

PRESENT: BARBARA R. KAPNICK
J.S.C. Justice

PART 12

Alchemy Condominium

INDEX NO. 109168/02

MOTION DATE _____

- v -
Howard Finkelstein

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

JAN 15 2003

SCANNED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is withdrawn,
the case having been resolved by
the parties pursuant to a stipulation
of settlement ~~prepared~~ prepared by
all counsel and signed by the parties
on January 9, 2003.

MOTION / CASE IS REFERRED TO JUSTICE

Dated: 1/9/03

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

BARBARA R. KAPNICK
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 12

ALCHEMY CONDOMINIUM, BY ITS BOARD OF
MANAGERS,

Plaintiff,

-against-

HOWARD FINKELSTEIN, HOUSE OF SOUND,
INC. and ROBERT CLIVILLES,

Defendants.

Index No. 109168/02

STIPULATION OF SETTLEMENT

WHEREAS, plaintiff Alchemy Condominium ("Alchemy") is a condominium association formed under Section 339 (i) of the Real Property Law of the State of New York;

WHEREAS, defendant House of Sound ("House of Sound") is the tenant of the premises known as Unit C-1 (referred to herein as the "Recording Studio" or the "Unit") at 36-40 West 13th Street, New York, N.Y. (the "Building") pursuant to a Lease dated August 1, 1994 (the "Lease") between House of Sound, as tenant, and Passaic Escape, Inc. ("Passaic"), as Owner, which Lease was assigned by Passaic to defendant Howard Finkelstein ("Finkelstein");

WHEREAS, defendant Robert Clivilles ("Clivilles") is a principal of House of Sound (House of Sound, Clivilles and all of their affiliated entities are collectively referred to as the "Studio Defendants");

WHEREAS, Finkelstein is the owner of the Unit;

WHEREAS, this action (the "Alchemy Action") was commenced by service of a Summons and Complaint dated May 6, 2002 and the filing of an Order to Show Cause with supporting documents dated on or about May 14,2002 (the "Order to Show Cause");



WHEREAS, on May 14,2002, the Honorable Barbara R. Kapnick executed an Order (the "TRO") which restrained the Studio Defendants, and all of their related entities, from "allowing or permitting any entity, person or group of persons, including but not limited to the Studio Defendants themselves, to play, broadcast or perform music or to cause such music to be played, broadcasted or performed in commercial unit C-1 of the premises leased to and used by the Studio Defendants to operate a music recording studio, such that the sound level in the lobby or in any resident's apartment within the premises resulting from such music exceeds legal limits;"

WHEREAS, thereafter, Alchemy moved by Order to Show Cause on or about June 13,2002, to hold the Studio Defendants in contempt for violations of the TRO, which application resulted in an Order dated June 29,2002;

WHEREAS, on or about July 25,2002 Alchemy served and filed an amended Verified Complaint;

WHEREAS, Finkelstein answered and cross-claimed against House of Sound by Answer dated August 27,2002;

WHEREAS, the Court has conducted a single hearing to determine (a) whether the House of Sound, Clivilles and its affiliates have violated the TRO; and (b) whether Alchemy is entitled to a permanent injunction restricting the Studio Defendants' use of the Recording Studio;

WHEREAS, subsequent to the commencement of this action, Clivilles and House of Sound commenced an action in the United States District Court, Southern District of New York entitled Robert Clivilles and House of Sound. Inc. v. Daniel Plants. Sally Plants, Alchemy Condominium, by its Board of Managers, Index No. 02CV5093 (the "Federal Action") and the

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parties to this Stipulation have agreed to settle the Federal Action and wish to incorporate the terms of that settlement into this Stipulation of Settlement;

WHEREAS, the parties desire to resolve all of the above actions in an amicable manner;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained and for good and valuable consideration the receipt of which is hereby acknowledged, it is hereby stipulated and agreed as follows:

1. The Studio Defendants hereby agree to perform certain soundproofing work on the first floor in the Recording Studio in order to comply with the recommendations given by the Studio Defendants' experts, Lewis S. Goodfriend & Associates ("LSG & A") and Soundvu Associates ("Soundvu") (LSG&A and Soundvu shall be collectively referred to herein as the "Sound Consultants"). Except ~~as~~ provided herein, the Soundproofing Work (~~as~~ hereinafter defined) shall be performed at the Studio Defendants' sole cost and expense. The Studio Defendants hereby agree to indemnify and hold harmless, Alchemy and its unit owners, Merlot Management and Finkelstein, in connection with any claims, causes of actions, or liabilities that arise as a result of the Soundproofing Work (~~as~~ hereinafter defined). Pursuant to paragraph 46 of the Lease, the Studio Defendants have delivered to Finkelstein plans and specifications (the "Plans") for the Soundproofing Work which Finkelstein has approved. All Soundproofing Work to be performed by the Studio Defendants shall be done in accordance with paragraph 46 of the Lease and any applicable laws and the Studio Defendants shall make all filings with any applicable municipal authorities as may be required by law. ~~Simultaneously with~~ the execution of this Stipulation, ^{Alchemy and/or} Finkelstein shall execute those building department applications submitted by the Studio Defendants for the Soundproofing Work and Clivilles shall pay to Finkelstein the sum

Within five (5) days of
~~Simultaneously with~~ the execution
 (provided same are accurate + truthful)

of \$1,000 representing Finkelstein's costs to have the Plans reviewed. Approval of the Plans by Finkelstein and Alchemy shall not relieve the Studio Defendants of satisfying any requirements of law (as may be defined in any applicable statute or the Lease) and shall not be deemed a consent or approval by Finkelstein or Alchemy as to the adequacy of the Plans to reduce the sound levels in conformity with this Stipulation.

2. The Soundproofing Work to be performed by the Studio Defendants shall be referred to herein as the "Soundproofing Work." The Soundproofing Work is set forth in the Plans attached hereto as Exhibit A and made a part hereof, as may be modified, from time to time, subject to the consent of the parties, which consent shall not be unreasonably withheld, to ensure that the sound levels emanating from the Studio meet with the parties' intention hereto.

~~By way of example, but without limitation, if, during the construction, it is determined by the Sound Consultants that certain additional work is required to reduce sound levels, or that, in consideration of the use of the particular studios, certain work in the Plans is not necessary, that the Soundproofing Work shall be modified to meet with those determinations, provided in all cases that such modifications in no way increase the sound level as compared to both the Plans as originally approved and the requirements of this Stipulation.~~ The Studio Defendants represent that the Soundproofing Work shall not adversely affect or impact upon the ability of Finkelstein or any subsequent occupant of the Unit to use the Unit for other purposes at the expiration of the Lease or otherwise adversely affect the value of the Unit. The Studio Defendants shall comply with their obligations to restore the Unit as may be set forth in the Lease.

3. Alchemy and its unit owners shall permit reasonable access, upon reasonable notice, to the contractors and consultants performing work on behalf of the Studio

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Defendants and their agents, and to contractors and consultants retained by Finkelstein for the purpose of performing reasonable interim testing during the course of the construction.

4. The Soundproofing Work shall commence in the portion of the Recording and Control (referred to as "Studio A") Studio known as "Studio A" no later than ~~(i) December 1, 2002, or (ii)~~ within two weeks after all necessary governmental permits have been issued, whichever is later (the "Commencement Date"). Notwithstanding the Commencement Date, as of December 1, 2002, Studio A shall not be used by the Studio Defendants. It is specifically understood that the Studio Defendants shall perform the work in "Studio A" prior to performing the work in the portion of the Recording Studio known as "Studio B".

5. The Studio Defendants and all of their affiliates and entities, hereby agree that effective January 1, 2003, they shall not "lock-out" or "sublease" (as restricted by and in accordance with the provisions of paragraph 63 of the Lease) any portion of the Recording Studio to any "third parties," unless the Soundproofing Work in the particular portion of the Recording Studio sought to be used has been completed. Notwithstanding the foregoing, it is agreed that effective January 1, 2003, Clivilles may use Studio ~~A~~^{and Control} B for his own personal use only, provided that the sound emanating from Studio B into any residential unit does not exceed ~~4~~³ decibels and in no event shall Clivilles use Studio B after ~~11:00~~^{11:00} p.m. starting January 1, 2003. Effective January 27, 2003, the Studio Defendants may only *

6. In the event the Soundproofing Work in both rooms is not completed by March 1, 2003, the Studio Defendants hereby agree that effective March 1, 2003 they shall not use any of the sound studios in the Recording Studio (except as set forth in the next sentence) in any manner whatsoever, at any time, on any day, for the purpose of operating the sound equipment therein or generating sound in any fashion. Nothing contained herein shall prohibit

at any time

* use Studio B until 8:30 PM provided that the sound emanating from Studio cannot be heard in any residential Unit in the Building, until such time as the Soundproofing work is completed in Studio B in which cases the standards contained here shall be applicable

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the Studio Defendants from using the studio for day to day business operations (excluding sound recording) on the first level *i.e.*, for meetings with clients, however, the Studio Defendants may use the basement level for sound recording provided that the sound from the Basement is not audible to any portion of the Building. Notwithstanding any restriction on performing

Soundproofing Work in either of the studios at any time of day or night, either room may be used

provided in paragraphs 9 + 11 of

~~(except as may be set forth in this S + C)~~ or room with no restrictions once the Soundproofing Work is complete in that room, and such room has

been tested and found to comply with the requirements of this Stipulation.

