Board of Mgrs. of the 257 W. 17th St. Condominiums v 257 Assoc. Borrower LLC
2015 NY Slip Op 30072(U)
January 16, 2015
Supreme Court, New York County
Docket Number: 160585/13
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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The Board of Managers of the 257 West 17th St. Condominiums,

Plaintiff,

-against-

DECISION AND ORDER
Index Number: 160585/13

257 Associates Borrower LLC, and
BBP Fitness LLC d/b/a Brick New York,

Defendants.

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KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this order to show cause for a preliminary injunction.

Papers	**Numbered**
Notice of Motion/Order to Show Cause, Affidavits, and Exhibits	1-29
Answering Affidavits and Exhibits	30-39
Reply Affirmation and Exhibits	n/a

Plaintiff, the Board of Managers of the 257 West 17th St. Condominium (the Board), brings this action for an order pursuant to CPLR 6301 and 6311 granting plaintiff a preliminary injunction enjoining defendant, BBP Fitness LLC d/b/a Brick New York (Brick), their agents, officers, employees, licensees and/or tenants from (a) dropping and/or throwing weights and/or weighted materials on the floors, walls, and/or ceilings of the commercial unit (Unit C1) at the building (the premises), or engaging in any other activity in the premises which will cause a violation of New York City's Noise Code; (b) operating a gym in the premises without the required physical culture establishment permit; and/or (c) organizing group running and/or jogging activities in front of the entrance of the building.

Defendant Brick opposes plaintiff's application.

Procedural History

This Court has conferenced this motion with counsel for the parties numerous times since the Order to show Cause was initially signed.[1] The purpose of dedicating approximately 10 hours to the issues raised in the papers submitted was to provide the parties with time to acoustically test the environment in the building. The goal of the testing was to provide the Court with as much empirical data as possible.

Factual Background

Plaintiff is the duly elected Board of Managers of a condominium located at 257 West 17th Street, New York, New York (the building). By a deed dated October 15, 2013, 257 Associates Borrower (257 Assoc. Borrower), a Delaware limited liability company, authorized to do business in New York, acquired title to the commercial Unit C1 from 257 Associates LLC, the former sponsor of the condominium plan. 257 Associates LLC shares a service address and mailing address with 257 Assoc. Borrower. Unit C1 consists of the majority of the first floor and he entire basement of the building. BBP Fitness LLC is a New York limited liability company d/b/a as Brick New York (Brick).

In or around January 2013, Brick entered into a written lease with 257 Associates LLC for a term of 10 years. Brick took possession of Unit C1 and opened for business on or about August 1, 2013. Brick operates an unlicensed physical fitness training gym, commonly known as a "cross-fit" gym. Its hours of operation are Monday through Thursday from 5:45AM and 9:00PM, Friday from 5:45AM to 8:00PM, Saturday from 8:00AM to 4:00PM, and Sunday from 9:00AM to 1:00PM.

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[1]During the course of the foregoing conferences, correspondence was exchanged to supplement the information supplied in the original papers.

"Cross-fit" has been described as a performance training program which focuses on "functional fitness that incorporates everyday movements with different load capacities and time requirements." (See Plaintiff's Exhibit F). Brick offers various types of classes and programs to its customers, but cross-fit classes are the most popular. During a typical cross-fit class, gym goers do exercises which include flinging heavy free weights, known as "kettle bells," into the air and letting them hit the floor.

It is undisputed that Brick installed a floating floor system in the premises. The purpose of the floating floor system was to have the raised floor absorb and dampen the sounds and vibrations caused by the dropping of the free weights. However, shortly after the commencement of Brick's gym operations, unit owners of the Condominium started to complain to the Board, the Condominium's managing agent and the Building staff about the noise and/or vibrations coming from the premises. Additionally, unit owners complained about large groups of runners that were in front of the Condominium's main entrance. These groups were 2-3 people abreast, which made it very difficult for those passing, thus causing an impediment for those entering and exiting the building and/or traversing the sidewalk in front of the building.

After becoming aware that unreasonable levels of noise and vibration were negatively affecting the residential unit owners of the building, the board and managing agent addressed the situation with 257 Assoc. Borrower and Brick. Despite reassurances from Brick to take corrective action, the noise and vibrations have continued unabated. The board retained the services of Acoustilog Inc. (Acoustilog), an acoustical expert, to measure the sound and determine if the noise emanating from the gym violated the New York Administrative Code. On August 21, 2013, Acoustilog conducted a series of noise and vibration tests at the building by dropping weights in both

the basement and the first floor. Acoustilog measured the sound in units located on the second, fourth, and sixth floors of the building. The results confirmed that the noise and vibrations are transmitting through the structure of the building, and exceed the legal decibel limits set forth in the New York City noise code. Acoustilog also noted that structural vibrations could easily be felt without the need to use any specialized equipment. (See Plaintiff's Exhibit H).

