

**Levitsky v All Am. Sch. Bus Corp.**

2023 NY Slip Op 32768(U)

July 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 533616/2022

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 533616/2022  
Motion Date: 4-24-23  
Mot Seq No. 1-3

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DMITRY LEVITSKY,

Plaintiff,

-against-

**DECISION/ORDER**

ALL AMERICAN SCHOOL BUS CORP. and  
CORAL HEADQUARTERS LLC,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as: 60-61, 63-75, 85-129, the motions and cross-motion are decided as follows:

In this action sounding, *inter alia*, in private and public nuisance, in motion sequence # 1, the plaintiff, DMITRY LEVITSKY, by pre-answer motion seeks a preliminary injunction pursuant to CPLR § 6301(1) enjoining and restraining defendants, ALL AMERICAN SCHOOL BUS CORP. (hereinafter "All American") and CORAL HEADQUARTERS LLC (hereinafter "Coral") from continuing to operate a school bus depot on the property located at 2460 E 69th Street a/k/a 2418 E 69th Street (Block 8455, Lot 1), Brooklyn, New York (the "school bus depot"); (2) directing defendants All American and Coral to remove all school buses from the bus depot property; or in the alternative, (3) pursuant to CPLR § 6301, enjoining and restraining defendants All American and Coral from operating the school bus depot" between the hours of 10:00 PM and 7:00 AM also known and defined as "quiet hours"; and (4) granting plaintiff such other and further relief as the Court may deem just and proper.

In motion sequence # 2, defendant Coral moves for an Order: (1) dismissing the complaint pursuant to CPLR §3211(a)(1) based upon the documentary evidence; and (2) pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

In motion sequence # 3, defendant All American cross-moves for an Order dismissing plaintiff's complaint in its entirety.

The three motions are consolidated for disposition.

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**Background:**

Plaintiff is the owner of a residential home located at 2415 E 69th Street, Brooklyn, New York, which has been his primary residence since October 2020. The school bus depot is located across the street at 2460 East 69th Street, Brooklyn, NY and is owned by defendant Coral and leased to the defendant-tenant All American, who provides school bus transportation for children attending New York City public and private schools. In his complaint, the plaintiff seeks injunctive relief and monetary damages alleging that the defendants' use of the school bus depot is not permitted and that the noise from school buses leaving on their routes in the morning and fumes from the buses warming up constitute both public and private nuisances.

The school bus depot has been used for the parking of school buses since 2009 and is located on property that has been zoned for M1 manufacturing since at least 1961. M1-1 zoning is designated for "light manufacturing" which

consists of automotive and other necessary semi-industrial uses which: (1) are required widely throughout the city; and (2) involve offensive noise, vibration, smoke, dust, or other particulate matter, odorous matter, heat, humidity, glare or other objectionable influences, making such uses incompatible with residential uses and other commercial uses.

Apparently, there is no certificate of occupancy for the subject property. Plaintiff alleges that the school bus depot operates five days a week, Monday through Friday, from as early as 5:00 A.M., with school buses beeping, idling, honking their horns without any apparent reason, squealing and squeaking their brakes, and revving up their engines as they leave, up until 7:00 AM. Plaintiff claims the school bus depot stores more than fifty ("50") diesel engine buses which are type "C" school buses and the buses cause noise to enter plaintiff's property to reach at least 75-80 decibels with some buses producing noise reaching as high as 90 decibels during the "quiet hours" violating local ordinances, rules and codes. Plaintiff contends that the buses emit the smell of diesel exhaust fumes to the area around plaintiff's home. He additionally claims he has observed buses idling for longer than three minutes in violation of NYC's idling law.

In paragraph 87 of the complaint, plaintiff claims he has suffered property damage of not less than \$350,000 but did not offer any proof this..

Motion Sequence # 1:

A party seeking a preliminary injunction must demonstrate by clear and convincing evidence a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840; *see* CPLR 6301). “The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits” (*Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596).

As stated above, the plaintiff is alleging both a private and public nuisance. The elements of a cause of action for private nuisance are interference (1) 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” (*Wlody v. Birch Family Servs., Inc.*, 210 A.D.3d at 1037, 179 N.Y.S.3d 675). Under the circumstances of this case, including that the plaintiff purchased the property with the school bus depot already in place and the school bus depot is zoned for light manufacturing, the plaintiff failed to establish by clear and convincing evidence that the interference with his right to use and enjoy his property was “substantial in nature” or “unreasonable in character” (*Wlody, supra.*; *Benjamin v. Nelstad Materials Corp.*, 214 A.D.2d 632, 633, 625 N.Y.S.2d 281; *Shrage v. Con Edison Co.*, 216 A.D.3d 1023, 1026, 188 N.Y.S.3d 691, 695).

The plaintiff also failed to demonstrate by clear and convincing evidence that he will prevail on his claim of public nuisance. “A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority” (*Copart Indus. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 362 N.E.2d 968). A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large (*see, Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 334, 464 N.Y.S.2d 712, 451 N.E.2d 459 [citing Restatement (Second) of Torts § 821C, comment *b* ] ). This principle

recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public (*532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292, 750 N.E.2d 1097, 1104; Restatement [Second] of Torts § 821C, comment *a*; Prosser, *Private Action for Public Nuisance*, 52 Va L Rev 997, 1007).

In this case, plaintiff has not demonstrated by clear and convincing evidence that he suffered a special injury, different from that suffered by others in his community (see *Graceland Corp. v. Consolidated Laundries*, 7 A.D.2d 89, 180 N.Y.S.2d 644, *affd.* 6 N.Y.2d 900, 190 N.Y.S.2d 708, 160 N.E.2d 926; Prosser, Torts [4th ed], pp. 586–590; *Queens Cnty. Bus. All., Inc. v. New York Racing Ass'n, Inc.*, 98 A.D.2d 743, 744, 469 N.Y.S.2d 448, 449). Although he is claiming property damages of not less than \$350,000.00, he did not submit any evidence to support this claim. For these reasons, plaintiff's motion for a preliminary injunction is denied. The court has considered plaintiffs remaining arguments in favor of the granting of a preliminary injunction and find unpersuasive.

Motion Sequence # 2 & 3:

Defendants' motion pursuant to CPLR 3211(a)(7) is denied. In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must “ ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*Sokol v. Leader*, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153, quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720; see *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511). Here, contrary to the defendants' contentions, plaintiff's complaint, liberally construed, adequately supports a cause of action to recover damages for both private and public nuisance (see *Copart Indus. v. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 569–571, 394 N.Y.S.2d 169, 362 N.E.2d 968; *Disunno v. WRH Props., LLC*, 97 A.D.3d 780, 781, 949 N.Y.S.2d 127; *Ford v. Fink*, 84 A.D.3d 725, 728, 924 N.Y.S.2d 94).

Defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(1) is also denied. On a motion to dismiss a complaint based on documentary evidence pursuant to CPLR

3211(a)(1), a court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v. Martinez*, 84 N.Y.2d 83, 87–88 [1994]; see *Kolchins v. Evolution Mkts., Inc.*, 31 N.Y.3d 100, 105–106 [2018]). Such a motion may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 2002]; see *Carbone v. U.S. Bank N.A.*, 156 A.D.3d 678, 679 [2d Dept 2017]). Evidence must be essentially undeniable and authentic to qualify as “documentary evidence” under CPLR 3211(a)(1) (see *Shah v Mitra*, 171 AD3d 971, 973 [2d Dept 2019]). Here, the documentary evidence did not conclusively refute any of the elements of plaintiff’s claims or private or public nuisance, including plaintiffs’ claim that he suffered special damages of not less than \$350,000.00.

Lastly, defendants did not establish that the plaintiff lacks standing as a matter of law. As stated above, a claim for damages which arises from a public nuisance cannot be maintained by a private individual absent special damages (see, *Copart Inds. v. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 362 N.E.2d 968; *Matter of Saks v. Petosa*, 184 A.D.2d 512, 513, 584 N.Y.S.2d 321; *Queens County Bus. Alliance v. New York Racing Assn.*, 98 A.D.2d 743, 744, 469 N.Y.S.2d 448). “[T]he harm suffered must be ‘of a different kind from that suffered by other persons exercising the same public right’ ” (*Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 334, 464 N.Y.S.2d 712, 451 N.E.2d 459, quoting Restatement, Torts, 2d, § 821C, Comment b). The defendants contend that since the plaintiff did not allege any injury separate and distinct from the injury which would be suffered by the public at large, their cause of action alleging a public nuisance must be dismissed (see, *Matter of Saks v. Petosa*, *supra*, at 513, 584 N.Y.S.2d 321; *Queens County Bus. Alliance v. New York Racing Assn.*, *supra*, at 744, 469 N.Y.S.2d 448; *Pearlman v. Simons*, 276 A.D.2d 762, 763, 714 N.Y.S.2d 767, 768–69; *In re Sanitation Garage Brooklyn Districts 3 & 3A*, 32 A.D.3d 1031, 1036, 822 N.Y.S.2d 97, 102). The plaintiff alleges, however, that he suffered special damages to his property of not less than \$350,000.00. Since the defendants have not demonstrated by admissible proof that there is no merit to this allegation, at this stage of the proceeding, the Court must accept this allegation as true.

As to plaintiff's claim of private nuisance, there is no requirement that a plaintiff plead and prove special damages.

Accordingly, it is hereby

ORDERED that plaintiff's motion and the defendants' motions are in all respects DENIED.

The foregoing constitutes the decision and order of this Court.

Dated: July 31, 2023

**PPS**

**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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