SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **04**

Justice

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ERIC SAUCIER,

Plaintiff,

- v -

BOARD OF MANAGERS OF 9 BARROW CONDOMINIUM, MARJORIE OTTER, LOWELL ASSOCIATES LLC,BOARD OF DIRECTORS OF 9 BARROW OWNERS CORP,

Defendants.

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INDEX NO. 154943/2022

MOTION DATE 06/05/2023

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 161, 162, 163, 164, 165, 166, 167, 168, 169, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 189, 190, 191, 192, 194, 197, 203, 205, 215

were read on this motion for PRELIMINARY INJUNCTION.

This decision and order replaces the September 26, 2023 decision and order erroneously filed under motion sequence 006 (NYSCEF Doc. No. 203).

Upon the foregoing documents, plaintiff's motion for a preliminary injunction is granted, in part, to the extent set forth below.

FACTUAL BACKGROUND

Plaintiff owns shares in the cooperative 9 Barrow Owners Corp. pursuant to a Proprietary Lease, through which he has exclusive use and occupancy of Unit 8B of 9 Barrow Street, New York, NY (the "Building"). This apartment is a duplex on the eighth and ninth floors of the Building and plaintiff's bedroom on the ninth floor is directly below the Building's roof. Plaintiff alleges that the cooling tower and residential exhaust fans on the Building's roof creates loud and disturbing noise and vibrations in his apartment and asserts claims for, inter alia, breach of the

Proprietary Lease and the Cooperative's by-laws, nuisance, and breach of fiduciary duty. As pertinent here, in his complaint plaintiff seeks a permanent injunction mandating that defendant Directors of 9 Barrow Owners Corp. (the "Board") "takes all necessary steps to permanently abate the ongoing nuisances created by the noise and vibrations emanating from the Residential HVAC equipment" (NYSCEF Doc. No. 103 [Am. Compl.]).

Plaintiff now moves, order to show cause, for a preliminary injunction enjoining the Board from allowing the noises from the rooftop cooling tower and the residential exhaust fans to continue to emanate into plaintiff's top-floor apartment and directing the Board to install sound reducing barriers or other commercially reasonable sound suppression equipment to abate these noises within three days of the Court's order.

In support of his motion, plaintiff submits an affidavit stating that the noise from the roof impacts his ability to use his apartment, has made sleeping at night difficult, and has given him tinnitus (NYSCEF Doc. No. 181 [Saucier Aff. at ¶¶9-10]). Plaintiff also submits the affidavit of Alan Fierstein, president of acoustical consulting service Acoustilog, Inc., who performed sound measurements and acoustical recordings from plaintiff's apartment on September 1, 2022, which demonstrated that the level of noise emanating from the cooling tower and all three rooftop exhaust fans constituted a per se violation of New York City Administrative Code §24-227 and an "unreasonable noise" under Administrative Code §24-218 (NYSCEF Doc. No. 183 [Fierstein Aff. at ¶¶19-24]). In his affidavit, Fierstein suggests "that the owner of the equipment: (i) [i]nstall an intake attenuator or a simple barrier in front of the cooling tower (ii) install sound attenuators and shock-mounts under the three exhaust fans" (Id. at ¶26).

In opposition, the Board does not dispute the facts alleged in either of these affidavits but instead argues that plaintiff's motion is moot, as the Board has been working to address these noise

concerns by implementing the advice of its own engineers as well as the suggestions made by plaintiff's own expert. The Board also asserts that it is not possible to remediate the noise problem within three days, as plaintiff demands, except by turning off the residential HVAC system for the Building.

DISCUSSION

A preliminary injunction will only be issued if plaintiff demonstrates, with convincing evidentiary support, a likelihood of success on the merits, irreparable injury absent granting of a preliminary injunction, and that a balancing of equities favors its position (See e.g., Nobu Next Door, LLC v Fina Arts Housing, Inc., 4 NY3d 839, 840 [2005]). "[A] mandatory preliminary injunction … by which the movant would receive some form of the ultimate relief sought as a final judgment," which plaintiff seeks here, "is granted only in unusual situations, where the granting of the relief is essential to maintain the status quo pending trial of the action" (Jones v Park Front Apts., LLC, 73 AD3d 612, 612 [1st Dept 2010] [internal citations and quotations omitted]) and, as such, "should not be granted, absent extraordinary circumstances" (Spectrum Stamford, LLC v 400 Atl. Tit., LLC, 162 AD3d 615, 617 [1st Dept 2018] [internal citations and quotations omitted]). Plaintiff has carried his burden here.

Plaintiff has established a likelihood of success on his nuisance claim through his affidavit and Fierstein affidavit, which establishes that the noise emanating from the exhaust fans is unreasonably loud and substantially interferes with his use and enjoyment of his apartment[1] (See e.g., Berenger v 261 W. LLC, 93 AD3d 175, 183 [1st Dept 2012]; see also Gross v 133 E. 80th St. Corp., 2023 NY Slip Op 30375[U], 1 [Sup Ct, NY County 2023]). Plaintiff has also established an irreparable injury for which money damages are insufficient as his undisputed affidavit sufficiently

[1] In light of the foregoing, the Court finds it unnecessary to address plaintiff's likelihood of success on his other claims (See e.g., Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd., 5 Misc 3d 285, 295 [Sup Ct, NY County 2004]).

details the physical harm the noise has caused him, including tinnitus (See e.g., Gross v 133 E. 80th St. Corp., 2023 NY Slip Op 30375[U], 1 [Sup Ct, NY County 2023]). Finally, the balance of the equities favors plaintiff. The harm to plaintiff absent an injunction outweighs any burden or harm to the Board from such an injunction—indeed, the Board cannot claim prejudice or inequity in being required to comply with its obligations under City and State law and its own by-laws (See Stellar Sutton LLC v Dushey, 82 AD3d 485, 487 [1st Dept 2011]; see also Doe v Dinkins, 192 AD2d 270, 276 [1st Dept 1993]).

Finally, although mandatory injunctions are, as discussed supra, only granted in extraordinary circumstances, "it is well settled that, where appropriate, a court has the power to issue a mandatory injunction, which disrupts rather than preserves the status quo, and whereby a party is affirmatively ordered to perform an act" (Worbes Corp. v Sebrow, 74 Misc 3d 1229(A) [Sup Ct, Bronx County 2022] [internal citations and quotations omitted]; see also Second on Second Cafe, Inc. v Hing Sing Trading, Inc., 66 AD3d 255, 276 [1st Dept 2009]). Such an injunction is appropriate here, given the undisputed ongoing risk to health to plaintiff and his family members from the noise (See e.g., Doe v Dinkins, 192 AD2d 270, 276 [1st Dept 1993]; cf. Real World Holdings LLC v 393 W. Broadway Corp., 204 AD3d 425, 426 [1st Dept 2022] ["[t]here was no imminent risk to the health and safety of plaintiff's members and their families, since the unit had been vacant long before the repairs that allegedly caused the contamination"]).

In light of the foregoing, the Court concludes that a preliminary injunction is warranted. While the Board is, by all appearances, working diligently to address the noise issues at issue, these efforts do not moot this relief, as the remediation efforts are ongoing and not guaranteed to resolve the noise issues entirely. However, to the extent that plaintiff seeks an order directing that the noise from the cooling tower and exhaust fans be remediated in three days, the Court declines

to do so. While "the business judgment rule does not shield defendants from liability from claims "based upon [plaintiff's] contractual relationship with [the Board] as a proprietary lessee, [his] rights, contractual and otherwise, as derived from that relationship, and [the Board's] alleged violation of those rights" (Dundy v Hanover Riv. House, Inc., 2008 NY Slip Op 33227[U] [Sup Ct, NY County 2008]]; see also Goldstone v Gracie Terrace Apt. Corp., 32 Misc 3d 1239(A) [Sup Ct, NY County 2011]), the Board's "decision as to the cost, means, allocation and methods employed in making repairs to the building," remain protected by the business judgment rule absent "evidence of self-dealing, fraud or other acts constituting a breach of fiduciary duty" (See e.g., Parker v Margolin, 56 AD3d 374 [1st Dept 2008]). No such evidence has been presented here. The Board is, however, strongly encouraged to provide plaintiff's counsel with regular, detailed updates of the progress of its remedial efforts.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is granted to the limited extent that defendant Board of Directors of 9 Barrow Owners Corp is to continue its noise remediation efforts with all reasonable speed, and is otherwise denied; and it is further

ORDERED that the parties are to appear for a status conference on June 26, 2024, at 2:15 pm in Part 4 (80 Centre Street, room 308) to discuss the progress of these remedial measures.

This constitutes the decision and order of the Court.

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6/13/2024
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE