

**Board of Mgrs. of the Charleston Condominium v
Oppenheim**

2023 NY Slip Op 31980(U)

June 13, 2023

Supreme Court, New York County

Docket Number: Index No. 152079/2020

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 152079/2020

THE BOARD OF MANAGERS OF THE CHARLESTON
CONDOMINIUM,

MOTION DATE 01/19/2023

Plaintiff,

MOTION SEQ. NO. 003

- v -

LANNY OPPENHEIM, JUDITH ZARUCKI

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for CONTEMPT.

Upon the foregoing documents, and after oral argument, which took place on March 7, 2023, where Tracy Peterson, Esq. appeared on behalf of Plaintiff The Board of Managers of the Charleston Condominium ("Plaintiff"), Mark Friedlander, Esq. appeared on behalf of Defendant Lanny Oppenheim as Trustee of the Judith Zarucki 2016 Trust, and Serge Joseph, Esq. appeared on behalf of Defendant Judith Zarucki ("Judith"), Plaintiff's motion seeking to hold Judith in contempt is denied, without prejudice.

Plaintiff brought this action on February 26, 2020 seeking a money judgment for unpaid fines and late fees, as well as injunctive relief enjoining Judith from having pets roam in common areas and/or from allowing marijuana odors to emanate from Judith's unit into other areas of the building (NYSCEF Doc. 1). On April 8, 2021, Plaintiff moved for a preliminary injunction (NYSCEF Doc. 9). On August 3, 2021, the Hon. Alexander M. Tisch granted Plaintiff's motion, without opposition, to the extent that Judith was preliminarily enjoined from allowing smoke and

excessive loud noises to permeate beyond her unit (NYSCEF Doc. 35). Thereafter, this matter was transferred to Part 33.

On March 28, 2022, a settlement agreement was reached by the parties and so-ordered by this Court (NYSCEF Doc. 45). Paragraph eight of the settlement agreement called for a probationary period of eighteen months, wherein Judith promised that she would not smoke marijuana in the unit such that the odors would not emanate to other areas of the building; that she would not house any dogs or cats in her unit other than the one cat and two dogs currently residing in her unit; that she would not allow any of her pets to urinate in any area of the building, and that she would not allow any loud and disturbing noises to unreasonably disturb other occupants of the building. If Judith abided by these terms, the preliminary injunction entered by Justice Tisch would be dissolved, and the action would be discontinued with prejudice.

Paragraph eleven of the settlement agreement states that if there is a complaint regarding a violation of paragraph eight, then Plaintiff would conduct an investigation. Within seven days after the investigation, Plaintiff would notify Defendant of the complaint and the results of the investigation, and Defendant would then have seven days to respond. If Plaintiff believed the complaint was meritorious, it would then seek to hold Judith in civil contempt.

On January 18, 2023, Plaintiff filed the instant motion for contempt (NYSCEF Doc. 46). The motion papers contained exhibits of the parties' performance under the terms of the settlement agreement. On May 23, 2022, Plaintiff's counsel sent a letter to Judith's attorneys advising them that at 8:09 a.m., Judith's cat was roaming the common areas of the Building, and that there was a strong odor of urine in the area (NYSCEF Doc. 54). On June 6, 2022, Plaintiff's counsel sent another letter to Judith's attorneys (NYSCEF Doc. 55). In that letter, Plaintiff's counsel alleged an incident on May 24, 2022 at 5:57 p.m. where the occupant of Unit 6E complained about the smell

of marijuana coming from Judith's apartment (*id.*). Allegedly, the doorman, Jason Oquendo, investigated and confirmed that the odor was emanating from Judith's apartment (*id.*).

On June 13, 2022, Judith's attorneys responded. They represented Judith would install a barrier or fence to ensure the cat did not roam (NYSCEF Doc. 56). They disputed the allegations regarding the marijuana smoke and alleged only that the doorman "confirmed" the odor without stating any other facts (*id.*). There was no further letter correspondence, indicating the issues seemed to have resolved.

The next letter exchange occurred on October 3, 2022, where Plaintiff's counsel wrote to Judith's counsel about a complaint on September 30, 2022 regarding a marijuana odor. A doorman, Kainarine Singh, investigated, but allegedly could not confirm the odor was coming from Judith's unit (NYSCEF Doc. 57). There were also complaints on September 30 and on October 1, 2022 where a dog "staying" in Judith's unit was observed urinating in a flower pot in the lobby and in the service elevator (*id.*). It appears there was no response to this letter.

Plaintiff provided an affidavit from Kira Yearwood ("Yearwood"), who has been Plaintiff's managing agent since January 2022 (NYSCEF Doc. 59). Yearwood's testimony largely reflects the incidents memorialized in the letters described above. However, Yearwood also mentioned an incident on October 22, 2022, where the police and fire department allegedly came to Judith's unit as a result of loud yelling and banging (*id.* at ¶ 21). There was an affidavit from a building employee Braho Bektesevic (NYSCEF Doc. 61). He claims that on October 22, 2022, a guest staying in Judith's unit died of an apparent drug overdose (*id.* at ¶ 10). He also claims he saw Judith accidentally drop drug paraphernalia in the service elevator during the morning rush on November 4, 2022 (*id.* at ¶ 11).

Judith submitted opposition on February 27, 2023 (NYSCEF Doc. 65). Judith argues that Plaintiff has not met its burden of proving, by clear and convincing evidence, that she has disobeyed the Court's orders with a reasonable degree of certainty. Judith also submitted an affidavit (NYSCEF Doc. 66). She vehemently denies many of the statements made in Bektesevic's and Yearlander's affidavits. She also denied allowing anyone in her apartment to smoke marijuana, and states the other complaints are too vague to impose the drastic remedy of holding her in contempt.

After oral argument, Plaintiff submitted an additional letter to the Court claiming there were additional complaints about a marijuana odor in the early morning hours of April 17, 2023 and in the afternoon of April 18, 2023 (NYSCEF Doc. 69). There was also a complaint about the cat wandering the fifth-floor hallway on April 19, 2023, and apparently a guest in Judith's unit was yelling in the hallway on April 13, 2023 at 3:57 a.m.

To find a party in civil contempt, the movant must show, by clear and convincing evidence, that (1) a lawful order of the court was in effect and clearly expressed an unequivocal mandate; (2) the appearance, with reasonable certainty, that the order was disobeyed; (3) that the party to be held in contempt had knowledge of the court's order; and (4) the prejudice to the right of a party to the litigation (*Bongiorno v Di Frisco*, 196 AD3d 452 [2d Dept 2021]). The clear and convincing evidence standard requires a party to show evidence that makes it highly probable that what he or she claims is what actually happened (*Currie v McTague*, 83 AD3d 1184 [3d Dept 2011]).

Based on the present record, the Court finds that Plaintiff has not proven the necessary elements by clear and convincing evidence. The Court is mindful that the building at issue is a multitenant building, and marijuana odors are both pungent and transitory. Although some doormen provide affidavits saying the smell was strongest near Judith's door, other doormen

testified that they could not say with certainty that the smell was coming from Judith's unit. Moreover, it is neither clear nor convincing that the smell could not have come from some other unit. This is especially the case based on Judith's sworn affidavit claiming that she never smokes marijuana or cigarettes in her apartment and would not allow anyone to do so. The Court is also mindful that the complaints which form the basis of the motion took place over the span of months. The Court cannot make a finding of contempt based on a record of contradictory affidavits.

As to the May 23, 2022 issue with the cat, it appears the issue was remedied as there were no further complaints about the cat. As to the issue with a dog who was a "guest" at Judith's unit, the Court agrees that the description is too vague as to issue a remedy as drastic as contempt. This is especially the case as Judith provides sworn testimony contradicting these allegations.

In essence, the nature of the violations and evidence presented are not so severe and consistent to rise to the level of clear and convincing which is the requisite for a finding of civil contempt. While if these complaints are true, the Court by no means condones them and has sympathy for Judith's neighbors, procedurally the Court cannot yet hold Judith in contempt. Therefore, the motion is denied without prejudice.

If the parties are unable to resolve their differences and Plaintiff wishes to pursue its contempt motion further, then testimony will have to be taken at a hearing from the witnesses who submitted affidavits so that this Court can make a finding as to credibility. If the parties elect to have a hearing, in order for the Court to definitively rule on Plaintiff's contempt motion, they are directed to contact the part clerk to be assigned a date for said hearing so that testimony may be taken and evidence presented. However, until said hearing is held, the instant motion is denied without prejudice¹.

¹ Should the parties elect to have a hearing on the issues presented, the Court will restore this motion to the motion calendar for re-submission on the date of the hearing.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion seeking to hold Defendant Judith Zarucki is denied without prejudice; and it is further

ORDERED that if the parties are unable to settle their disputes over animals and the odor of marijuana the court will hold a hearing at which testimony and evidence regarding Defendant Judith Zarucki's violations of the settlement agreement and preliminary injunction will be presented, the parties are directed to contact the part clerk at SFC-Part33-Clerk@nycourts.gov to be assigned a date for said hearing to take place; and it is further

ORDERED that within ten days of entry, counsel for Defendant Judith Zarucki shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action.

This constitutes the Decision and Order of the Court.

<u>6/13/2023</u> DATE		<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE