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Neighbor on Neighbor Disputes: A Landlord or Community Association's Obligation

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Suffolk County Bar Association, New York

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Beth M. Gazes, Esq. – Associate Attorney at Taylor Eldridge & Endres, P.C.

Beth concentrates in real estate law, particularly in the areas of community association governance, litigation. real estate transactions, and landlord tenant matters,

Ms. Gazes is a graduate of Touro Law Center. While in law school, she served as a Board Member of the Moot Court Honors Board, as well as a member of the Touro Law Center Honors Program, Trial Advocacy and Practice Society, and Journal of Gender, Race, and Ethnicity. She was her class representative of the Student Bar Association and was the Founder of the Public Speaking Club at Touro Law Center. She also served as research assistant in areas of both land use and environmental crimes. Off campus, Ms. Gazes served on the NYSBA Commercial and Federal Litigation Section's Publication Committee and coached a Brentwood High School Student Mock Trial Team. She also served as intern to the Honorable C. Randall Hinrichs.

While studying at Touro, Ms. Gazes received CALI Awards for Academic Excellence in Land Use and Zoning, Legal Research, NY Civil Procedure, and her pro bono work at the college's Small Business and Not-for-Profit Clinic. She received the ABA State & Local Government Section Recognition for Academic Performance in Land Use and was honored at graduation with the Touro Law Pro Bono Service Award: Special Service to the Public & Community.

Ms. Gazes is a member of the Suffolk County Bar Association, New York Bar Association, and Suffolk County Women's Bar Association. She currently sits as a member of the Advisory Board of Touro's Institute for Land Use and Sustainable Development Law and was appointed to that position by Touro's Dean Elena Langan in February 2020. Ms. Gazes is also a member of the Ambassadors Counsel of Pride for Youth/Long Island Crisis Center and is a volunteer attorney with the Transgender Legal Defense & Education Fund assisting transgender individuals effectuate name changes on a pro bono basis.

MELISSA B. SCHLACTUS, ESQ. – TAYLOR ELDRIDGE & ENDRES, PC

Melissa B. Schlactus, Esq. received her B.A. in psychology (magna cum laude), from Binghamton University, where she was elected to Phi Beta Kappa. She earned her J.D. (magna cum laude) from Touro Law Center. While in law school, she served as the Issue Editor of the Touro Law Review. Ms. Schlactus authored two published articles in 2010 examining the cases *Goldstein v. New York State Urban Development Corp.* and *People v. Davis*. These articles explored the issues of eminent domain and due process which recently arose in two influential decisions.

Ms. Schlactus interned for the Suffolk County District Attorney's Office and for the Honorable Leonard D. Wexler of the U.S. District Court for the Eastern District of NY. Following graduation, she completed a post- graduate fellowship with the New York Appellate Division, Second Department, working for the Honorable Leonard B. Austin. Prior to joining Taylor, Eldridge & Endres, Ms. Schlactus practiced mortgage default litigation, where she represented major financial institutions in foreclosure proceedings. She is a member of the Suffolk County Bar Association and is admitted to practice law in the States of New York and New Jersey, as well as in the U.S. District Courts for the Eastern District of New York and the District of New Jersey.

Ms. Schlactus currently is a member of the CAI-Long Island Board of Directors and is the President and editor of the Chapter's quarterly newsletter and sits on the organization's New York Legislative Action Committee.

NEIGHBOR ON NEIGHBOR DISPUTES

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I. Disputes Between Neighbors

- a. Nuisance
  - i. An interference substantial in nature
  - ii. Intentional in origin
  - iii. Unreasonable in character
  - iv. With a person's property right to use and enjoy land
  - v. Caused by another's conduct in acting or failure to act
- b. Noise Complaints
  - i. Excessive noise or incidental to apartment living?
    1. Children running, jumping, and playing is not a nuisance
    2. Loud music played late at night is a nuisance
- c. Smoking
  - i. Smoke passes into neighboring units through breaches in walls, ceilings, and floors due to shared attics, hallways and ventilation systems

II. Role of Community Association Boards

- a. Board is not obligated to reconcile disputes
  - i. By-Laws and Declaration do not require Boards to police owners' behaviors
- b. Boards should still attempt to reconcile the dispute

i. Attempt to avoid litigation, including discrimination suits

ii. Boards are almost always dragged into the conflict

III. Best practices for Boards

a. Investigate complaints

i. Carpeting requirements

ii. Building engineer/architect identify the source of smoke infiltration

iii. Install enhanced air filtration systems

iv. Ask smoker to smoke away from party walls or outside

b. Mediation

i. Use of independent agencies

ii. Limited if parties won't participate

IV. Role of the Landlord/Manager

a. Landlord/management is not obligated to reconcile disputes.

b. Don't be a muck-raker.

c. Mediation, mediation, mediation.

201 W. 89th Owners, Inc. v Mostel

Civil Court of the City of New York, New York County

December 2, 2014, Decided

L & T 083986/2013

Reporter
46 Misc. 3d 1201(A) *; 5 N.Y.S.3d 330 **; 2014 N.Y. Misc. LEXIS 5405 ***; 2014 NY Slip Op 51756(U) ****

[**1]** 201 W. 89th Owners, Inc., Petitioner-Landlord, against Barbara Mostel, Respondents-Tenants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

odor, subject premises, apartment, cigarette, smell, smoke, public hallway, hallway, detect, second floor, visited, door, Notice, house rules, asserts, inspection, cigarette smoke, cleaning, tenants, proprietary lease, managing agent, complaints, Cure, Lessee, corridor, Landlord's, emanating, Premises, Lease, resides

Counsel: [*1]** For Petitioner: Rosen Livingston & Cholst LLP by Andrew J. Wagner, Esq.

For Respondent: Adam Leitman Bailey, P.C. by Christopher Halligan, Esq.

Judges: Peter M. Wendt, J.H.C.

Opinion by: Peter M. Wendt

Opinion

Peter M. Wendt, J.

Following trial in this summary holdover proceeding, held on July 8th and 21st, 2014, the court sets forth below its findings of fact and conclusions of law.

Petitioner is the owner and landlord of cooperative unit 2C, located at 201 West 89th Street, New York, New York 10024 (the "subject premises"). In October 2013, Petitioner commenced this holdover proceeding against the Respondent on the ground that Respondent has violated a substantial obligation of her tenancy and has violated substantial terms of the proprietary lease for the subject premises. The Notice to Cure dated and served on April 8, 2013, attached to the petition and incorporated therein by reference, alleges that Respondent, in violation of paragraph "13" and 18(b) of the Proprietary Lease and paragraph (5) of the Landlord's House Rules, has unreasonably allowed cigarette smoke and/or other odors to escape the subject premises and permeate **[****2]** throughout the public corridor outside the subject premises. The Notice to Cure further alleged that: **[***2]** (1) the Landlord, its agents, employees and/or building service personnel have observed that the odor of cigarette smoke exists in the public corridor outside of the subject premises, and the odor is potent near the apartment door of the subject premises; (2) the building's managing agent has received several complaints from other building tenants about the recurring presence of cigarette smoke odor in the public corridor outside of the subject premises; (3) Despite receiving repeated requests from the managing agent to abate the odor of cigarette smoke emanating from the subject premises, Respondent has ignored such requests, and the condition in the public corridor near the subject premises persists. The Notice to Cure required Respondent to cure this default on or before May 14, 2013. The subsequent Notice of Termination, dated August 15, 2013 and also attached to the petition, alleges that Respondent failed to comply with the Notice to Cure.

In her Answer dated April 18, 2014, Respondent asserted the following affirmative defenses: (1) Petitioner has unclean hands in that there is a lengthy history of hostility against the Respondent by the Petitioner and/or members of its Board **[***3]** of Directors and/or certain unduly powerful shareholders of Petitioner; (2) Petitioner is estopped from bringing this proceeding as Respondent has been caused to change

her position to her detriment due to the personal hostility between Petitioner and Respondent. Respondent also asserted the following counterclaims for: (1) attorneys' fees; (2) damages and punitive damages for intentional infliction of emotional distress; and (3) damages and punitive damages for prima facie tort.

At trial, Petitioner's Notice to Admit (Petitioner's Exhibit 1), Respondent's response to the notice (Respondent's Exhibit A), a certified copy of the deed (Petitioner's Exhibit 2), and the original proprietary lease (Petitioner's Exhibit 3) for the subject premises was admitted into evidence without objection by either side. Petitioner presented its *prima facie* case through the testimony of Felix Romero, the superintendent, Alfred Nicasio, the property manager for the building, Sandra and Jeffrey Smith, tenants who reside on the same floor as Respondent in the building, and through its exhibits.

Mr. Felix Romero[1] testified that he has been employed by Petitioner for eighteen (18) years as the superintendent **[***4]** for the building located at 201 West 89th Street, New York, New York. He asserted that his duties are to maintain the building, perform repairs with the handyman, assist the handyman and other tasks. He testified he was familiar with the subject premises, and has visited the subject premises approximately three or four **[****3]** times a year for the past ten (10) years to perform repairs. Mr. Romero further testified that the subject premises is on the second floor with three (3) other apartments, including apartment 2A. Mr. Romero asserted that Sandra and Jeffery Smith reside in apartment 2A with their teenage children. He further asserted that apartment 2A and the subject premises are across the hallway from each other; apartment 2B is next to apartment 2A, and has been empty for four (4) years as it is a sponsor owned apartment; and apartment 2D also on the second floor has been vacant for at least four (4) years. Mr. Romero asserts that he has been to apartment 2B at least fifty (50) times in the last two years supervising the renovations being done, and did not detect any odor in apartment 2B. He further asserts that he has visited apartment 2D in the last two (2) years to check on the **[***5]** apartment for leaks, and did not detect any odor. Mr. Romero maintains that he has visited apartment 2A four (4) times in the last two (2) years, and also did not detect any odors. Mr. Romero further testified that he has visited the subject premises at least eight (8) times in the last two (2) years to perform repairs, and each visit lasted from seven (7) to ten (10) minutes.

Mr. Romero alleges that since early 2012, he smelled cigarette odor in the subject premises. Further, Mr. Romero asserts that when he left the subject premises into the public hallway, he observed cigarette odor. Thereafter, in March 2012, Mr. Romero asserts he visited the subject premises to address the issue of insufficient heat. Mr. Romero **[***6]** testified that he smelled cigarette odor in the public hallway. Thereafter, in late September and December 2012, he testified he visited the subject premises to perform repairs, and again smelled cigarette odor in the public hallway. He further testified that the severity of the cigarette odor was the same in December 2012 as in March and September 2012. Subsequently, in early 2013, he testified he visited the subject premises to perform further repairs, and still smelled the cigarette odor outside of the subject premises. Mr. Romero asserts his next visit was in March 2014, and although he smelled cigarette odor, the odor was less strong in the public hallway in 2014 than the previous years.

Mr. Romero testified that in early 2012, he received a complaint from Sandra Smith regarding the cigarette odor in the public hallway, which he referred to management. He further testified that he did not receive any other complaints from anyone in the building prior or subsequent to Ms. Smith's complaint.

On cross examination, Mr. Romero testified that there are 107 apartments in the building, and knows only one of the co-op owners who smoke. He testified that other than apartment 2C, 3A and 9C, **[***7]** he does not know of anyone else who smokes in the building. He asserts that he's seen the owners of 3A and 9C smoking outside, however he never saw Respondent smoking outside of the building. He further testified that the previous tenant in apartment 2D was a smoker. He asserts that the porter cleans the public hallway on the second floor, and cleans the public areas outside of the subject premises once a week. He testified that the walls on the second floor hallway were painted four (4) years **[****4]** ago, and there are vents on all floors of the building in the public hallways. He asserts that all the floors are connected to the same ventilation shaft,

[1] On October 31, 2014, the attorneys' for both parties entered into a stipulation agreeing that "the Judge's reading of his notes into the record on September 19, 2014 shall be deemed an appropriate part of the record, and counsel for both sides agree not to object to the Court repeating its notes of the testimony being substituted for the actual testimony. If a portion of the court's notes overlap the actual testimony, the actual testimony shall superseded the notes dictated."

and that all vents are designed to carry the air and odors outside.

On the redirect of Mr. Romero, he testified that there were no apartments below the second floor. Moreover, he testified that the purpose of the exhaust vents is to exhaust smells such as cigarettes and cooking odors. He asserts that the air in the vent flows up through the exhaust vents, however he never received complaints from any tenants above the second floor regarding cigarette odors. He testified that the prior tenant of apartment 2D who also smoked cigarettes vacated **[***8]** the apartment in 2009.

Alfred Nicasio testified that he is employed by Lawrence Properties, a real estate firm. He testified that he is a property manager and manages six (6) buildings, including the building located at 201 West 89th Street, New York, New York. He testified that he has managed the building since April 2011, and his duties are dealing with complaints from the shareholders and receiving rent payments. He asserts that there are 107 units in the building. Admitted into evidence on Petitioner's case without objection by Respondent was the certified copy of the multiple dwelling registration. Mr. Nicasio testified that Barbara Mostel resides in apartment 2C, and that he first visited the subject premises in late 2011 due to a cigarette complaint communicated to him verbally from Sandra Smith who lives on the second floor. He asserted that the day he visited the subject premises, he smelled cigarette odor in the hallway. He states he spoke with Respondent regarding the steps, if any, she took to stop the cigarette odor from penetrating into the hallway. He asserts she stated she would try electric cigarettes and try exiting the cigarette odor through the air conditioning vent **[***9]** in the subject premises. Mr. Nicasio asserted that he sent a letter by certified mail (Petitioner's Exhibit 5) dated February 6, 2012 to Respondent informing her that he found a strong smell of cigarette smoke not only in the subject premises but also in the public hallway, and informed her that a re-inspection would take place two weeks later.

Mr. Nicasio testified that he returned to the subject premises two weeks later, and still detected cigarette odor in the public hallway at the same level as it had been two weeks earlier. Thereafter, Mr. Nicasio testified he sent another letter dated March 28, 2012 reinforcing the idea that there was still cigarette odor in the public hallway. Subsequent to the letter dated March 28, 2012, Mr. Nicasio asserts he conducted another inspection, and found that the smell of cigarette odor in the public hallway had not changed. Mr. Nicasio testified that during all the inspections, he smelled cigarette odor in the subject premises and in the public hallway, and the cigarette odor slightly increased when the subject premises door was opened. Mr. Nicasio asserted that after each inspection, he reported all the information back to the Board.

Mr. Nicasio **[***10]** testified that in 2013 there was an agreed upon inspection at the subject premises, however he does not recall the month of the inspection. He asserted that between March 2012 and March 2013, he received additional verbal complaints from **[****5]** Sandra Smith, but from no other tenants in the building. In the fall of 2013, Mr. Nicasio stated that another inspection of the subject premises was performed. He testified that he, Respondent's attorney, and Felix Romero were present at the inspection. Mr. Nicasio further testified that when he entered the public hallway, there was a less offensive odor. He asserted he smelled some cleaning chemicals but the cigarette odor was still present. He further stated that the inspection in the fall of 2013 was the last time he was on the second floor of the building. Mr. Nicasio testified that in June 2014, he attended the annual shareholder's meeting, and Respondent was present and spoke at the meeting.

On cross examination, Mr. Nicasio testified that Sandra Smith was the only person that ever complained about the odor from the subject premises. He further testified that neither he nor the landlord retained any experts or employed any machines to determine **[***11]** the odor or its strength. He states that the next inspection of the subject premises was not until after the Notice of Cure dated April 8, 2013 was served on Respondent.

Thereafter, Petitioner called Sandra Smith to testify on its behalf. Ms. Smith testified that she resided in apartment 2A of the building for fourteen (14) years with her husband, Jeffrey Smith, and two children. She testified that there are four (4) apartments on the second floor. In describing the layout of the public hallway, Ms. Smith asserted that upon exiting the elevator, her apartment is directly to the left, apartment 2B is next door to her apartment, apartment 2C is across from the elevator, and apartment 2D is to the far right of the elevator. Ms. Smith further asserted that apartment 2D and 2B are vacant, and that Respondent, Barbara Mostel, resides in apartment 2C. Ms. Smith testified that she contacted management to complain about the cigarette odor in the hallway. She stated that in 2008, she detected these odors every day, and through 2012, the smell of cigarettes in the hallway remained the same. She further asserted that the

source of the odor was from Respondent's apartment. She testified that Respondent's **[***12]** door would always be open, and that is when the smell in the hallway was really bad. Ms. Smith stated that she requested Respondent keep her door closed to prevent the odor from getting into the hallway. She testified that in 2011, she notified Mr. Romero, the superintendent, and Mr. Nicasio, the property manager of the cigarette odor in the hallway, however, in 2012, Ms. Smith asserted she did not contact anyone from management. Ms. Smith testified that although the smell of cigarette odor still existed, she was in contact with Mr. Nicasio and believed that the Board was handling the complaint by assisting Respondent in getting rid of the smell and the source of the smell. She stated in 2012, she found the odor offensive, and was very concerned about how the second hand smoke would affect her children at the time. She further asserted that, in 2013, the situation did not change, and she was able to detect the odor at least four (4) days out of the week. She testified that some days were better than others when the cigarette odor in the public hallway was less detectable. Ms. Smith asserted that she first complained to Respondent about the odor approximately ten (10) years ago. Thereafter, **[***13]** she stated that a few years after, Respondent informed her to write a note and slip it under **[****6]** her door anytime she smelled the odor in the public hallway. Ms. Smith asserted that in subsequent conversations regarding the odor, Respondent stated that both she and the Board were attempting to remedy the odor. Ms. Smith stated she was unaware of any actions Respondent was taking to remedy the odors, and does not know whether she was home when the entrance door to the subject premises was left ajar.

On cross-examination, Ms. Smith testified that she is employed as a real estate broker, and has sold several apartments in the building. She testified that although she was not an interested broker in the sale of unit 2B, she was concerned as a shareholder how the odor in the public hallway would affect the sales price for unit 2B. She also asserted that she is not trying to sell her apartment. Nevertheless, Ms. Smith testified that when she left her apartment that day[2] the odor was faint, and has been faint for approximately a month. She asserted that a month prior to her testifying, the odor was "on and off" further describing that it meant "sometimes it was stronger than other days." She stated **[***14]** that when Respondent would leave her door ajar approximately an inch, the odor was very strong. She asserted that in 2003, Respondent would leave the door ajar many times, however she doesn't recall seeing the entrance door to the subject premises left open in the last year. Ms. Smith states that she is also unaware of any other tenants in the building complaining about Respondent's conduct, besides herself. She testified that she does not smoke, has never smoked, and does not like the smell of smoke. She asserted that she sees Respondent smoking outside of the building. Further, she asserted that she has not seen Respondent smoking in the subject premises as she has never been in her apartment, and thus, can only speculate that Respondent smokes in the subject premises. She states that two (2) months after the letter dated January 29, 2013 (Petitioner's Exhibit 6), she was aware, and Respondent informed her, that she was continuing to try and mitigate the odor by smoking electronic cigarettes. Ms. Smith testified that she and Respondent did not have any further conversations subsequent to March 2013.

On re-direct, Ms. Smith testified she never **[***15]** saw Respondent smoking an e-cigarette. She asserted that Respondent was trying to do things in her apartment such as changing the furniture in the subject premises, but never witnessed her doing so.

Jeffrey Smith, Sandra Smith's husband, testified that he's lived at apartment 2A in the building for approximately 14 years[3]. Mr. Smith testified that Respondent resides in the subject premises, and that she's resided there since they moved into apartment 2A. Mr. Smith asserted that he was in court today regarding the smoke odor on the second floor. Mr. Smith stated that he detected the odor in 2008, 2009, 2011 and 2012, and that the odor was akin to the smell of an ashtray. Mr. Smith testified that he had difficulty **[****7]** ascertaining how frequently he would detect the odor in 2008, since he quickly leaves the apartment in the morning. However, he would certainly smell the odor in the evening when he would walk the dog or take out the garbage. Mr. Smith testified that Respondent would "episodically" leave the subject premises door open, and on those occasions the odor would be stronger. Mr. Smith stated that in 2013, the odor was "still fairly present" explaining that he would sometimes

[2] Sandra Smith testified on July 21, 2014.

[3] The parties stipulated on the record that Mr. Smith's testimony regarding the description of the location of his apartment in relation to the elevator is identical **[***17]** to his wife, Sandra Smith.

notice **[***16]** it more, and sometimes notice it less. Mr. Smith further testified that he couldn't state it affected his health, nonetheless, he was not happy about the stale smells, and that it concerned his wife because she was "allergic" and had young children at home. Mr. Smith asserted he knew the source of the cigarette odor was from the subject premises, as apartment 2B and 2D were vacant, and no one in his apartment smoked. Mr. Smith further testified that due to the non-smoking regulations in offices and restaurants, he has become very sensitive to the smell of smoke. Thus, he is aware when someone smokes. For the period of January 2014 to July 2014, he asserts that the cigarette odor varied as some days are stronger than others, however, the situation has "generally" improved. Importantly, Mr. Smith could not testify with certainty the last time he detected an odor in the public hallway. Mr. Smith also asserted that he and Respondent never discussed the state, the degree or anything in substance about the odor in the public hallway.

On cross-examination, Mr. Smith testified that he never discussed the issue of cigarette smoking with Respondent, and never saw Respondent physically smoking in the subject premises. Mr. Smith also stated that he could not state how many times he smelled "even a faint smell of smoke" in the public hallway in 2013 and 2014. Further, Mr. Smith asserted that workers were present in apartment 2B and 2D for the last two years, but more recently in the past several months.

Respondent called Annette Kahn to testify on her behalf. Ms. Kahn testified that since 1985, she has resided in the building in apartment 8B, and has been employed as a French teacher for fifty (50) years. Ms. Kahn asserted that she was a member of the Board in about 2003 to 2004. Ms. Kahn testified that Respondent was an occupant in the building at the time she was a member of the Board. Ms. Kahn stated that she frequently dealt with issues relating to complaints about people smoking in public areas. Ms. Kahn asserted that she became aware of a case being brought against Respondent when it was discussed during an annual general meeting held five weeks previously[4]. Ms. Kahn stated Respondent maintained **[***18]** that she believed there was no smell, and in response, she informed Respondent that if she agreed she would be happy to support her. Ms. Kahn testified that since becoming aware of the case, she went to the second floor hallway twice, and did not detect any cigarette odor. She asserted that there was an odor in the hallway, however it was not smoke. She asserted that there was a very strong odor of dried roses, and it came from a basket of dried roses on the common table in the hallways. **[****8]** She stated she was familiar with the smell of cigarettes because she can't stand the smell, but didn't detect the smell of cigarette odors on each of her two visits to the second floor public hallway.

On cross-examination, Ms. Kahn testified that she didn't remember the last time she visited the second floor of the building prior to those two occasions.

Emily Goodman also testified on behalf of Respondent. Ms. Goodman testified that she is familiar with Respondent, and has known her for more than fifty (50) years. She testified that she became aware of this proceeding against Respondent several month ago, and visited the subject premises in June 2014. Ms. Goodman **[***19]** asserted that during her visit in June 2014: 1) she entered the building; 2) the doorman called Respondent to inform her of a visitor; 3) she took the elevator to the second floor; and 4) she was in the hallway for several minutes prior to Respondent opening the door to let her in. She asserted that she did not detect any odors in the hallway. She further asserted that she did not detect a strong smell of cigarettes at the moment Respondent opened the door to the subject premises to let her in. She stated that she admired the sectional sofa in the subject premises, and thereafter, Respondent informed her that it was new.

On cross-examination, Ms. Goodman testified that she did not detect any type of odor in the hallway. Moreover, she asserted she did not detect any offensive odors. She asserted that she and Respondent are childhood friends as they went to school together and were in a group of girls that were very good friends. She further asserted that they grew apart, and she didn't see her often unless she ran into her on 89th Street or in the neighborhood. Ms. Goodman stated that the only other time she saw Respondent recently was during a reunion with their friends.

Raina Bretan **[***20]** also testified on Respondent's behalf. Ms. Bretan testified that she resides at 200 East 71st Street, Apt. 8L, New York, New York 10021, and is employed as attorney in the States of New York and New Jersey. Ms. Bretan asserted that she is familiar with Respondent because she was an intern and then an associate of the firm Adam Leitman Bailey, P.C. participating and working on this proceeding. Ms. Bretan asserted that she terminated her employment with the

[4] Annette Kahn testified on July 21, 2014.

firm in mid-February 2014, and is currently employed with the Bank of Tokyo. Ms. Betran stated that in working on this case, she visited the subject premises on two (2) separate occasions. Ms. Betran testified that on the first occasion, in September 2013, she was directed to go to the building and inspect the subject premises to take notes of the smell in the second floor hallway and inside of the apartment. She asserted that she was in the hallway for approximately 30 to 45 seconds prior to Respondent answering the door, and did not detect any smoke or odors of smoke. Ms. Betran further asserted that when she entered Respondent's apartment, she could tell that a smoker resided there, and that there was a latent smell of cigarettes **[***21]** mixed with the smell of linens in the subject premises. She stated she discussed with Respondent the course of action in regards to coordinating a cleaning service for the subject premises, and the purchasing of additional furniture.

She testified that after the visit with Respondent, she contacted several cleaning services to coordinate a thorough cleaning of the subject premises to address the smell of cigarettes. Ms. Betran testified that she visited the subject premises for a second time in October 2013. She stated that Respondent informed her that she would not be home, and to let herself into the subject premises as the door was unlocked. Ms. Betran testified that she: 1) took the elevator up to the second floor; 2) went to the apartment door; 3) knocked on the door; 4) went into the subject premises; 5) observed all of Respondent's efforts to address the smell of cigarettes, such as leaving lemons out and using scented sprays and 6) observed new furniture at the subject premises, namely a new couch. She asserted that she did not detect any odor in the hallway, and also noticed that the odor in the subject premises had drastically improved. She stated Respondent arrived two to **[***22]** three minutes later, and they discussed the joint inspection they were going to have with the superintendent and managing agent of the building to ascertain whether or not there were any odors in the hallway subsequent to Respondent and the cleaning company's efforts in cleaning the subject premises.

Ms. Betran testified that the superintendent and managing agent arrived for the inspection approximately ten (10) minutes after Respondent arrived, and she met them in the hallway. She asserted she is very sensitive to the smell of smoke, and did not detect any odor or cigarette smoke in the hallway. She further asserted that the superintendent and managing agent implicitly agreed with her that there was no odor in the hallway. She testified that she believed everyone was in agreement because the parties shook hands, and the superintendent and managing agent did not have any further inquiries or follow up questions. Thereafter, she stated the superintendent and managing agent requested to enter the subject premises, however, she was under strict instructions by the law firm and Respondent not to allow access into the apartment because the issue in this proceeding concerned whether there **[***23]** was an odor in the common area, and not the subject premises. Ms. Betran further asserted that she did not recall the superintendent and managing agent indicate that there was still an odor in the common area.

On cross-examination, Ms. Betran testified that prior to visiting the subject premises, she had never met Respondent. She further testified that she did not know how the hallway smelled prior to her visit in September 2013. She asserted that the subject premises was scheduled to be cleaned a few days before the inspection. She states she is not a smoker and has never been a smoker.

Respondent testified on her own behalf, and stated that she's lived at the subject premises for approximately fourteen (14) years. She testified that prior to 2013, she never received any complaints related to cigarette smoke issues. She asserted that she is familiar with her neighbor, Ms. Smith, and has known her since Ms. Smith moved in. Ms. Mostel testified that she had several conversations with Ms. Smith on or about March 2013, and specifically she recalled showing Ms. Smith her electronic cigarette. She asserted that she switched to electronic cigarettes in or about March 2013 because Ms. Smith **[***24]** informed her **[****9]** that she was allergic to everything, and she was unaware that the building had rules regarding any kind of "annoying" smell, but nonetheless, still attempted to address the issue. She testified that upon becoming aware, she had the superintendent install insulating flaps on the bottom of the back and front door. She asserted she also purchased two new couches, disposed of the old couch and a chair, and retained a cleaning service to do a regular cleaning before the second inspection. From March 2013 until Petitioner served the Notice to Cure, Respondent asserted she would regularly clean the subject premises by vacuuming the floors and walls, and clean the glass and mirrors.

On cross-examination, Respondent testified that she was unaware of any prohibition against causing unreasonable offensive odors from emanating into the

common areas from the apartment until she was informed specifically where it was in the proprietary lease. Respondent testified that she became aware of the rule when Mr. Nicasio sent a clipping or a small cut out of pertinent section in the proprietary lease to her. Respondent asserted that prior to 2013, there may have been a complaint, however she **[***25]** was never informed, orally or by written notice, that it was related to odors. Respondent testified that she began taking remedial measures in March 2013. Respondent stated that she did not receive letters from management prior to 2013 regarding the odors in the hallway emanating from the subject premises. Upon being shown Petitioner's Exhibit 5, Respondent recalled receiving it. Upon being shown Exhibit C of Petitioner's Exhibit 1, Respondent recalled a few letters that referred to odors emanating into the common areas outside her apartment.

Subsequently, both sides rested, and the court reserved decision. The burden of proof is upon Petitioner to prove Respondent breached the proprietary lease and house rules by allegedly permitting unreasonable cigarette odor to escape the subject premises and permeate a public area of the building. As further discussed below, the court finds that Petitioner failed prove, by a preponderance of the evidence, that Respondent has violated the proprietary lease and house rules.

The Notice to Cure specifically states that Respondent is "in violation of paragraphs 13 and 18(b) of the Lease and paragraph (5) of the Landlord's House Rules, you have unreasonably allowed **[***26]** cigarette smoke and/or other odors to escape the Premises and permeate throughout the public corridor outside of the Premises." Moreover, the Notice to Cure alleged the following:

The Landlord, its agents, employees and/or building service personnel have observed that the odor of cigarette smoke exists in the public corridor outside of the Premises, and the odor is potent near the apartment door of the Premises;

The building's managing agent has received several complaints from other building tenants about the recurring presence of cigarette smoke odor in the public corridor outside of the Premises; and

Despite receiving repeated requests from the managing agent to abate the odor of cigarette smoke emanating from the Premises, you have ignored such requests, and the condition in the public corridor near the Premises persists.

Paragraphs 13 of the Lease states "The Lessor has adopted House Rules which are appended hereto, and the Directors may alter, amend or repeal such House Rules and adopt new House Rules. The Lease shall be in all respects subject to such House Rules which, when a copy thereof has been furnished to the Lessee, shall be taken to be part hereof, and the Lessee hereby **[***27]** covenants to comply with all such House Rules and see that they are faithfully observed by the family, guests, employees and subtenants of the Lessee. Breach of a House Rule shall be a default under this Lease. The Lessor shall not be responsible to the Lessee for the non-observance or violation of House Rules by any other lessee or person."

Paragraph 18(b) of the Lease states "The Lessee shall not permit unreasonable cooking or other odors to escape into the Building. The Lessee shall not permit or suffer any unreasonable noises or anything which will interfere with the rights of other lessees or unreasonably annoy them or obstruct the public halls or stairways." The Court notes that although paragraph 18(b) of the Lease mentions "odors," nowhere in the provision does it prohibit "smoke" or "smoking." Indeed, nowhere in the proprietary lease does it prohibit "smoke" or "smoking" in the building.

Paragraph (5) of the Landlord's House Rules states, in pertinent part, "No Lessee shall make or permit any disturbing noises in the Building or do or permit anything to be done therein which will interfere with the rights, comfort or convenience of other Lessee..." The Court notes that paragraph (5) of the House Rules **[***28]** does not even mention odors of any sort.

Respondent asserts that the Notice to Cure is defective as it states that "the building managing agent has received several complaints from other building tenants, plural, about the recurring presence of cigarette smoke odor in the public corridor outside of the premises," however, during trial, Mr. Nicasio testified that no "other" tenants complained. It is insufficient to dismiss this proceeding based upon a *de minimis* technicality in the Notice to Cure as it is clear that Respondent could reasonably ascertain the grounds upon which Petitioner commenced this proceeding. *Hughes v. Lenox Hill Hospital, 226 AD2d 4, 17, 651 N.Y.S.2d 418 (1st Dept 1996)* ("[T]he appropriate standard for assessment of the adequacy of notice is one of reasonableness in view of all attendant circumstances.")

Respondent also asserts that 2014 standards should not be applied to a lease that was entered by both

parties in 2000 since the lease says nothing about smoking and clearly did not mean smoking at the time it was written and did not mean smoking at the time it was executed. The Court also finds this argument unavailing, as it must analyze the facts and laws of this proceeding in accordance with current standards.

Nevertheless, Petitioner failed to **[***29]** prove by a preponderance of the evidence that Respondent violated the proprietary lease and house rules by permitting offensive cigarette odors to emanate from the subject premises and permeate the public hallway outside of her apartment. Although there may have been an occasional odor in the public hallway, the Court finds that the Petitioner failed to prove that the odor was so offensive as to interfere with the rights, comfort or convenience of other tenants within the building. Petitioner did not present any evidence from an expert to prove the content of the air or that the alleged "odor" was dangerous or hazardous. Furthermore, Mr. Nicasio testified that Petitioner did not retain any experts or employ any machines to determine the odor or its strength.

Mr. Romero testified that all the floors are connected to the same ventilation shaft, and that all vents are designed to carry the air and odors upwards and outside, however, he never received any complaints from other tenants in the building prior or subsequent to Ms. Smith's complaint. Notably, Mr. Nicasio also testified that he never received complaints from any other tenants in the building regarding cigarette odors. The Court **[***30]** notes that the subject apartment is located on the second floor, below the great majority of all the apartments in the building.

The Court finds that Ms. Smith's subjective testimony that the cigarette odor offended her is not sufficient to prove by a preponderance of evidence that Respondent has violated the proprietary lease and house rules by permitting offensive odors to emanate from her apartment and into the common areas of the building. Moreover, Ms. Smith's husband could not definitely testify how frequently he would detect the cigarette odor in 2008, and that the odor was "still fairly present" in 2013. Thereafter, Mr. Smith testified that he could not state how many times he smelled "even a faint smell of smoke" in the public hallway in 2013 and 2014. He also asserted that due to the non-smoking regulations in offices and restaurants he has become "very sensitive" to the smell of cigarette smoke. Furthermore, Mr. Smith was even unable to testify with certainty the last time he detected an odor in the public hallway.

Ms. Kahn, a former member of the Board and a resident of the building, testified that after becoming aware of this proceeding, she visited the second floor public **[***31]** hallway on two occasions and did not detect any cigarette odor. She further asserted that she is familiar with the smell of cigarettes as she cannot stand the smell, and did not detect the smell of cigarettes on each of her two visits to the public hall on the second floor. Ms. Goodman also credibly testified that upon visiting Respondent at the subject premises, she did not detect any odors in the public hallway.

For all the above reasons, after a trial at which all the testimony and exhibits were carefully considered, as well as the credibility of the witnesses, the Court finds that Petitioner has failed to prove its cause of action by a preponderance of the evidence. Other than the subjective testimony of one witness (Ms. Smith), the landlord failed to produce any objective evidence or reliable testimony of any witnesses to show that Respondent has engaged in a pattern of permitting offensive odors to emanate from the subject premises and into the public hallway, in violation of paragraphs 13 and 18(b) of the proprietary lease and paragraph 5 of the house rules. In fact, Respondent called three reliable and disinterested witnesses (Emily Goodman, Annette Kahn and Raina Bretan) who **[***32]** all visited the subject premises and credibly testified that they did not detect any cigarette odor in the public hallway outside the subject apartment. Accordingly, after trial, the petition is dismissed with prejudice.

The foregoing constitutes the decision and order of this Court.

Dated: New York, New York

December 2, 2014

PETER M. WENDT, J.H.C.

End of Document

Bacharach v. Board of Mgrs. of the Brooks-Van Horn Condominium

Supreme Court of New York, New York County

October 14, 2022, Decided

Index No. 650906/2022

Reporter
2022 N.Y. Misc. LEXIS 6048 *; 2022 NY Slip Op 51012(U) **; 2022 WL 9688751

[1]** Samuel Bacharach and Yael Bacharach, Plaintiffs, against Board of Managers of the Brooks-Van Horn Condominium, Alex Rubin, and Frida Fridman, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

plaintiffs', condominium, individual defendant, Bylaws, defendants', condo, house rules, noise, motion to dismiss, cause of action, unit owner, flooring, business-judgment, apartment, allegations, documents, noise complaint, carpeting, neighbor, complaints, injunctive relief, private nuisance, leave to amend, private-nuisance, injunction

Counsel: [*1] Bergstein Flynn & Knowlton PLLC, New York, NY (Lee Bergstein and David Friedman of counsel), for plaintiffs.

Boyd Richards Parker & Colonnelli, P.L, New York, NY (Bryan J. Mazzola of counsel), for defendant Board of Managers of the Brooks-Van Horn Condominium.

The Law Firm of Robert Moore, PLLC, New York, NY (Robert Moore of counsel), for defendants Alex Rubin and Frida Fridman.

Judges: Hon. Gerald Lebovits, J.S.C.

Opinion by: Gerald Lebovits

Opinion

Gerald Lebovits, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 51, 53, 54, 55, 56, 57 were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 44, 45, 46, 47, 48, 49, 50, 52 were read on this motion to DISMISS.

This action arises out of a dispute between neighboring residents in a condominium apartment building managed by defendant Board of Managers of the Brooks-Van Horn Condominium (Board). Plaintiffs Samuel and Yael Bacharach live in the condominium unit below defendants Alex Rubin and Frida Fridman (individual defendants).

Plaintiffs allege **[*2]** that the individual defendants have created in their apartment noise that rises to the level of a nuisance. According to plaintiffs, these defendants replaced their floor without the required Board approval; that this new flooring contains insufficient soundproofing; and that as a result, plaintiffs are subjected to substantial and unreasonable noise from the upstairs apartment. Plaintiffs further allege that the Board has breached its contractual obligation under the governing condominium documents to enforce the building's house rules with respect **[**2]** to the excessive noise coming from the upstairs apartment.

In motion sequence 001, the individual defendants move under *CPLR 3211 (a) (7)* to dismiss plaintiffs' claims against them for private nuisance and injunctive relief. Plaintiffs cross-move for leave to amend under *CPLR 3025 (b)* to add a claim under *Real Property Law (RPL) § 339-j*. That claim seeks what plaintiffs style as a "declaration" that "direct[s] Defendants Fridman and Rubin . . . to seek retroactive Board approval"—and, should approval be denied, to cure that flooring work "to ensure compliance with all Condominium requirements and all applicable governmental regulations."

In motion sequence 002, the Board moves **[*3]** under

CPLR 3211 (a) (1) and (a) (7) to dismiss plaintiffs' breach-of-contract claim against it.

Motion sequences 001 and 002 are consolidated for disposition. The individual defendants' motion to dismiss is granted. Plaintiffs' cross-motion for leave to amend their claims against the individual defendants is granted. The Board's motion to dismiss is denied.

DISCUSSION

I. The Individual Defendants' Motion to Dismiss (Mot Seq 001)

The individual defendants move under CPLR 3211 (a) (7) to dismiss the claims against them—plaintiffs' second and third causes of action. In deciding an (a) (7) motion to dismiss, the court must determine "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." (*African Diaspora Mar. Corp. v Golden Gate Yacht Club, 109 AD3d 204, 211, 968 N.Y.S.2d 459 [1st Dept 2013]* [internal quotation and citation omitted].) In this analysis, the complaint is liberally construed, all facts alleged in the complaint are accepted as true, and the plaintiff is given the benefit of every possible favorable inference. (*Leon v Martinez, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]*.)

A. The Branch of the Motion Seeking Dismissal of Plaintiffs' Private-Nuisance Claim

The motion to dismiss the second cause of action, for private nuisance, is granted. A party alleging a private **[*4]** nuisance must establish: "(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." (*Copart Indus. v Consolidated Edison Co. of NY, 41 NY2d 564, 570, 362 N.E.2d 968, 394 N.Y.S.2d 169 [1977]*.) Plaintiffs' allegations do not establish a substantial and unreasonable interference with their right to enjoy their property.

The alleged conduct on which plaintiffs' nuisance claim is based—excessive noise caused by the "persistent[ ] running, jumping and playing" of defendants' children (NYSCEF No. 10 at ¶ 36)—does not rise to the level of substantial and unreasonable interference with plaintiffs' enjoyment of their apartment because it is "incidental to normal occupancy" in an apartment building. (*Brown v Blennerhasset Corp., 113 AD3d 454, 454, 979 N.Y.S.2d 27 [1st Dept 2014]*; *see also* ***Hirschhorn v Board of Mgrs. of 169 Hudson St. Condominium, 2019 NY Slip Op 30202[U], at *3 [Sup Ct, NY County Jan. 21, 2019]*** [holding that the "allegation of noises" in one apartment from "steps and . . . children running" in a neighboring apartment "does not support a cause of action alleging a private nuisance"].)

Plaintiffs rely on *Dubin v Glasser*, in which the motion court denied defendant's motion to dismiss a private-nuisance claim that was based on alleged loud noises caused by a lack of carpeting on hardwood floors. (*See 2021 NY Slip Op 30449[U], at *2 [Sup Ct, NY County Feb. 17, 2021]*.) **[*5]** But the court in *Dubin* did not separately consider the sufficiency of the allegations supporting the private-nuisance claim. (*See id.*) Additionally, plaintiff in *Dubin* alleged that **[**3]** "defendant causes loud noises at all hours of the day and night," with the "worst time [being] . . . from 11:00 pm to 8:00 am." (*Id. at *1*.) Plaintiffs here do not allege similar nocturnal noises. Further, here there is evidence suggesting that defendants ultimately complied with the carpeting regulations by the time of the action. (*See* NYSCEF No. 30 at 5; NYSCEF No. 28.) In contrast, the defendant in *Dubin* asserted that he was not subject to the condo bylaws' carpeting requirement. (*See 2021 NY Slip Op 30449[U], at *2*.)

The motion-court decisions in *Kahona Beach LLC v Santa Ana Restaurant Corp. (2012 NY Slip Op 30211[U] [Sup Ct, NY County Jan. 24, 2012])* and *George v Board of Directors of One W. 64th St., Inc. (2011 NY Slip Op 32325[U] [Sup Ct, NY County Aug. 19, 2011])*, relied on by plaintiffs, are not to the contrary. The allegations in those cases concerned loud music played late at night (*Kahona Beach*) and loud, amplified music accompanying group dance and exercise routines (*George*), neither of which can fairly be considered incidental to normal apartment occupancy. (*See Kahona Beach LLC v Santa Ana Rest. Corp., 29 Misc. 3d 1210[A], 958 N.Y.S.2d 308, 2010 NY Slip Op 51787[U], at *2-3 [Sup Ct, NY County Aug. 26, 2010]* [describing allegations and evidence supporting plaintiff's claims]; *George, 2011 NY Slip Op 32325[U], at *1, *7-8* [same].)

Plaintiffs' private-nuisance claim is dismissed as against the individual **[*6]** defendants for failure to state a

cause of action.[1]

B. The Branch of the Motion Seeking Dismissal of Plaintiffs' Injunctive-Relief Claim

The individual defendants' motion to dismiss plaintiffs' third cause of action against them, for injunctive relief, is granted. "The standard of proof for a permanent injunction is the same as that for a preliminary injunction except that the movant must prevail on the cause of action that has led it to seek equity damages." (*Metro Sixteen Hotel, LLC v Davis, 2016 NY Slip Op 32235[U], at *4-5 [Sup Ct, NY County 2016]*.) To obtain an injunction, the movant must clearly demonstrate: "(1) a likelihood of ultimate success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor." (*See St. Paul Fire & Mar. Ins. Co. v York Claims Serv., 308 AD2d 347, 348, 765 N.Y.S.2d 573 [1st Dept 2003]*.) Here, given this court's dismissal of the private-nuisance claim against the individual defendants, plaintiffs cannot prevail on the merits.

II. Board Motion to Dismiss (Mot Seq 002)

The Board moves under *CPLR 3211 (a) (1)* and *(a) (7)* to dismiss the breach-of-contract claim against it—plaintiff's first cause of action.

A motion to dismiss under *CPLR 3211 (a) (1)* "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter **[*7]** of law." (*Goshen v Mutual Life Ins. Co. of NY, 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]* [internal citation omitted].) To plead a breach of contract claim, the plaintiff must establish: "(1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages." (*VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 58, 967 N.Y.S.2d 338 [1st Dept 2013]*.) A condo board violating the condo bylaws is "akin to a breach of contract." (*Pomerance v McGrath, 124 AD3d 481, 482, 2 N.Y.S.3d 436 [1st Dept 2015]*.)

Plaintiffs have alleged that the Board violated the Condo Declaration, Bylaws, and Rules **[**4]** and Regulations by failing to redress defendants non-compliant flooring work and carpeting, which ultimately led to an unabated noise condition. (*See* NYSCEF No. 44 at 10-13.) The Board contends that it has sole discretion in determining whether and how enforce the house rules, and that its discretionary decisions are protected from judicial inquiry by the business-judgment rule. (*See* NYSCEF No. 30 at 5-14.) But the house rules are ambiguous as to whether the Board has the right or the duty to enforce them; and whether the Board has acted appropriately under the business-judgment rule presents factual issues that cannot be decided at this stage of the action. The Board's motion is denied.

A. The Board's Argument that it Enjoys Sole Discretion to Determine Whether and How to Enforce the [*8] Building's House Rules

In contending that it has sole enforcement discretion, the Board relies on three sections of the condo Bylaws. Section 2.6 of the Bylaws provides that the Board may take any act within its power that is "deemed necessary or desirable" to perform. (NYSCEF No. 47 at 5.) Bylaws § 9.2 (a) gives the Board the right "to enjoin, abate, or remedy the continuance or repetition" of a unit owner's breach of the condo's governing documents "by appropriate proceedings brought either at law or in equity." (*Id.* at 40.) And § 9.3 provides that this remedy, like the others specified in Bylaws article 9 or "elsewhere in the condominium documents," may be "exercised at one time or at different times, concurrently or in any order, in the sole discretion of the Board of Managers." (*Id.*)

It is not self-evidently clear, though, that the remedial discretion conferred by § 9.3 permits the Board simply to refrain from seeking to enforce an asserted breach of the condo's governing documents. That is, under § 9.3 the Board need not employ any particular remedial measure upon receiving complaints about asserted violations of the building's house rules; but that discretion does not necessarily **[*9]** mean that the Board can simply disregard those complaints for multiple years should the Board decide that the complaints do not warrant even informal efforts at dispute resolution. This court's skepticism of the Board's reading of article 9 of the Bylaws is bolstered by § 2.4, cited by plaintiff, which provides that the Board has the "power[] and dut[y]" to "enforce by legal means the terms, covenants, and conditions contained in the Condominium Documents." (*Id.* at 3-4, § 2.4 [xv].) At the very least, these provisions of the Bylaws may

[1] This court therefore does not reach the individual defendants' alternative statute-of-limitations argument with respect to plaintiffs' nuisance claim.

reasonably read more narrowly than the Board would have it, such that the Bylaws are ambiguous on this point—a fatal defect for a CPLR 3211 (a) (1) motion. (*See* Mehra v Morrison Cohen LLP, 203 AD3d 438, 439, 160 N.Y.S.3d 604 [1st Dept 2022].)

This court is unpersuaded by the Board's reliance on the ***Hirschhorn*** motion court's dismissal of claims against the condominium board. (*See* NYSCEF No. 30 at 9.) There, in granting the board's motion, the court gave weight to the "undisputed" fact that "once apprized that plaintiff had a complaint about noise from his upstairs neighbor's apartment, the Board investigated, and ascertained that that apartment was in compliance with" a condominium rule requiring "75 per cent of an apartment's flooring be covered by a carpet." **[*10]** (***2019 NY Slip Op 30202[U], at *2***.) Here, plaintiffs have alleged (and the Board does not dispute) that the Board did not investigate the individual defendants' compliance with the building's carpet rule for at least two years after the Board first received plaintiffs' noise complaints.[2]

B. The Board's Argument that its Determinations About How to Respond to Plaintiffs' Noise Complaints are Shielded by the Business-Judgment Rule

The Board also argues in the alternative that its decisions about how to respond to plaintiffs' noise complaints are shielded by the business-judgment rule. Under that rule, "[s]o long as the board acts for the purposes of the [condominium], within the scope of its authority and in good faith, courts will not substitute their judgment for the board's." (Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 538, 553 N.E.2d 1317, 554 N.Y.S.2d 807 [1990].) The Board argues that it acted for the purpose of the condominium as a whole through its investigation and fining of defendants (thereby leading to defendants' ultimate compliance with the building's carpet rule), and that the plaintiffs cannot show that the Board acted outside the scope of its authority or in bad faith. At least at this stage of the action, this court finds the Board's argument unpersuasive.

Plaintiffs **[*11]** point to provisions of the condo bylaws and house rules that (i) prohibit uses of property within the building that interfere with building residents' quiet and peaceful enjoyment of the premises; and (ii) bar noise-related disturbances, in particular. (*See* NYSCEF No. 44 at 4-5, 10-11, citing NYSCEF Nos. 47 at § 5.6 [bylaws], 48 at § 1 [house rules].) Plaintiffs contend that these provisions show that the Board has a legitimate interest in protecting unit owners from unreasonable noise and interference with their quiet and peaceful possession of property.

The Board does not dispute this premise. Instead, it argues that its actions with respect to plaintiffs' noise complaints were undertaken in good faith to further this interest, and therefore that the business-judgment rule bars this court from second-guessing the Board's decisionmaking on this issue. The difficulty for the Board is that this argument does not account for the apparent multiyear gap between when plaintiffs first made noise complaints to the Board and when the Board first acted in response to those complaints. The Board does not attempt to explain how a decision simply to disregard plaintiffs' complaints for multiple **[*12]** years could be a good-faith decision made to further the legitimate interests of the building and its residents. Nor, on this record, does this court perceive an explanation.

This court does not, to be clear, decide on this motion that the Board in fact ignored years' worth of plaintiffs' noise complaints; or, for that matter, that the Board's (alleged) decision to wait at least two years before acting on those complaints is necessarily unjustifiable as a legitimate, good-faith decision. Rather, the court decides only that on the allegations of the complaint and the record developed on this motion, the Board's conduct—in particular, the Board's asserted failure to act at all prior to 2019—is not shielded by the business-judgment rule. (*See* Dau v 16 Sutton Place Apt. Corp., 205 AD3d 533, 536, 169 N.Y.S.3d 268 [1st Dept 2022].)

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[2] *Ewen v Maccherone (25 Misc. 3d 1235[A], 906 N.Y.S.2d 772, 2009 NY Slip Op 52428[U] [Civ Ct, NY County Dec. 1, 2009])*, also cited by the Board, is inapposite. The motion-court decision in that case did not, as the Board suggests, address whether the condo board in that case had an "affirmative obligation[] to enforce the [building] rules against one unit owner on behalf of another unit owner"—merely whether the Board had the *exclusive right* to take enforcement-related steps. (NYSCEF No. 30 at 8; *compare* Ewen, 2009 NY Slip Op 52328[U], at *3, *4-5.) In any event, the cited decision was reversed on appeal to the Appellate Term, First Department. (32 Misc 3d 12, 927 N.Y.S.2d 274 [App Term, 1st Dept 2011].) And in doing so, the Appellate Term noted the "[i]ncongru[ity]" that plaintiffs in the case had not named the condo board as a defendant, despite having repeatedly alleged in the complaint that their injuries stemming from their neighbors' smoking were due in part to a "building-wide ventilation problem known" to the board but not satisfactorily addressed. (*Id.* at 16.)

The Board's motion to dismiss plaintiffs' first cause of action is denied.

III. Plaintiffs' Cross-Motion for Leave to Amend (Mot Seq 001)

Plaintiffs cross-move under CPLR 3025 (b) to add a new claim against the individual defendants for relief relating to those defendants' allegedly improper installation of flooring without Board approval. The motion is granted.

Leave to amend under CPLR 3025 (b) is freely granted: Absent prejudice or surprise, leave should be denied only if **[*13]** the proffered amendment is "palpably insufficient or clearly devoid of merit." (*Fairpoint Cos, LLC v Vella, 134 AD3d 645, 645, 22 N.Y.S.3d 49 [1st Dept 2015]* [internal quotation marks].) A plaintiff need only "show that the proffered amendment" clears this low bar; it is not required also to "establish the merit of its proposed new allegations." (*MBIA Ins. Corp. v Greystone & co., Inc., 74 AD3d 499, 500, 901 N.Y.S.2d 522 [1st Dept 2010]*.)

Plaintiffs assert two bases for this cause of action. *First*, relying on *Dubin v Glasser*, plaintiffs contend that they have a claim against the individual defendants sounding in contract, as third-party beneficiaries of those defendants' contractual obligations to comply with the governing condominium documents (including the obligation to obtain approval for their flooring installation). *Second*, plaintiffs argue that they may bring a claim against the individual defendants under RPL § 339-j.

In *Dubin*, the motion court held that part of the cooperative lease in that case "and the concomitant house rules are for plaintiff's benefit," and that "the benefit is sufficiently immediate to [plaintiff] to indicate the assumption by defendant and the landlord of a duty to plaintiff." (*2021 NY Slip Op 30449[U], at *2*.) This court is skeptical that a condominium's house rules—which apply in undifferentiated form to all unit owners within the condominium—can supply the **[*14]** necessary "clear indication" that the unit owners, the condo board, and the condo sponsor, intended to confer upon particular unit owners the right to enforce provisions of the house rules against one another through third-party-beneficiary actions in contract. (*Girlshop, Inc. v Abner Props. Co., 5 AD3d 141, 142, 772 N.Y.S.2d 506 [1st Dept 2004]*; *see also Stipe v Harbor House Owners Corp., 2011 NY Slip Op 32557[U], at *14 [Sup Ct, NY County 2011]* [holding that a lease provision stating that lessees "shall not permit or suffer any unreasonable noises or anything which will interfere with the rights of other lessees or unreasonably annoy them or obstruct the public halls or stairways" was insufficient to establish a clear indication of the parties' intent to confer third-party beneficiary standing to other lessees].) This court's skepticism is heightened by the prospect that permitting unit owners to bring this kind of contract-based enforcement action could undermine the governance/enforcement role and authority of condo boards.

The court need not definitively decide that issue, however: Whether plaintiffs here may sue the individual defendants in contract on a third-party beneficiary basis, this court agrees that plaintiffs should be permitted to amend their complaint to assert a claim under RPL § 339-j.

Section 339-j provides that a condominium unit owner's failure to comply with **[*15]** the condo bylaws, or house rules adopted under the bylaws, "shall be ground for an action . . . for damages or injunctive relief or both maintainable by the board of managers on behalf of the unit owners or, in a proper case, by an aggrieved unit owner." Plaintiffs' proposed amended complaint alleges that the individual defendants breached the house rules by failing to obtain Board approval for their flooring work, and seeks relief aimed at redressing that failure. To be sure, as the individual defendants point out, the proposed new claim is phrased as seeking declaratory, rather than injunctive relief. But even assuming that § 339-j does not permit aggrieved unit owners to seek **[**5]** declaratory relief against other owners, plaintiffs are not merely asking this court to declare the legal rights of the parties, but instead seek an order directing the individual defendants to take particular specified actions with respect to their flooring work. (*See* NYSCEF No. 92 at 15 ¶ 91, 16 [proposed amended complaint].) That requested order is more akin to injunctive rather than declaratory relief—and thus within the scope of § 339-j.

The question remains, though, whether the circumstances of this action make it **[*16]** "a proper case" for plaintiffs to seek injunctive relief against the individual defendants, as § 339-j requires. The parties have not provided, and this court's research has not found, cases construing this aspect of the statute. Construing the statute essentially as a matter of first impression, this court agrees with the individual defendants' position that the only reasonable reading of

"proper case" is one in which "the Board's decision is not protected by the business-judgment rule." (NYSCEF No. 55 at 3.)

The structure of *§ 339-j* envisions a condominium board's having primary authority to redress violations of condo bylaws or rules through an action under the statute; the statute confers a cause of action on aggrieved unit owners only as an alternative to board action. Permitting an aggrieved unit owner to sue a neighbor in a case where the board has considered legal action and declined to bring suit would undermine the board's enforcement discretion that is protected by the business-judgment rule. Put another way: Under the business-judgment rule, a condominium unit owner cannot push the board to take desired measures against a neighbor by threatening to sue the board should it not act. By **[*17]** the same token, a unit owner should not be able to push the board to take the desired measures against a neighbor by threatening to sue the neighbor directly unless the board acts—at least absent a private nuisance.[3]

This court's construction of *RPL § 339-j* does not, however, provide a basis to deny plaintiffs' cross-motion for leave to amend. It is unclear from the record—and the Board's papers do not discuss—whether the Board ever reached a determination about the individual defendants' (putative) noncompliance with the applicable bylaws or house rules governing defendants' floor replacement. At this stage of the litigation, therefore, this court lacks a basis to conclude that the protections of the business-judgment rule bar a *§ 339-j* claim focused on the individual defendants' floor-related work in their unit. And, as discussed above, this court declines to conclude on the current motions that the Board's response to plaintiffs' post-floor-replacement noise complaints is shielded by the business-judgment rule.

Accordingly, for the foregoing reasons, it is

ORDERED that the individual defendants' motion under *CPLR 3211 (a) (7)* to dismiss plaintiffs' second and third causes of action (mot seq 001) is granted; and it is **[*18]** further

ORDERED that plaintiffs' cross-motion under *CPLR 3025 (b)* for leave to assert an additional cause of action against the individual defendants (mot seq 001) is granted, and the proposed amended complaint appearing at NYSCEF No. 42 will be deemed the operative complaint in this action upon service of a copy of this order with notice of entry; and it is further

ORDERED that the Board's motion under *CPLR 3211 (a) (1)* and *(a) (7)* to dismiss plaintiffs' first cause of action is denied; and it is further

ORDERED that plaintiffs serve notice of entry on all parties.

Dated: October 14, 2022

Hon. Gerald Lebovits, J.S.C.

End of Document

[3] In that circumstance, the aggrieved unit owner could simply bring a claim sounding in private nuisance, rather than relying on *RPL § 339-j*.

Division of Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of ALEXANDRA J. DOLAN, Complainant, v. CAMCO SERVICES OF NY INC., THE RIVERWALK HOMEOWNERS ASSOCIATION, STEPHANIE GALVEZ, JENNIFER LIZANA, DREW VARANO, DENNIS ROSS, MARY DOE, MIKE DEGERONIMO, Respondents.	DETERMINATION AND ORDER AFTER INVESTIGATION Case No. 10215850

On 8/26/2021, Alexandra J. Dolan filed a complaint with the New York State Division of Human Rights ("Division") charging the above-named respondent with an unlawful discriminatory practice relating to housing because of age, sex in violation ofN.Y. Exec. Law, art. 15 (Human Rights Law).

After investigation and following opportunity for review of rel11ted information and evidence by the named parties, the Division has determined that there is NO PROBABLE CAUSE to believe that the respondents have engaged in or are engaging in the unlawful discriminatory practice complained of. This determination is based on the following:

Complainant alleges she was discriminated against based on her age and sex when Respondents failed to protect her from harassment by her downstairs neighbor.

The subject property is the top-floor unit ofa two-floor condominium townhouse, located at 55 Barley Lane, Patchogue, NY.

Respondents are Stephanie Galvez, Jennifer Lizana, Drew Varano, Dennis Ross, Mary Doe, Mike Degeronimo, members of Respondent The Riverwalk Homeowners Association; and the management company Cameo Services of NY Inc. (Respondents). Respondents deny any allegations of discrimination.

Complainant alleges Respondents continuously showed favor for her older male neighbor over her when both parties were submitting competing complaints against each other. However, Complainant could not articulate a nexus between the acts she believed were discriminatory and her protected classes of age and sex. Notably, Complainant admits the first members of the Riverwalk Homeowners Association (HOA) she contacted about the age and sex-based discrimination were Stephanie Galvez and Jennifer Lizana, who are both females like Complainant. Furthermore, the HOA Board is 50% female, with three women and three men on the Board.

Respondents believe they exhausted all remedies within their power to reconcile the matter amicably, although they had no obligation to reconcile a matter between neighbors. Upon further investigation, it does appear that Respondents exhausted all available and necessary measures to assist in the neighbor-to-neighbor conflict, including hiring a mediator. This mediator stayed in contact with Complainant until one(!) week before she filed her complaint with the Division. Notably, in Complainant's last contact with Respondents' mediator, she asked the mediator what his next steps were to help her and the mediator suggested that she contact an agency with authority to do more, because he had exhausted all remedies within his power.

Complainant believes Respondents should have forced her neighbor to stop making noise reports and banging on his ceiling. The investigation revealed that Respondents could not force the downstairs neighbor to get along with Complainant in the same way that Respondents could not force the neighbor to participate in mediation. However, the investigation shows Respondents acted reasonably within their power and treated both parties the same in communications and attempts to resolve the dispute. Respondents sent letters to both parties threatening to fine both parties if they could not resolve the matter, although ultimately, Respondents never fined either party because it determined it would not serve the parties or the overall community by implementing fines. Each time Respondents sent a letter to Complainant, the same letter was sent to her neighbor informing each party of how Respondents planned to hold them both accountable if the disputes continued because the parties were now disrupting other residents with their behavior.

The investigation revealed Respondents' By-laws also support the level of Respondents' interference, or lack thereof, according to Complainant. According to the HOA's By-laws, Respondents have no duty to police the behaviors of its owners. Respondents' by-laws do not obligate it to remedy the complained-of conditions or vest it with exclusive rights to enforce another unit owner's compliance. Respondents owed no duty to Complainant, as they had no control over Complainant or her neighbor, because like all the Riverwalk condominium owners, they are responsible for their own conduct. No landlord/ tenant relationship existed here.

The evidence does not show Complainant was treated differently from her neighbor and Respondents always sent Complainant and the neighbor the same communications. Respondents informed Complainant that she and the neighbor would both be held accountable and issued fines if the disputes continued. Due to both Complainant and her neighbor frequently calling the police, Respondents informed both owners they would be liable for the $250 fee required to hire a mediator to help resolve their dispute. Respondents hired a mediator and did not request the

legal fee from either party. Complainant feels Respondents sided with her neighbor, but the evidence does not support the allegations that Respondent favored the neighbor's complaints over hers, resulting in discriminatory treatment. The evidence presented does not support the allegations that Complainant was discriminated against or treated differently based on her protected age and sex classes.

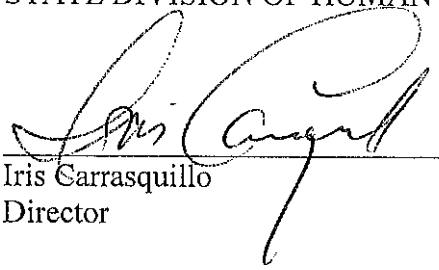
The complaint is therefore ordered dismissed and the file is closed.

PLEASE TAKE NOTICE that any party to this proceeding may appeal this Determination to the New York State Supreme Court in the County wherein the alleged unlawful discriminatory practice took place by filing directly with such court a Notice of Petition and Petition within sixty (60) days after service of this Determination. A copy of this Notice and Petition must also be served on all parties including General Counsel, State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. DO NOT FILE THE ORIGINAL NOTICE AND PETITION WITH THE STATE DIVISION OF HUMAN RIGHTS.

PLEASE TAKE FURTHER NOTICE that in the alternative to the right to appeal noticed above, in cases alleging housing discrimination only, a person whose complaint has been dismissed by the New York State Division of Human Rights after investigation for lack of jurisdiction or lack of probable cause may file the same cause of action in a court of appropriate jurisdiction pursuant to this section, unless appeal to the New Yark State Supreme Court as stated above has been sought.

Dated: September 6, 2022
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS

By: 
Iris Carrasquillo
Director

Hirschhorn v Board of Mgrs. of 169 Hudson St. Condominium

Supreme Court of New York, New York County

January 21, 2019, Decided

650717/18

Reporter
2019 N.Y. Misc. LEXIS 338 *; 2019 NY Slip Op 30202(U) **

[1]** JASON HIRSCHHORN, Plaintiff, -against- BOARD OF MANAGERS OF 169 HUDSON STREET CONDOMINIUM, JENNIFER RIGAMER VORHOFF, and NICHOLAS ROBBERT VORHOFF, Defendants. Index No. 650717/18

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

noise, apartment, cause of action, Condominium, fiduciary duty, supplemental, attributed, sequence

Judges: **[*1]** HON. DAVID B. COHEN, J.S.C.

Opinion by: DAVID B. COHEN

Opinion

DAVID B. COHEN, J:

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence No. 001, defendants Jennifer Rigamer Vorhoff and Nicholas Robbert Vorhoff move, pursuant to *CPLR 3211 (a) (7)*, for an order dismissing the third and fourth causes of action alleged in the complaint. Those causes of action, respectively, allege a private nuisance and seek injunctive relief. In motion sequence No. 002, defendant Board of Managers of 169 Hudson Street Condominium (Board) moves, pursuant to *CPLR 3211 (a) (1)* and (7), to dismiss the action, as against it. The causes of action alleged against the Board are breach of contract, breach of fiduciary duty, and seek injunctive relief.

The complaint alleges, in sum, that loud noises and vibrations emanate from the Vorhoffs' apartment, which is situated directly above plaintiff's apartment in the condominium building (Condominium), located at 169 Hudson Street in Manhattan, and that, despite repeated complaints to the Board, the Board has taken no action. Plaintiff's complaint is supported by an **[**2]** affidavit and a supplemental affidavit from Alan Fierstein, the president of Acoustilog, Inc. The supplemental affidavit, which **[*2]** was submitted after the Vorhoffs' motion to dismiss was filed, contradicts Mr. Fierstein's initial affidavit in the following respects: (1) the initial affidavit states that the noise heard in plaintiffs apartment was attributable to "the people in Apartment 6N": the supplemental affidavit attributes the noise to "someone and/or something in Apartment 6N"; and (2) the supplemental affidavit states that the noise cannot be attributed to the structure of the building, whereas the initial affidavit attributed some of the noise to the vibration of the structure of the building. Mr. Fierstein does not explain these contradictions. A sworn statement that contradicts an earlier sworn statement raises only "a feigned issue," and is not entitled to credibility. *Abraido v 2001 Marcus Ave. LLC, 126 AD3d 571, 571, 4 N.Y.S.3d 43 (1st Dept 2015)*; *see also* *Celaj v Cornell, 144 AD3d 590, 590, 42 N.Y.S.3d 25 (1st Dept 2016)*; *Eion Michael Props., LLC v 102 Bruckner Blvd. Realty, LLC, 143 AD3d 622, 622, 40 N.Y.S.3d 378 (1st Dept 2016)*. Accordingly, the court will disregard Mr. Fierstein's supplemental affidavit. Moreover, plaintiff's May 4, 2018 affidavit, in which he states that he does not know the source of the noise to which he objects, contradicts multiple earlier statements that he made to the Vorhoffs, that the noise of which he was complaining was caused by people walking or running in their apartment. *See* Moore, reply aff, exhibit A at 2 ("I can hear **[*3]** all steps . . . [i]t can be unbearable at times."); exhibit B at 1 ("It's not voices or music or anything out of the norm you hear in NY. It's running."); exhibit C at 1 ("I'm sitting here now hearing running up and down the apartment. Down here it's like construction"). In sum, plaintiff has failed to show that the noise of which he

complains is not attributable to the normal incidence of apartment dwelling.

[3]** A party alleging a private nuisance must show "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to enjoy land, (5) caused by another's conduct in acting or failure to act." *Copart Indus. v Consolidated Edison Co. of NY, 41 NY2d 564, 570, 362 N.E.2d 968, 394 N.Y.S.2d 169 (1977)*. To the extent that Mr. Fierstein initially attributed some of the noise heard in plaintiff's apartment to the vibration of the building, plaintiff failed to allege that defendants caused the noise about which he was complaining. *See Brown v Blennerhasset Corp., 113 AD3d 454, 454, 979 N.Y.S.2d 27 (1st Dept 2014)* (no causation shown, where, there too, Mr. Fierstein attributed objectionable noise to the structure of the building). Also, the complaint fails to allege facts showing that the noise was unreasonable. Other than unspecified references to "banging," the only noises identified in the complaint are those **[*4]** of steps and of children running. As a matter of law, the allegation of such noises does not support a cause of action alleging a private nuisance. *Brown v Blennerhasset Corp., 113 AD3d at 454* (noises "incidental to normal occupancy, including heavy footsteps" not actionable); *see also Carroll v Radoniqi, 105 AD3d 493, 494, 963 N.Y.S.2d 97 (1st Dept 2013)* (plaintiff lacking knowledge of specific renovation work being performed in abutting cooperative unit unable to sustain claim of private nuisance).

The claim for injunctive relief is denied because, seeking monetary damages from both the Vorhoffs and the Board, plaintiff acknowledges that such damages would make him whole. *JSC VTB Bank v Mavlyanov, 154 AD3d 560, 560, 63 N.Y.S.3d 40 (1st Dept 2017)*, citing *Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541, 541, 729 N.E.2d 683, 708 N.Y.S.2d 26 (2000)*.

The complaint must also be dismissed as against the Board. The Condominium by-laws provide that "The Board has no liability to Unit Owners in the management of the Condo, except for willful misconduct or bad faith." Mazolla, aff, exhibit 3, Article III, § 12. It is undisputed, **[**4]** that once apprized that plaintiff had a complaint about noise from his upstairs neighbor's apartment, the Board investigated, and ascertained that that apartment was in compliance with the Condominium's "carpet rule," which requires that 75 per cent of an apartment's flooring be covered by a carpet. The by-laws provide that, while the Board has the right to **[*5]** "enjoin, abate or remedy" the breach of any provision of the Condominium declaration, or the by-laws, any such remedy "may be exercised . . . in the sole discretion of the Board." *Id.*, Article XI. Finally, insofar as is relevant here, Article XV, § 8 provides that unit owners are responsible for ensuring that their units comply with all applicable laws. Accordingly, the fact that the Board took no action on plaintiff's complaint of noise, beyond verifying that that the Vorhoffs' apartment complied with the carpet rule, does not constitute a breach of contract.

The complaint repeatedly alleges that the Board engaged in self-dealing, but it alleges not a single fact to support that allegation, other than to note that Ms. Vorhoff is the president of the Board. The unstated inference, that the other Board members failed to act to plaintiff's satisfaction, because of their deference to Ms. Vorhoff, does not suffice to support this cause of action.

The cause of action alleging that the Board violated its fiduciary duty to plaintiffs, by failing to act against the Vorhoffs, must be dismissed, because the Board, as distinguished from the individual members of the Board, owes no fiduciary duty to unit owners. *Argyrides v River Terrace Apts. LLC, 2014 N.Y. Misc. LEXIS 267, 2014 WL 255712 (Sup Ct, NY County 2014)*, citing *Peacock v Herald Sq. Loft Corp., 67 AD3d 442, 443, 889 N.Y.S.2d 22 (1st Dept 2009)* (co-op board **[*6]** has no fiduciary duty to shareholders) and *Stalker v Stewart Tenants Corp., 93 AD3d 550, 552, 940 N.Y.S.2d 600 (1st Dept 2012)* **[**5]** (corporation has no fiduciary duty to its shareholders); *see also Fletcher v Dakota, Inc., 99 AD3d 43, 948 N.Y.S.2d 263 (1st Dept 2012)* (same).

Accordingly, it is hereby

ORDERED that, in motion sequence No. 001, the motion of defendants Jennifer Rigamer Vorhoff and Nicholas Robbert Vorhoff to dismiss the complaint, as to them is granted, and the third and fourth causes of action in the complaint are dismissed with costs as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that in motion sequence No. 002, the motion of defendant Board of Managers of 169 Hudson Street Condominium to dismiss the complaint, as to it, is granted, and the first, second and fourth causes of action alleged in the complaint are dismissed with costs as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs.

Dated: January 21, 2019

/s/ David B. Cohen

J.S.C.

End of Document

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2020

No. 15-1823-cv

DONAHUE FRANCIS,
Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., AND CORRINE DOWNING,
Defendants-Appellees,

and

RAYMOND ENDRES,
Defendant.

On Appeal from the United States District Court
for the Eastern District of New York

ARGUED *EN BANC*: SEPTEMBER 24, 2020
DECIDED: MARCH 25, 2021

Before: LIVINGSTON, *Chief Judge*, CABRANES, POOLER, KATZMANN, CHIN, LOHIER, CARNEY, SULLIVAN, BIANCO, PARK, NARDINI, MENASHI, *Circuit Judges*.[*]

CABRANES, *Circuit Judge*, filed the majority opinion, in which LIVINGSTON, *Chief Judge*, SULLIVAN, BIANCO, PARK, NARDINI, and MENASHI, *Circuit Judges*, joined in full.

CHIN, *Circuit Judge*, joined by POOLER, KATZMANN, LOHIER, and CARNEY, *Circuit Judges*, filed an opinion dissenting in part and concurring in part.

LOHIER, *Circuit Judge*, joined by POOLER, KATZMANN, CHIN, and CARNEY, *Circuit Judges*, filed an opinion dissenting in part and concurring in part.

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[*] Judge Katzmann, who assumed senior status on January 21, 20201, participated in this case pursuant to 28 U.S.C. § 46(c).

The principal question presented to the *en banc* Court is whether a plaintiff states a claim under the Fair Housing Act of 1968 ("FHA"), 42 U.S.C. § 3601 *et seq.*, and parallel state statutes for intentional discrimination by alleging that his landlord failed to respond to reported race-based harassment by a fellow tenant. We conclude that landlords cannot be presumed to have the degree of control over tenants that would be necessary to impose liability under the FHA for tenant-on-tenant misconduct.

We **VACATE** the panel decision and **AFFIRM** the judgment of the District Court dismissing the Complaint.

SASHA SAMBERG-CHAMPION (John P. Relman, Yiyang Wu, *on the brief*), Washington, D.C., *for Plaintiff-Appellant*.

Ohana v. 180 Prospect Place Realty Corp.

United States District Court for the Eastern District of New York

March 11, 1998, Decided

94-CV-5816 (FB)

Reporter
996 F. Supp. 238 *; 1998 U.S. Dist. LEXIS 3275 **

TAMI OHANA and EDITH STERN, Plaintiffs, -against- 180 PROSPECT PLACE REALTY CORP.; ALLAN FOGELSON; RICHARD PILSON; RUTH JACKSON; and GLORIA PHELPS, Defendants.

Disposition: [1]** Motions by defendants Jackson and Phelps to dismiss amended complaint denied.

Core Terms

enjoyment, fair housing, plaintiffs', rental, rights, national origin, dwelling, religion, housing, familial status, district court, discriminatory, enumerated, intimidate, color, sex

Counsel: TAMI OHANA, Plaintiff, Pro se, Hollywood, CA.

EDITH STERN, Plaintiff, Pro se, Hollywood, CA.

RUTH JACKSON, Defendant, Pro se, Brooklyn, NY.

GLORIA PHELPS, Defendant, Pro se, Brooklyn, NY.

For 180 Prospect Place Realty Co., Allan Fogelson, Richard Pilson, Defendants: RICHARD J. PILSON, Esq., Berliner & Pilson, Esqs., New York, NY.

Judges: FREDERIC BLOCK, United States District Judge.

Opinion by: FREDERIC BLOCK

Opinion

[*239] MEMORANDUM AND ORDER

BLOCK, District Judge:

Plaintiffs Tami Ohana and Edith Stern, *pro se*, commenced this action against, *inter alia*, Ruth Jackson ("Jackson") and Gloria Phelps ("Phelps"), seeking monetary damages against these defendants for their alleged interference with plaintiffs' rights under § 3617 of the Fair Housing Act, *42 U.S.C. § 3601 et seq.* ("FHA"), and an implementing regulation, *24 C.F.R. § 100.400*. Presently before the Court are Jackson's and Phelps' motions to dismiss plaintiffs' complaint, as amended, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, for failure to state a claim. The Court denies their motions. In so doing, **[**2]** the Court holds that the FHA not only protects individuals from discrimination in the acquisition of their residences because of race, color, religion, sex, familial status, or national origin, but also protects them from interference by their neighbors for such discriminatory reasons in the peaceful enjoyment of their homes.

BACKGROUND

Plaintiffs' amended complaint alleges the following pertinent facts: On December 12, 1991, plaintiffs moved into Apartment 4D at 170 Prospect Place, Brooklyn, New York. [1] From that day forward, until they moved out the following December, Jackson and Phelps, their not-too-friendly neighbors, engaged in a series of discriminatory acts against them based upon plaintiffs' race (Hebrew), religion (Jewish), and national origin (Middle Eastern). [2]

[3]** These acts took the form of racial and anti-Jewish slurs and epithets, threats of bodily harm, and noise

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[1] Plaintiffs allege that they moved into the apartment on December 12, 1992; however, based upon a close reading of the amended complaint, which alleges discriminatory acts throughout 1992, while they were living in the apartment, it appears that plaintiffs actually moved into the apartment in December of 1991.

[2] Plaintiffs also claim sexual discrimination; however, they do not allege specific factual allegations to support that claim.

disturbances. For example, on the day after plaintiffs moved in, Phelps "stalked plaintiffs in front of their [apartment] door and said she is 'unhappy that whites moved next door.'" On another occasion, Jackson "yelled loudly 'I'll have the motherf ker Jews out.'" At times, Phelps and Jackson also banged on walls and hammered late at night while shouting their slurs and epithets. Specifically, on at least two occasions, Jackson "hammered loudly while hollering 'Jews move,' [at] around 2:00 a.m. and 2:30 a.m., startling [plaintiffs] awake." On another occasion, Jackson "forced herself into [plaintiffs'] apartment and put her fist in plaintiff Stern's face saying she had 'already hit the landlord.'" In another incident, Jackson "accosted plaintiff Stern in the hall . . . and shouted at plaintiff Stern that 'she was not black enough to live in the building' and that she'll 'send an Arab to kill her.'"

Visitors to Jackson's and Phelps' apartments participated in this type of abusive activity. For example, plaintiffs allege that "defendant Jackson with other tenants **[**4]** from 170 Prospect Pl., and visitors to her Apt. (# 3D) directed threats of bodily harm and anti-Jewish epithets at plaintiffs, intentionally done during the Jewish holiday of Purim." [3]

DISCUSSION

A. Standard for a Rule 12(b)(6) Motion to Dismiss

A complaint should only be dismissed pursuant to Rule 12(b)(6) "if it appears that [the **[*240]** plaintiffs] can prove no set of facts, consistent with [their] complaint, that would entitle **[**5]** [them] to relief." Electronics Communications Corp. v. Toshiba America Consumer Prods., Inc., 129 F.3d 240, 242-43 (2d Cir. 1997). Furthermore, "the court must accept as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff." Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59, 63. A *pro se* complaint is held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).

B. The Fair Housing Act

The United States Supreme Court has noted that the FHA is "a comprehensive open housing law." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413, 20 L. Ed. 2d 1189, 88 S. Ct. 2186 (1968). [4] The purpose of the FHA, as expressed by Congress, is "to provide, within constitutional limitations, for fair housing throughout the United States." *42 U.S.C. § 3601*. Thus, it is intended to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." Otero v. New York City Housing **[**6]** Auth., 484 F.2d 1122, 1134 (2d Cir. 1973). In order to achieve its purpose, the provisions of the FHA are to be construed broadly. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-12, 34 L. Ed. 2d 415, 93 S. Ct. 364 (1972). Consistent with its broad reach, the FHA provides for both private and governmental rights of action. *See* 42 U.S.C. §§ 3612-3614.

[7]** 42 U.S.C. § 3617 is the section that triggers liability under the FHA. It states:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

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[3] Plaintiffs have also joined as defendants Allen Fogelson, the owner of the premises, 180 Prospect Place Realty Corp., the management company, and Richard Pilson, Fogelson's attorney. Their theory of liability against Fogelson and the management company is, *inter alia*, that they had notice of the actions taken by Phelps and Jackson and failed to intervene. Liability in respect to Pilson is predicated upon their claim that he threatened to have plaintiffs evicted based upon false claims for discriminatory reasons. None of these defendants have moved to dismiss.

[4] In so noting, the Court distinguished the FHA from the more limited sweep of 42 U.S.C. § 1982, which provides that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Jones, 392 U.S. at 413. While white citizens have standing under § 1982, *see* Puglisi v. Underhill Park Taxpayer Assoc., 947 F. Supp. 673, 683 (S.D.N.Y. 1996) (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976) (similarly interpreting § 1981)), the FHA's "'potential for effectiveness . . . is much greater than (§ 1982) because of the sanctions and the remedies that it provides.'" Jones, 392 U.S. at 415 n.19.

Section 3603 consists of definitions and exemptions with respect to the sale and rental of dwellings. Section 3604 prohibits discrimination on the basis of race, color, religion, sex, familial status, and national origin, in the sale or rental of housing, including the terms and conditions of sale or rental, the provision of services in connection with a sale or rental, the availability of dwellings for sale or rental, and advertisements for sale or rental. It provides, specifically, under subdivision (a), that it is unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, **[**8]** familial status, or national origin." Section 3605 prohibits discrimination in "real estate-related transactions," including the making of loans for the purchase of a dwelling. Finally, § 3606 prohibits discrimination in the provision of brokerage services.

The Court must determine whether the viability of plaintiffs' § 3617 claim depends upon whether they possess viable claims under §§ 3603-3606. The District Court for the Southern District of New York has recently noted that "the necessity of a nexus between § 3617 and the sections enumerated therein is not free from doubt." United States v. Weisz, 914 F. Supp. 1050, 1054 (S.D.N.Y. 1996). As Judge Haight points out in *Weisz*, the issue has been broached, but not decided, by the Sixth and Seventh Circuits. *Id.; see* Michigan Protection and Advocacy Service, Inc. v. Babin, 18 F.3d 337, 347 n.4 (6th Cir. 1994) ("for the purpose of this opinion we will assume, without **[*241]** deciding, that the plaintiffs' § 3617 claim does not depend upon the validity of their § 3604(f) claim."); Metropolitan Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1288 n.5 (7th Cir. 1977), *cert. denied*, *434 U.S. 1025, 54 L. Ed. 2d 772, **[**9]** 98 S. Ct. 752 (1978)* ("We decline to decide whether section 3617 can ever be violated by conduct that does not violate [§§ 3603, 3604, 3605 or 3606]."); *but see* Smith v. Stechel, 510 F.2d 1162, 1164 (9th Cir. 1975) ("Section 3617 does not necessarily deal with a discriminatory housing practice, or with the landlord, financier or brokerage service guilty of such practice. It deals with a situation where no discriminatory practice may have occurred at all because the would be tenant has been discouraged from asserting his rights…."); Evans v. Tubbe, 657 F.2d 661, 663 n.3 (5th Cir. 1981) ("The defendant Tubbe's alleged conduct is arguably within the prohibitions of both §§ 3604(a) and 3617."); Sofarelli v. Pinellas County, 931 F.2d 718, 722 (11th Cir. 1991) ("We find that Sofarelli may be able to prove a set of facts * * * which would clearly constitute coercion and intimidation under § 3617."). Judge Haight's research caused him to conclude that "the Second Circuit does not appear to have addressed the issue." Weisz, 914 F. Supp. at 1054.

The Second Circuit has, however, commented in Frazier v. Rominger, 27 F.3d 828 (2d Cir. 1994), that "section 3617 prohibits **[**10]** the interference with the exercise of Fair Housing rights *only* as enumerated in [§§ 3603, 3604, 3605, or 3606], which define the substantive violations of the Act." 27 F.3d at 834 (emphasis supplied). Taken at face value, this suggests that plaintiffs, once having secured their housing, have no right under the FHA to be free from interference with the peaceful enjoyment of their home by one not associated with its sale or rental.

At issue in *Frazier*, however, was the discrete question of whether a landlord's refusal to rent, which would clearly be cognizable under § 3604(a), could serve, simultaneously, as a separate § 3617 claim because it would also, perforce, constitute "interference" under § 3617. As the court pointed out, "under this theory, every allegedly discriminatory denial of housing under § 3604(a) would also constitute a violation of § 3617 in that the denial 'interfered' with the prospective tenant's Fair Housing Act rights." 27 F.3d at 834. Consequently, the court "declined to believe that Congress ever intended such a statutory overlap" and concluded, therefore, "that the plaintiffs' sole remedy in this case existed in their § 3604(a) cause of action." **[**11]** [5] *Id.*

Unlike *Frazier*, plaintiffs do not appear to have a claim against the defendants bottomed on a violation of any of the substantive provisions of §§ 3603-3606. The closest nexus would be that provision under § 3604(a) barring practices which have the effect of making dwellings unavailable on the basis of a person's protected status. However, this proscription appears to relate to activities in the course of the underlying rental or sale of the premises, or actions that would preclude access to or actual possession of one's property, *see, e.g.,* Evans, 657 F.2d 661 (barring access to property by erection of metal gate), rather than actions that would **[**12]** interfere with the enjoyment of a person's property. The question remains, therefore, whether § 3617 can ever

[5] It would appear that the only realistic purpose that could be served by allowing § 3617 to serve as a separate claim when the claim is covered under one of the enumerated sections would be to obviate the statute of limitations applicable to §§ 3603-3606. *See, e.g.,* New York ex rel. Abrams v. Merlino, 694 F. Supp. 1101, 1103 (S.D.N.Y. 1988).

serve as a separate basis for an FHA claim where there is no predicate for liability under any of the statute's specifically referenced enumerated substantive provisions. A number of district courts have held that it can, and despite the strictures and seemingly preclusive tone of its language, a careful reading of *Frazier* suggests that the Second Circuit agrees.

Most of the district court cases that have recognized such a separate substantive basis for § 3617 liability come from the Northern District of Illinois, including Stirgus v. Benoit, 720 F. Supp. 119 (N.D. Ill. 1989) (firebombing of plaintiff's house) and Stackhouse v. DeSitter, 620 F. Supp. 208 (N.D. Ill. 1985) (firebombing of plaintiff's car). *See also* Cass v. American Properties, Inc., 1995 U.S. Dist. LEXIS 2298, 1995 WL 132166 (N.D. Ill. Feb. 27, 1995) (interference **[*242]** with a party's aid or encouragement of others' enjoyment of fair housing rights); Seaphus v. Lilly, 691 F. Supp. 127 (N.D. Ill. 1988) (various acts of vandalism); Waheed v. Kalafut, 1988 U.S. Dist. LEXIS 964, 1988 WL 9092 (N.D. Ill. Feb. 2, 1988) (firebombing house, banging garbage **[**13]** cans and screaming racial epithets). *Stirgus,* as well as *Seaphus* and *Waheed,* each followed the lead of *Stackhouse* where, after observing "that it was unsettled whether § 3617 could be violated by conduct which did not also violate one of the other enumerated sections," 620 F. Supp. at 210, and noting that the Seventh Circuit declined to decide the question in *Metropolitan Housing,* Judge Aspen squarely held "that § 3617 may be violated absent a violation of § 3603, 3604, 3605 or 3606." *Id.*

In so holding, Judge Aspen adopted the *dicta* of the District Court of the Southern District of Ohio in Laufman v. Oakley Building & Loan Co., 408 F. Supp. 489, 497-98 (S.D. Ohio 1976), that "reading § 3617 as dependent on a violation of the enumerated sections would render § 3617 superfluous." Stackhouse, 620 F. Supp. at 210. Embracing the time honored rule of statutory construction that "each provision of a legislative enactment is to be interpreted as meaningful and not as surplusage," *id.*, the court in *Stackhouse* construed the wording of § 3617 as itself indicating, that a violation of §§ 3603-3606 "will sometimes, but not always be involved." **[**14]** *Id.* In that respect, it perceived that § 3617 makes it "unlawful to coerce, intimidate, threaten, or interfere with any person" in three different circumstances: "(1) in the exercise or enjoyment of any right protected by § 3603-3606; (2) on account of the person's having exercised or enjoyed such a right; and (3) on account of his having aided or encouraged any other person in the exercise or enjoyment of such a right." 620 F. Supp. at 210-11. The firebombing of plaintiff's automobile was, accordingly, proscribed under the second § 3617 scenario, "prohibiting coercive acts taken against persons who *already have exercised* their rights to fair housing." *Id.* (emphasis supplied). [6]

[15]** *Stackhouse* has been cited with approval by District Courts of the Second Circuit. *See, e.g.,* Puglisi v. Underhill Park Taxpayer Assoc., 947 F. Supp. at 696 (S.D.N.Y. 1996); New York ex rel. Abrams v. Merlino, 694 F. Supp. 1101, 1103-04 (S.D.N.Y. 1988). More tellingly, it was also cited by the Second Circuit itself in *Frazier*, as were *Stirgus* and *Laufman,* as examples of situations warranting protection of individuals "from coercion, intimidation, threats, or interference in the exercise or enjoyment of [one's] Fair Housing, Act rights." 27 F.3d at 833. It is at once apparent, therefore, that the court's seemingly preclusive language in *Frazier* is not to be taken literally, and that the Second Circuit does indeed recognize that a claim under § 3617 could entail circumstances not embraced under §§ 3603-3606. The underlying facts in *Frazier* simply did not constitute any such circumstance.

Moreover, a regulation promulgated under the FHA provides that the enjoyment of one's dwelling free from discrimination comes within the protection afforded by § 3617. 24 C.F.R. § 100.400(c)(2). It states, specifically, that "threatening, intimidating or interfering **[**16]** with persons in their *enjoyment of a dwelling* because of the race, color, religion, sex, handicap, familial status, or national origin of such persons" is prohibited by § 3617. 24 C.F.R. § 100.400(c)(2) (emphasis added). Since the reach of § 3617 is not free from doubt, this interpretation, which is a plausible construction of the statute and is compatible with Congress' expressed broad purpose in enacting the FHA, is entitled to deference. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984); Coalition of New York State Career Schools, Inc. v. Riley, 129 F.3d 276, 279 (2d Cir. 1997); Perry v. Dowling, 95 F.3d 231,

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[6] As here, *Stackhouse* was decided on the basis of the applicability of § 3617, although the court noted that it could conceivably be decided on the basis of § 3604(a) alone if the concept of "unavailability" were to receive a very broad construction. 620 F. Supp. at 211 n.6. The Court takes a somewhat more skeptical view of the applicability of § 3604(a), *supra*, and therefore believes that resolution of the § 3617 issue is indicated. Notably, the court in *Stackhouse* stated that given its interpretation of § 3617, it did not have to find a violation of § 3604(a). *Id.*

235-36 (2d Cir. 1996); *Velazquez v. Legal Services Corp., 985 F. Supp. 323, 1997 WL 789369*, at *30-31 (E.D.N.Y. 1997).

[*243] The peaceful enjoyment of one's home is a root concept of our society. It is obviously sufficiently pervasive to embrace the expectation that one should be able to live in racial and ethnic harmony with one's neighbors. This case is not about providing a federal judicial forum for the resolution of disputes amongst neighbors. **[**17]** *See Weisz, 914 F. Supp. 1050 at 1054-55*. It is simply about holding one accountable for intentionally intruding upon the quietude of another's home because of that person's race, color, religion, sex, familial status or national origin. The Fair Housing Act, with its broad range of compensatory, punitive and injunctive remedies, *see 42 U.S.C. § 3613(c)*, is an appropriate means for accomplishing this salutary end, and *Frazier* need not, and should not, be construed as precluding plaintiffs' claim from being embraced by *§ 3617*. Accordingly, plaintiffs, having already exercised their rights to fair housing, have set forth a cognizable claim under *§ 3617* of the Fair Housing Act against Jackson and Phelps for allegedly intentionally interfering with the enjoyment of these rights because of plaintiffs' race, religion and national origin.

CONCLUSION

The motions by defendants Jackson and Phelps to dismiss the amended complaint are denied.

SO ORDERED.

FREDERIC BLOCK

United States District Judge

Dated: March 11, 1998

Brooklyn, New York