On September 18, 2013, 257 Associates LLC informed Brick in writing of the noise and vibration complaints it received from the Board. The letter also advised the gym to immediately address these concerns, and to make certain that the design and operation of the gym complied with the applicable provisions of law and the Condominium's by-laws. (See Plaintiff's Exhibit I).

Brick also retained an acoustical expert, Shen Milson & Wilke, LLP (SM&W), to test and measure the noise and vibration levels throughout the building. The tests performed by SM&W on September 25, 2013, also showed that the noise levels coming from Brick exceeded the codified noise limits. SM&W also noted that vibration from the weight drops was perceptible in the apartments being tested. (See Plaintiff's Exhibit J).

On October 1, 2013, Richard Lebow, on behalf of 257 Associates LLC, informed Brick that it was aware of the SM&W acoustic test results, and indicated that the noise and vibration problems had to be remedied immediately. (See Plaintiff's Exhibit L). On November 6, 2013, Brick sent an email to Mr. Lebow and members of the board outlining the steps it would take to "abate and reduce down all structure and airborne noise to a legal city limit." (See Plaintiff's Exhibit M). According to the email, Brick provided a time line from October 31, 2013 through December 1, 2013 to complete the remedial measures. Brick allegedly contacted a floor specialist to provide additional matting and rubber tile to resurface the existing floor. Brick also contacted an acoustical engineer

to work with the floating floor installation company to explore possible improvements to the floor. Finally, defendant contacted various companies to test different lifting platforms, and pads in an effort to absorb the noise and vibrations.

Despite these efforts, the unit owners' complaints have continued. Plaintiff has submitted the affidavits of eight residents of the building in support of the instant application. In sum, they state that they are subjected to continuous noise and vibrations that can be heard and felt in all of their apartments. These disruptions interfere with the residents' ability to sleep, work, and/or enjoy their homes. Additionally, the affidavits state that the residents are also disturbed by the organized running sessions held by Brick in front of the building, which cause fear and risk of physical injury to residents who are entering and exiting the building. On or about November 6, 2013, the New York City Environmental Control Board issued a violation against the premises because Brick is operating without a physical culture establishment permit. (See Plaintiff's Exhibit N).

On or about November 13, 2013, the Board commenced the instant action, alleging: (1) breach of the Condominium's declaration, by-laws, rules, and regulations; and (2) private nuisance. Plaintiff seeks a permanent injunction against the aforementioned activities. Plaintiffs now move by an order show cause seeking a preliminary injunction enjoining defendant from dropping and/or throwing weights and/or weighted materials on the floors, organizing group running activities in front of the entrance of the Building, and operating a gym in the Premises without the required physical culture establishment permit.

On November 15, 2013, this Court signed an Interim Temporary Order directing defendants to refrain from intentionally dropping weights and/or weighted objects on the floor and/or walls of the facility before the hours of 7:30AM and after 8:30PM. The Order also states that upon receipt

of reasonable notice, access to the apartments would be granted for the purpose of performing acoustical testing referred to herein, as well as, to report the date and time of any noise and/or vibration complaints to defendants.

On June 16, 2014, by letter to the Court and all parties, plaintiff's counsel requested a conference with the Court. The parties engaged in settlement discussions, pending receipt of the acoustic test reports.

On October 23, 2014, plaintiff's counsel wrote a letter to the Court again. This letter provided the Court with a status report regarding Brick's pending Board of Standard and Appeals (BSA) application seeking the permit to operate a physical culture establishment. According to this letter, the BSA would not issue the appropriate permit to Brick until the noise and vibration issues caused by Brick were properly resolved. In a failed effort to comply, Brick installed a drop ceiling in the premises, which took several weeks to complete. Brick did concede during the BSA hearing that the flooring system on the entire first floor of the premises was not adequate, but made the representation that a new system would be devised to cure the noise and vibration problems; however, Brick did not set forth any schedule for the development and installation of a new flooring system. Brick has proffered to the BSA the affidavit of Jared Blank, one of Brick's principals, which states that

> "As agreed by Brick at the public hearing, during the BSA public hearing porcess and until the BSA adopts a resolution concerning Brick's BSA application, Brick has instituted a policy whereby Brick's members are instructed not to drop weights at Brick. This policy regarding no weight dropping will remain in effect until the BSA issues its resolution on the BSA Application." (See Blank's Affidavit dated September 30, 2014, attached to plaintiff's letter to this Court, dated October 23, 2014).

The same October 23, 2014, letter included yet another acoustical report produced by Wilson

Ihrig & Associates (Wilson Ihrig), a newly retained vibration consulting company hired by Brick. The tests performed on September 12, 2014, by Wilson Ihrig, resulted in the following conclusion:

> [There is] "a strong transfer of vibration particularly at 16 HZ and higher frequencies with very little vibration transfer at lower frequencies... [A]t this time there appears to be a lack of resilient toping layers available and suitable for this particular application of free weight drops. What is conceptually needed is a layer that is soft and thick as possible to cushion the impact but also hold up to impact loading...Unfortunately, there is limited data currently available on the Pliteq flooring that enable analyzing it theoretically or comparing against other materials." (See Plaintiff's Letter, dated October 23, 2014, attached to this decision as Exhibit "A").

On November 11, 2014, plaintiff's counsel sent a third letter, on notice, to this Court, seeking a preliminary conference in order to set a discovery schedule. The letter states that counsel received new complaints from unit owners concerning the "disturbing noises emanating from the gym at unreasonable hours of the day and night." (See Plaintiff's Letter, dated November 11, 2014, attached to this decision).

Arguments

Plaintiff argues that they are entitled to the relief sought because defendants are in violation of the New York City Noise Control Code, as well as the condominium by-laws relating to nuisance, and that such violations will cause plaintiff to suffer irreparable injury.

Brick contends that the continuous operation of their business does not constitute an intentional interference with plaintiff's quiet enjoyment of the condominium.

257 Assoc. Borrower, has appeared in the action, but has not taken a position on plaintiff's application.

Discussion

CPLR 6301 states that a preliminary injunction:

> "may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action were the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which is committed or continued during the pendency of the action, would produce injury to the plaintiff."

To obtain a preliminary injunction pursuant to CPLR 6301, plaintiff 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. See *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 (2005). The decision of whether to issue a preliminary injunction rests in the trial court's sound discretion (see *Schweizer v Town of Smithtown,* 19 AD3d 682 [2005]). Here, plaintiff has set forth the prima facie elements for injunctive relief based upon the uncontested facts recited by the experts and the parties herein.

To establish a private nuisance there must be an intentional and unreasonable interference by a defendant with a plaintiff's right to use and enjoy the premises he or she occupies. The elements of the cause of action are: (1) an interference 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. *JP Morgan Chase Bank v Whitmore*, 41 AD3d 433, 434 (2nd Dept 2007). "[E]xcept for the issue of whether the plaintiff has the requisite property interest, each of the other elements is a question for the jury, unless the evidence is undisputed" (*Weinberg*, 217 AD2d at 579; *but see McCarty v. Natural Carbonic Gas Co.,* 189 NY 40, 47 [1907] ["What is reasonable is sometimes a question of law and at others a question of fact. When it depends upon an interference from peculiar, numerous or complicated circumstance it is usually a question of fact"]). Residents are not required to seek medical care or

move in order to demonstrate injury (*see State v Fermenta ASC Corp.*, 166 Misc2d 524, 533 [Sup.Ct., Suffolk County 1995], aff'd in part, 238 A.D.2d 400 [2nd Dept. 1997]), but must establish substantial annoyance or discomfort to the ordinary reasonable person, and more than mere discomfort or minor inconvenience (*Dugway, Ltd. v Fizzinoglia,* 166 AD2d 836 [3rd Dept. 1990]). Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct. *Domen Holding Co. v Aranovich,* 1 NY3d 117 (2003) (repeated verbal abuse and threats); *see also 61 W. 62 Owners Corp. v CGM EMP LLC,* 77 AD3d 330 (1st Dept 2010) (noise occurring late every night), *mod. on other grounds,* 16 NY3d 822 (2011); *Broxmeyer v United Capital Corp.*, 79 A.D.3d 780, 914 N.Y.S.2d 181 (2nd Dept. 2010) (noise created by the operation of HVAC units); *JP Morgan Chase Bank v Whitmore*, 41 AD3d 433 (2nd Dept 2007) (noise created by exhaust fans).

In *61 W. 62 Owners Corp.*, the plaintiff tenant submitted affidavits of nine tenants as to the late-night recurrence of excessive noise from a nearby rooftop bar. 77 AD3d at 332. The plaintiff also produced an affidavit from an acoustical consultant who reported that the decibel levels of the music played at the bar late at night consistently exceeded the noise level permitted by ordinance. 77 AD3d at 332. There, the court found that the plaintiff sufficiently established the elements of a claim for nuisance on the merits. 77 AD3d at 334. Similarly, in *Bronxmeyer* (79 AD3d at 783) and *JP Morgan Chase Bank* (41 AD3d at 435), plaintiffs presented evidence that the noise generated by the ongoing operation of the rooftop air conditioning units and/or exhaust fans prevented them from enjoying their apartments. This evidence, together with expert testimony that the noise levels violated applicable code provisions, satisfied the elements of a private nuisance claim.

Here, the element of intent is satisfied because the noise is intentional and caused by Brick's members. The gym's use of heavy free weights during its daily cross-fit classes is permitted and encouraged in furtherance of its own commercial purposes. Defendant has continued to hold cross-fit classes, despite being made aware of the numerous complaints regarding the noise and vibrations emanating from the gym when such classes are occurring. Brick has both actual and constructive notice that the ongoing operation of the gym and cross-fit classes would result, or was substantially certain to result, in loud noises and vibrations, not only which caused residents interference, but also violated the New York City Noise Control Code (New York City Administrative Code 24-201, et seq.).

Defendant insists that if there is any interference it is not unreasonable. Brick aptly emphasizes that the continuous operation of its business must be weighed against the residents' alleged discomfort, with the court weighing the reasonableness of the noise level alleged, in light of all of the circumstances presented. Plaintiffs have no obligation to tolerate any violation of the Noise Code. Brick is required to operate their business within the confines of the law. In a noise case, however, while sound level is certainly a significant factor, the unreasonableness of an alleged interference with a property owner's rights also requires the evaluation and weighing of multiple factors, including the duration of the allegedly offending sound, the times at which it is made, whether the condition is recurring, and if so, with what frequency (*see Futerfas v Shultis,* 209 AD2d 761 [3rd Dept1994]). Clearly, sounds that are reasonable midday, may no not be so after midnight (*see Matter of Twin Elm Management Corp. v Banks,* 181 Misc. 96 [MuncCt, Borough of Queens, 2d Dist.1943] [12 hours of piano practice found not to be a nuisance where there was no showing that the piano playing was exceptionally loud or performed at unreasonable

hours]). In addition, the character of the neighborhood must also be considered, as what is acceptable in an industrial area may not be acceptable in a residential area. Whether or not plaintiff came to the nuisance is also a factor, but of less significance than the level, duration and frequency of occurrences of sound (*cf. McCarty,* 189 NY at 50), and of little if any, significance concerning a violation of the law (*see Graceland Corp. v Consolidated Laundries Corp.,* 7 AD2d 89 [1st Dept1958], *affd* 6 NY2d 900 [1959]).

Here, the affidavits, submitted by the owners and/or occupants of the building, in support of the motion, detail the daily assault on the quiet enjoyment of their apartments, including sleep deprivation, inability to concentrate/work, stress, inability to use the apartment, and fear of injury when entering/exiting the building due to the organized running groups. Additionally, it is undisputed that Brick is currently operating illegally. This evidence, coupled with the expert testimony provided by both plaintiff's and defendant's acoustical engineers that the noise levels violate applicable code provisions, demonstrates a likelihood of success on the merits of plaintiff's nuisance claim (*see Poughkeepsie Gas Co. v Citizens' Gas Co.,* 89 NY 493; *Arcamone-Makinano v Britton Prop., Inc.,* 83 AD3d at 624; *61 W. 62 Owners Corp. v CGM EMP LLC,* 77 AD3d 330). Plaintiffs have also demonstrated that the lack of quiet enjoyment is causing irreparable injury (*see 61 W. 62 Owners Corp. v CGM EMP LLC,* 77 AD3d 330 [1st Dept. 2010]).

Finally, plaintiffs have also established the third element necessary for injunctive relief. The balance of the equities tips in favor of the condominium and its residents. Plaintiffs, and residents of the condominium, have a right to enjoy their apartments in relative peace. Defendants have clearly failed to cure the noise problems in the building, and have had ample

time to make the necessary renovations to abate the vibrations and noise.

Due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of the plaintiff and against the defendant and that the plaintiff is entitled to a preliminary injunction on the ground that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision [the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff, as set forth in the aforesaid decision], it is

ORDERED that the undertaking is fixed in the sum of $100,000.00 conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision, and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts: (a) dropping and/or throwing weights and/or weighted materials on the floors, walls, and/or ceilings of the commercial unit (Unit C1) at the building (the premises) or engaging in any other activity in the premises which will cause a violation of New York City's Noise Code; (b) operating a gym in the premises without the required physical

culture establishment permit; and/or (c) organizing group running and/or jogging activities in front of the entrance of the building.

Dated: January 16, 2015

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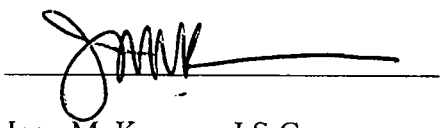

Joan M. Kenney, J.S.C.