7. The Soundproofing Work shall be done in a manner which complies with the Lease and which complies with Alchemy's rules and regulations governing alterations, which rules and regulations are set forth in Exhibit B annexed hereto and made a part hereof. The Soundproofing Work shall be performed in coordination with Alchemy, Finkelstein and their respective professionals, all of which shall have the right to inspect the Soundproofing Work, on reasonable notice, and to perform tests to ascertain whether the Soundproofing Work is being performed in accordance with the Plans and this Stipulation. During the duration of the Soundproofing Work, testing shall be performed at regular intervals with representatives of Alchemy present to ensure that such work eliminates the sound that has been objected to by Alchemy and its residents.

8. Within thirty (30) days after the completion of the Soundproofing Work, but in no event later than April 1, 2003, neither the Studio Defendants nor its customers, clientele, guests, invitees, employees or contractors shall be entitled to use the Residential Lobby of 36-40 West 13th Street, New York, N.Y. (the "Residential Lobby") after 6:00 p.m., seven (7) days per week, for any purpose whatsoever. Notwithstanding the previous sentence, clientele of the Studio Defendants may use the Residential Lobby if (a) ^{their} use is for purposes of ingress and

solely

*member holding no less than a twenty (20%) percent interest in House of Sound equity

egress to the Recording Studio, and (b) such clientele are personally accompanied during each such ingress and egress by either Clivilles or a principal officer* . The Studio

Defendants hereby agree to (i) inform their customers, clientele, guests, invitees, employees and contractors that they may not use the lobby entrance after 6:00 p.m., seven days per week (except in compliance with the previous sentence) and (ii) to take whatever reasonable steps are necessary in order to insure that their customers, clientele, guests, invitees, employees or

contractors do not make use of the Residential Lobby after 6 p.m., seven days per week. This shall not act to restriction

or do not unreasonably interfere with the residents of the Building @ all other hours.

permanently restrict use of the lobby entrance by Finkelstein or any subsequent tenant,

The studio defendants shall have use of the side entrance for ingress and egress and shall be permitted to erect an awning over that entrance subject to any applicable governmental rules code, etc and to the consent of Alchemy.

in addition, the studio defendants shall keep the corridor free from debris & stuff on the side entrance in compliance of all laws.

In exchange for the Studio Defendants' agreement to perform the Soundproofing Work and forbear use of the Building's lobby as set forth herein, Alchemy agrees to pay to the Studio defendants to contribute \$110,000 towards such Soundproofing Work ("Alchemy's Contribution").

and to settle all lawsuits

Alchemy's Contribution shall be paid as follows:

and personal property

a. Upon commencement of the Soundproofing Work, which commencement must be verified by Alchemy's acoustical consultant, Alchemy shall pay to the contractor performing the Soundproofing Work, upon presentation of an invoice for same, the sum of ~~\$\$\$50,000~~ \$55,000.00

b. Upon final completion of the Soundproofing Work, as reasonably certified by Finkelstein's, Alchemy's and House of Sound's consultants, in accordance with the Plans, as they may be amended from time to time as set forth herein, and provided that there has been compliance with the terms of this Stipulation of Settlement, Alchemy shall pay to the contractor performing the Soundproofing Work sum of \$27,500.00; and

which the applicable agency seeks to enforce

which consent shall not be unreasonably withheld (it being agreed that the aesthetic appeal of such awning is part of such consent) If the side entrance cannot be utilized by the studio defendants by reason of some applicable law code, or regulation, the parties agree to use reasonable efforts to provide for alternative access to the Studio.

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b. Within sixty (60) days after the completion of the Soundproofing in Studio A Work, the parties shall perform sound tests to establish that the sound emanating from the Studio A complies with the terms of this Stipulation; provided that it does so, as reasonably certified by Alchemy's acoustical consultant, and provided that (i) the Studio Defendants have complied with the terms of this Stipulation of Settlement, (ii) that the Soundproofing Work has yielded results which are reasonably acceptable to Alchemy, and (iii) that all applicable building department sign-offs have been delivered to Alchemy and Finkelstein, the sum of \$27,500.00 shall be paid to House of Sound within ~~one hundred twenty-five~~ ^{sixty} ~~(125)~~ ⁽⁶⁵⁾ days after the completion of the Soundproofing Work;

(c) The balance of \$27,500 to Defendant ~~...~~ ^{an} days of the Soundproofing work in Studio a, subject to the same ^{completion of the} Upon the making of the final payment referred to in paragraph 9 (c), above, the parties to this Stipulation shall execute a Stipulation of Discontinuance in the form annexed hereto as Exhibit C.

and as required by this Stipulation

11. It is hereby agreed among the parties that reasonably acceptable to Alchemy, as set forth in paragraph 9 hereto, shall mean below legal limits, and that the Studio Defendants shall endeavor and use reasonable efforts to effect soundproofing which creates a comfortable living environment for the residents of Alchemy.

It is hereby agreed that the soundproofing work must yield results that are reasonably acceptable to Alchemy.

12. Upon execution of this Stipulation of Settlement, the applicable parties to this Stipulation shall execute a Stipulation (in the form annexed as Exhibit D) discontinuing the Federal Action with prejudice. In addition, upon execution of this Stipulation of Settlement, the parties to this action shall exchange releases, in the forms annexed hereto as Exhibits E and F.

13. The court shall retain continuing jurisdiction over this matter to ensure compliance with this Stipulation of Settlement. In the event the Studio Defendants fail to

*requirements set forth in paragraph 9 (b) (i), (ii) + (iii) + provided that the soundproofing work in Studio B is substantially completed by February 1, 2004. If the soundproofing work in Studio B is not →

Substantially completed in Studio B by February 1, 2004, ^{the} Alchemy shall have no obligation to make the final \$27,500 contribution. ~~If the soundproofing work is not performed in studio B, the restrictions in which case the restrictions on the use set forth in paragraph 6, including that which limits the sound to inaudible levels, shall perfectly apply.~~

comply with the terms of this Stipulation, they hereby consent to the restoration of this matter to the calendar for the purpose of entertaining Plaintiff's application for an order by Hon. Barbara Kapnick requiring closure of the Studio until there is full compliance by the Studio Defendants subject to any defenses (the "Permissible Defenses") which the Studio Defendants may interpose at that time; provided that the Studio Defendants agree that Permissible Defenses shall be limited to issues concerning the parties' compliance with the terms of this Agreement and shall not include any opposition to the granting of closure if the court finds that the Studio Defendants have breached the terms of this Stipulation. Y

14. It is specifically understood and agreed by and between the parties that this Stipulation of Settlement is the result of extensive negotiations among the parties. It is understood and agreed that all parties shall be deemed to have drawn this document in order to avoid any negative inference by any court as against the preparer of the document.

15. This Stipulation of Settlement sets forth the entire understanding among the parties, and cannot be modified orally.

16. This Stipulation of Settlement shall be binding upon and shall inure to the benefit of the respective parties, their heirs, assigns, executors, administrators, and successors in interest of their property. ^{including but not limited to an party to whom the lease is assigned or to whom the recording studio is sublet.}

17. This Stipulation of Settlement may be executed in counter-parts. ^{and facsimile} signatures shall be deemed originals thereof.

18. Except as expressly provided herein, this Stipulation and the agreements contained herein:

In the event an application is made to Judge Kapnick based on a breach of the terms of this stipulation, the party found to be in breach of this stipulation shall be responsible for the reasonable attorneys fees of the party making the application. If no breach is found as a result of the application, the party making the application shall pay the non-breaching party's reasonable attorneys fees.

by Judge Kapnick

a. are without prejudice in all respects to the rights of Finkelstein under the Lease with regard to approval of additional alterations, filing and compliance with law or with respect to Finkelstein's rights as a unit owner under the governing documents of the Condominium;

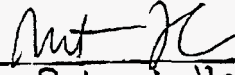
b. that execution of this Stipulation and consent to the Soundproofing Work shall be deemed to satisfy all obligations of Finkelstein (except with respect to any future assessments passed by Alchemy as a result of this Stipulation or otherwise) and shall resolve all claims against Finkelstein by Alchemy and the Studio Defendants related to sound transmission in compliance with the Condominium's By-Laws, rules and regulations through the date hereof; and

applicable to all Unit in accordance with their respective percentage interests


c. that restrictions on the use of the Recording Studio as set forth herein are voluntary between Alchemy and House of Sound and shall not affect House of Sound's or Clivilles' obligations under the Lease, including, without limitation, their obligation to pay rent, additional rent, use and occupancy or to obtain approvals for additional work or alteration.

19. This agreement is entered into by the Board of Managers solely as agent for the unit owners. The members of the Board of Managers shall have no personal liability thereunder, except to the extent of their liability, if any, as unit owners.

BOARD OF MANAGERS OF THE
ALCHEMY CONDOMINIUM

By: 
Name: Robert Heiss
Title: President

HOUSE OF SOUND, INC.

By: 
Name: Robert Clivilles
Title: President


Robert Clivilles

Howard Finkelstein

SO ORDERED:

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19. This agreement is entered into by the Board of Managers solely as agent for the unit owners. The members of the Board of Managers shall have no personal liability thereunder, except to the extent of their liability, if any, as unit owners.

BOARD OF MANAGERS OF THE
ALCHEMY CONDOMINIUM

By: _____
Name: Robert Heiss
Title: President

HOUSE OF SOUND, INC.

By: _____
Name: Robert Cliviles
Title: President

Robert Cliviles

Howard Finkelstein

SO ORDERED: