

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWERPART 25

Index Number: 109262/2010

SHERLOCK, JERRY

VS.

20 EAST 9TH STREET OWNERS CORP.

SEQUENCE NUMBER: 001

DISMISS

INDEX NO.

109262/10

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for _____

PAPERS NUMBERED

1
2
3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAR 31 2011

NEW YORK
COUNTY CLERK'S OFFICEDated: 3/30/11

J.S.C.

HON. EILEEN A. RAKOWERCheck one: FINAL DISPOSITION NON-FINAL DISPOSITIONCheck if appropriate: DO NOT POST REFERENCE SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

X

JERRY SHERLOCK,

Plaintiff,

Index No.109262/10-

- against -

20 EAST 9TH STREET OWNERS CORP., ORSID
REALTY CORP., ANDREW SOUTHERN and RINA
SINEK,

Seq No.: 001 &002

Decision and Order

FILED

Defendants.

MAR 31 2011

HON. EILEEN A. RAKOWER, J.S.C.

X
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff is a shareholder in a cooperative located at 20 E. 9th Street in the County and State of New York. Plaintiff resides in Apartment 8-E, pursuant to a proprietary lease with 20 East 9th Street Owners Corp. (Owner). Plaintiff brings this action to resolve issues of noise he claims emanates from the apartment above his, Apartment 9-E. Plaintiff complains that excessive noise has deprived him of the quiet enjoyment of his home and has created a nuisance; and further, he takes issue with the fact that Apartment 9-E has not been forced to follow House Rules by the Owner and Orsid Realty Corp. (Manager), the managing agent of the building. Defendants Andrew Southern and Rena Sinek reside in Apartment 9-E with their young child. Owner and Manager bring this motion to dismiss pursuant to CPLR 3211. Southern and Sinek, by separate motion, also seek dismissal. Plaintiff opposes both motions.

Specifically, plaintiff alleges in his complaint that

Southern and Sinek regularly and routinely cause and allow loud and unremitting noises to emanate from their apartment. Southern and Sinek create such noise conditions at all hours of the day and night. The level of noise emanating from Southern and Sinek's apartment significantly exceeds the normal level of ambient sound that emanates from an average New York City apartment.

Plaintiff states that the proprietary lease and house rules of the subject building require that at least 80% of the floor space be carpeted and padded, and that Apartment 9-E has failed to cover the floors accordingly. Plaintiff further alleges that

By reason of their unwillingness and refusal to act with respect to the nuisance created and maintained by Southern and Sinek, Orsid and the Co-op have aided and abetted the creation and maintenance of said nuisance.

Plaintiff, by his first cause of action, seeks to have this Court

permanently enjoin Southern and Sinek to cease and desist from creating, maintaining and allowing unreasonable levels of noise in their apartment, and direct that they place carpeting and padding throughout their apartment in an amount sufficient to cover eighty (80%) per cent of the floor of the apartment occupied by Southern and Sinek. [sic]

Plaintiff, by his second cause of action, seeks to have this Court

direct that the defendants 40 E. 9th St. Owners Corp. [sic] and Orsid Realty Corp., as managing agent, take all steps necessary to ensure that Southern and Sinek permanently cease and desist from creating and permitting loud, continuous and unremitting noise to emanate from the apartment occupied by Southern and Sinek, including, without limitation, that they place carpeting and padding throughout their apartment in an amount sufficient to cover eighty (80%) per cent of the floor of the apartment occupied by Southern and Sinek.

Initially, Orsid urges that, as a disclosed agent of a principal, it had no authority to act independently of the Owner's directions. Orsid is the disclosed managing agent of the co-op, Orsid was "bound by its principal's actions," and thus was not free to act independently to enforce the lease or the House Rules. (*Kaufman v. Tudor Realty Services Corp.*, 4 AD3d 212, 213[1st Dept. 2004]).

Owner argues that plaintiff has no standing to compel it to exercise its business judgment and pursue an action against Southern and Sinek for an alleged breach of the proprietary lease. Additionally, plaintiff has no privity to the proprietary lease for Apartment 9-E, and cannot seek to enforce its provisions.

It is well settled that the decisions of co-op boards are protected by the business judgment rule. (see *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 NY2d 530[1990]). "T]he business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith." (*40 West 67th Street Corp. v. Pullman*, 100 NY2d 147, 153 [2003]). The board is presumed to act in good faith, and plaintiff bears the burden of showing that the co-op board breached its fiduciary duty. (see *Jones v. Surrey Co-op Apartments, Inc.*, 263 AD2d 33[1st Dept. 1999]). Without such a showing, judicial inquiry into the actions of the co-op board is prohibited, even though the results may show that what the co-op did was "unwise or inexpedient." (*Id.* at 36).

Where there is an allegation of nuisance created by noises emanating from a co-tenant's apartment, the cooperative cannot be held liable if "it did not create the nuisance and had surrendered control of the premises to [the] . . . tenant." (*Bernard v. 345 East 73rd Owners Corp.*, 181 AD2d 543[1st Dept. 1992]). Here, there is no allegation that the Owner either created the nuisance, or retained control of the subject apartment.

The elements of a cause of action for a common law private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) and 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." (*61 West 62 Owners Corp. v. CGMEMP LLC*, 77AD3d 330[1st Dept. 2010]). Plaintiff alleges

Southern and Sinek regularly and routinely cause and allow loud and unremitting noises to emanate from their apartment . . . all hours of the day and night . . . [d]espite repeated requests . . . none of the defendants have taken any action to mitigate the noise emanating from the apartment . . . Southern and Sinek have refused to install carpeting and padding . . . Sherlock has been deprived and continues to be deprived of

the quiet enjoyment of his apartment and is subjected to unhealthy and intolerable levels of noise . . .

Plaintiff's pleadings, which allege an intentional, substantial, and unreasonable interference with plaintiff's quiet enjoyment, satisfy the elements required to state a cause of action for common law nuisance as against Southern and Sinek.

On a motion to dismiss under CPLR 3214(a)(7) "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 AD2d 243, 245 [1st Dept. 2000]).

Wherefore it is hereby

ORDERED that defendants' 20 East 9th Street Owner's Corp. and Orsid Realty Corp.'s motion to dismiss is granted and the complaint is dismissed in its entirety as against said defendants, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendants' Andrew Southern and Rena Sinek's motion to dismiss is denied; and it is further

ORDERED that defendants Andrew Southern and Rena Sinek are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 30, 2011


EILEEN A. RAKOWER, J.S.C.

FILED

MAR 31 2011

**NEW YORK
COUNTY CLERK'S OFFICE**