of the night by loud music, screams and the sounds of video games, along with the smell of

marijuana coming from Rosabianca's unit. In April 2021, their tenant notified them that he also had been experiencing noise and odor emanating from Rosabianca's unit, and that he purchased an air purifier and noise cancelling machine. Micalizzi further alleges that he contacted the defendant Board and Managing Agent on many occasions starting in August 2018 but that, to his knowledge, they failed to take any definitive action, except that on one occasion the defendant Board notified Rosabianca that the conduct of his tenants was in violation of the condominium's by-laws. The affidavit submitted by plaintiff Santoro states only that she agrees with her husband's allegations, offering no additional facts regarding the complained of conduct. Both affidavits are sworn and notarized in Italy and present an issue of compliance with CPLR 2309(c).

The plaintiffs' breach of contract claim fails as against Rosabianca because plaintiffs did not allege that any contractual relationship or privity of contract with him. Generally, only parties in privity may enforce the terms of the contract. See ComJet Aviation Mgt. v. Aviation Invs. Holdings, 303 AD2d 272 (1st Dept. 2003); Freeford Ltd. v. Pendleton, 53 A.D3d 32 38 (1st Dept. 2008). The plaintiffs have not alleged any relationship with Rosabianca approaching privity (see generally Parrott v. Coopers & Lybrand, L.L.P., 95 NY2d 479 [2000]); Sykes v. RFD Third Ave. 1 Assocs., LLC, 67 AD3d 162, 167 [1st Dept. 2009], aff'd, 15 NY3d 370 [2010]) nor provided any decisional authority to support a theory that owners of neighboring condominium units are in privity of contract with one another merely by virtue of proximity.

"[T]he elements of the common law cause of action for a private nuisance are ' (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with the plaintiff's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act. See Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 570 (1977).'" 61 West 62 Owners Corp. v CGM EMP LLC, 77 AD3d 330, 334 (1st Dept. 2010); see Broxmeyer v United Capital Corp., 79 AD3d 780 (2nd Dept. 2010). Furthermore, "nuisance imports a continuous invasion of rights". See Nussbaum v Lacopo, 27 N.Y. 311, 315 (1970). That is, "[n]uisance is characterized by a pattern of continuity or recurrence of objectionable conduct." Berenger v 261 West LLC, 93 AD3d 175, 182 (1st Dept. 2012).

It has long been held that "great noise" or "noxious vapors" may constitute an interference with a right to use and enjoy land, *i.e.* a nuisance. See Rosenheimer v Standard Gaslight Co., 36 A.D. 1, 4 (1898). However, it is also well settled that "not every intrusion will

constitute a nuisance. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other ... If one lives in the city he [or she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life". Nussbaum v Lacopo, 27 NY2d 311, 315 (2nd Dept. 1970) quoting Campbell v Seaman, 63 NY 568, 577 [1876]). The noise complained of must be substantial and unreasonable, something more than "noises that are incidental to normal occupancy." Brown v Blennerhasset Corp., 113 AD3d at 454 (1st Dept. 2014).

In his affidavit, plaintiff Micalizzi describes the nuisances as having occurred between August and November of 2018 and again from June to August of 2019, apparently abating between December 2018 and May 2019. Sometime thereafter, he and plaintiff Santoro rented their apartment to a tenant who also complained to them on several occasions about the noise and odors emanating from Rosabianca's unit between April and August of 2021. No allegations are made concerning the period September 2019 to the date of Micalizzi's affidavit, May 4, 2022. There is no affidavit from that or any other tenant. While the noise and odor incidents may have occurred on various occasions during 2018, 2019 and 2021, and have constituted objectionable conduct, as alleged the conduct does not constitute a "continuous invasion of rights" (Nussbaum v Lacopo, supra at 316) or "a pattern of continuity or recurrence." Berenger v 262 West LLC, supra at 182; compare 61 West 62 Owners Corp. v CGM EMP LLC, supra [plaintiff owner of a residential cooperative building established nuisance claim as against defendant operator of a bar on rooftop of adjacent building which played loud music daily].

The plaintiffs also fail to establish, *prima facie*, a claim for trespass, which is an injury to the right of possession and requires a showing of an intentional entry onto the land of another without permission. See Phillips v Sun Oil Co., 307 NY 328 (1954); Berenger v 262 West LLC, supra; Congregation B'Nai Jehuda v Hiye Realty Corp., 35 AD3d 311 (1st Dept. 2006). Here, no property was taken. Generally, intangible intrusions such as noise and odor 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" (75 Am. Jur. 2d, Trespass § 27)". Ivory v Int'l Bus. Machines Corp., 116 AD3d 121, 130 (3rd Dept. 2014). At most, if the noise and odor intrusions alleged rose to the level required for a finding of nuisance, that would not be a trespass but, at most, "simply a misuse by the defendant of its own property to the injury of its neighbor." Rosenheimer v Standard Gaslight Co., supra at 331. Neither was established here.

Since the plaintiffs' submissions fall short of established a *prima facie* claim for breach of contract, nuisance or trespass (CPLR 3215[f]), they are not entitled to any relief, including the injunctive relief requested as against defendant Rosabianca or his unidentified tenants – a mandatory and permanent injunction. That relief would also require the plaintiffs to show that these defendants are presently causing or threatening to cause harm to the plaintiffs themselves (see e.g. Simon v FranInvest, S.A., 178 AD3d 436 [1st Dept. 2019]), but the conduct complained of in the plaintiffs' papers occurred only sporadically and prior to September 2019. In that regard, the court notes that no application for a preliminary injunction was made seeking immediate relief earlier in the litigation.


Any relief not expressly granted herein is denied.

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against defendants Luigi Rosabianca and "John Does 1-10" pursuant to CPLR 3215 is denied, and it is further

ORDERED that the plaintiffs and answering parties shall proceed with discovery and appear for a preliminary conference on October 13, 2022, at 10:00 a.m.

This constitutes the Decision and order of the court.

<u>8/10/2022</u> DATE	 NANCY M. BANNON, J.S.C. HON. NANCY M. BANNON			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER