

El-Kam Realty Co. v Lipsman

2024 NY Slip Op 33394(U)

September 20, 2024

Supreme Court, New York County

Docket Number: Index No. 151657/2022

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 151657/2022

**EL-KAM REALTY COMPANY,
Plaintiff,**

MOTION SEQ. NO. 001; 002

- v -

**SHERI LIPSMAN, JASON BITTON, JOHN DOE, and JANE
DOE,**

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 22, 30, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 62, 63, 64, 67, 100, 101, 102

were read on this motion to/for **DEFAULT JUDGMENT**.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 21, 32, 55, 65, 103

were read on this motion to/for **INJUNCTION/RESTRAINING ORDER**.

Plaintiff, the owner of the property known as 517 East 75th Street, New York, NY 10021 (the, "building"), commenced this action by summons and complaint against defendant SHERI LIPSMAN a/k/a SHERIE LIPSMAN ("Lipsman")¹, the rent-stabilized tenant of apartment GAE in the building, as well as Lipsman's son, JASON BITTON ("Bitton"), seeking ejection (first cause of action); a money judgment against defendants for private nuisance (second cause of action); a declaratory judgment that: i) defendants breached the 2016 settlement agreement;² and ii) plaintiff is entitled to damages resulting from defendants' joint and several breaches; damages and legal fees for defendants' breach of the settlement agreement (fourth and fifth causes of action) (NYSCEF Doc. No. 1, *summons and complaint*).

Plaintiff moves this court, by order to show cause (OSC), pursuant to CPLR 3215, for an Order granting it a writ of ejection, declaratory judgment, and compensatory damages for injuries sustained by plaintiff of no less than \$25,000.00 plus fees, costs, disbursements and interest in an amount to be determined by the court as against defendants (Mot. Seq. 001).

¹ At plaintiff's request, an Adult Protective Services ("APS") referral was made for Lipsman. APS denied assistance, after which Lipsman contacted the court seeking additional time to seek an attorney. The court granted the adjournment, but to date, Lipsman has not participated in the action.

² Plaintiff commenced a holdover proceeding in New York Housing Court under L&T Index No. 074268/2015 based on Bitton's alleged nuisance conduct. The holdover proceeding was resolved by a settlement agreement in 2016, wherein the parties agreed that Bitton would vacate the subject apartment but provided for limited visitation to the premises.

Additionally, plaintiff seeks an Order, pursuant to CPLR 6301, granting it a preliminary injunction restraining defendants from (i) engaging in hostile behavior towards, and physical confrontations with, the occupants residing, staying, working, or visiting the building at 517 East 75th Street, New York, New York 10021; (ii) making noises and playing music at volumes that can be heard outside of apartment GAE; (iii) violating “NYC Quiet Hours” as specified in Local Law 113 (NYC Adm. Code §§ 24- 202–270); and for such other and further relief as is just and proper, including costs and disbursements (NYSCEF Doc. No. 21 [Mot. Seq. 002]).

Plaintiff argues that a default judgment against defendants is warranted because they were duly served with the summons and complaint and their time to appear or join issue has since expired. Plaintiff represents that “[d]efendants’ bad acts continue to menace [p]laintiff, its [b]uilding, and the [b]uilding’s other occupants.”

As for the motion seeking injunctive relief, plaintiff argues that Bitton should be prohibited from permitting excessive noise to emanate from the subject apartment in violation of the Administrative Code of the City of New York. Plaintiff claims a probability of success on the merits based on their claim that Bitton, in violation of the 2016 settlement agreement, is living in apartment GAE and engaging in conduct that interferes with the tenants’ quiet enjoyment of the building. It submits the affidavit of Guillaume Chevalier, a tenant in the building who claims to reside in the unit directly below defendants’ apartment. Chevalier affirms that Bitton plays loud heavy metal music at all hours of the night, from approximately 10:00 P.M. to 7:30 A.M. Chevalier further maintains that he has contacted the police on several occasions regarding the excessive noise, to no avail. He also attempted to engage Bitton to resolve the situation, but Bitton allegedly “brushed past” him and later called him an “Arab” to another tenant in the building. This situation, claims Chevalier, has caused him chronic sleep deprivation, affecting his physical and emotional wellbeing. Chevalier, who is a French national and in the United States on a work visa, claims that his performance at work has suffered due to his sleep deprivation caused by the loud music and that his status in the country may be adversely impacted by this situation if a preliminary injunction is not granted (NYSCEF Doc. No. 17).

Plaintiff also submits the affidavit of Olivia Nikaj, its property manager, who affirms that, as alleged by Chevalier, Bitton “blast[s] music all night during City-mandated quiet hours” and uses “vulgar language and racial epithets.” Nikaj also asserts that Bitton took a hatchet to the building’s boiler. Other neighbors, claims Nikaj, have consistently complained about defendants’ disruptive conduct (NYSCEF Doc. No. 16, *Nikaj affidavit*).

In opposition to the motion, Bitton denies the allegations, claiming, among other things, that the averments of Chevalier and Nikaj are “untrue and fabricated.” (NYSCEF Doc. No. 80, *Bitton affidavit*). He denies that Chevalier lives directly under apartment GAE and that there is loud noise coming from the subject apartment. Furthermore, Bitton maintains that he never used any racial epithets or bigoted language when referring to Chevalier and that, in fact, it was Chevalier who has engaged in harassing behavior. In support of said assertion, Bitton submits a June 23, 2022, time-stamped photo from a ring camera purportedly showing Chevalier kicking Lipsman’s door (NYSCEF Doc. No. 86, *photos*). Bitton also furnishes a certification of

authenticity transcribing Chevalier's audio from the June 23, 2022, wherein he is alleged to have used racial slurs against Bitton (NYSCEF Doc. No. 87, *transcription*).³

CPLR 3215 (a) provides, in pertinent part, that when “a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him [or her].” To establish his or her entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default. (see *PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016].)

Under CPLR 6301, the “party seeking a preliminary injunction must demonstrate 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*, 4 NY3d 839, 840 [2005]). “A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits” (*Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 122 [1st Dept 1991]; *61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 337 [1st Dept 2010].) It is well-settled that “[p]reliminary injunction are drastic remedies, substantially limiting the nonmovant’s rights, and are awarded in special circumstances.” (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]).

Addressing the motion seeking a default judgment (Mot. Seq. 001), plaintiff moves, pursuant to CPLR 3215, for an order granting plaintiff a default judgment on all causes of action pled in the verified complaint as against defendants based on their failure to appear and answer the complaint. Bitton filed a cross-motion to dismiss the action, pursuant to CPLR 3212, and seeks “damages for [c]ounter-[c]laims of [r]etaliation and [d]iscrimination.” However, Bitton has not interposed an answer in this action, nor has he requested an extension of time to formally appear in this action. Therefore, his request for summary judgment, prior to joinder of issue, is procedurally improper and therefore denied. Moreover, although Lipsman interposed an amended answer (NYSCEF Doc. No. 56), plaintiff rejected same as untimely (NYSCEF Doc. No. 58, *notice of rejection*) and no motion has been made to compel plaintiff to accept the late pleading. Upon consideration of the moving papers, the motion is granted to the extent that a default judgment is noted as against defendants. However, issues pertaining to liability shall be determined at the time of trial.

The motion for injunctive relief (Mot. Seq. 002) is denied. Plaintiff has failed to establish, as a matter of law, that defendants have allowed noise to emanate from Lipsman’s apartment in excess of what is permitted under the New York City Noise Code. In support of its application, plaintiff relies on nothing more than the affidavit of Chevalier to argue that Bitton is making noises and playing music at volumes that can be heard outside of apartment GAE. However, there is no other proof establishing the noise level coming from defendants’ apartment (compare *Gross v 133 E. 80th St. Corp.*, 2023 NY Slip Op 30375[U], **5 [Sup Ct, NY County 2023] [finding that the affidavit of plaintiff’s expert established that the noise complained of was significant above the legal limit under the Noise code]; see *Schulman, Blitz & Williamson, LLP v*

³ By Order filed September 14, 2023, the court indicated that Bitton’s submissions under Mot. Seqs. 003 and 004 (which were previously denied on procedural grounds) would be deemed as opposition to Mot. Seqs. 001 and 002.

VBG 990 AOA LLC, 2018 NY Slip Op 32993[U], **4 [Sup Ct, NY County 2018] [finding that the proof submitted was fatally conclusory absent expert affidavits or other supporting evidence]). Furthermore, this court notes that Bitton denies Chevalier’s claim that there is loud noise emanating from the subject apartment, raising a factual dispute as to same. While this court recognizes the strong policy of protecting a tenant’s right to enjoy their apartment in peace, especially during late night hours (see 61 W. 62 Owners Corp. v CGMEMP LLC, 77 AD3d 330 [1st 2011]), plaintiff has not established a “clear right” to the relief requested on this application (New York Yankees P’ship v Sports Channel Assocs., 126 AD2d 470, 472 [1st Dept 1987]); thus, the motion is denied. All other reliefs have been considered and are hereby denied. Based on the foregoing, it is hereby

ORDERED that plaintiff’s motion (Mot. Seq. 001), pursuant to CPLR 3215, is granted solely to the extent that defendants’ default is noted; however, issues pertaining to liability shall be determined at the time of trial; and it is further

ORDERED that plaintiff shall notify APS at the time of trial with respect to defendant Sheri Lipsman; and it is further

ORDERED that plaintiff’s motion seeking injunctive relief (Mot. Seq.002) is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

ORDERED that, within thirty (30) days after service of this decision and order, with notice of entry, plaintiff shall file its note of issue with the court.

This constitutes the decision and order of this court.

September 20, 2024


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE