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

PRESENT: HON. CAROL EDMEAD J.S.C. PART 35

Index Number : 119249/2006

PILDES, ROBERT

VS

65TH STREET RESTAURANT LLC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 119249/06

MOTION DATE 10/5/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
OCT 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendant 65th Street Restaurant, LLC d/b/a Restaurant Daniel, for an Order granting summary judgment dismissing the complaint of plaintiffs Robert Pildes and Frances Pildes, is **granted** and the Complaint herein is dismissed in its entirety. It is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiffs.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/5/07

CAROL EDMEAD J.S.C.

Check one: ✓ FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

ROBERT PILDES and FRANCES PILDES,

Plaintiffs,

-against-

65th STREET RESTAURANT, LLC d/b/a RESTAURANT DANIEL,

Defendant.

Index No. 119249/06

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

When one purchases a condominium unit directly over a bustling restaurant that has permission to operate seven days a week from 7:00 a.m. to 2:00 a.m., and that has permission to engage live music, what should one expect? What rights does one have?

Defendant 65th Street Restaurant, LLC d/b/a Restaurant Daniel ("Restaurant Daniel" or "defendant") was the first purchaser of a unit in the Condominium known as 610 Park Avenue Condominium (the "Condominium") located at 610 Park Avenue, New York, New York (the "Building"). Restaurant Daniel is the owner of a commercial unit ("Commercial Unit 1"), in the Condominium.

According to defendant, its name was used prominently in promoting sales of units in the Building. Restaurant Daniel opened for business on December 1, 1998 and since that time has perennially been one of the top-rated restaurants in New York City.

Plaintiffs Robert Pildes and Frances Pildes (the "Pildes" or "plaintiffs") purchased Residential Unit 2-C of the Condominium on October 16, 1998, some ten months after Restaurant Daniel entered into its purchase agreement; some six months after Restaurant Daniel

closed title to Commercial Unit 1; and, ostensibly, after Restaurant Daniel was touted as a tenant in the Condominium. On or about July, 2004, some 5 ½ years after Restaurant Daniel was open and operating, the Pildes purchased the adjoining Unit 2-B. Thereafter, the Pildes combined Units 2-B and 2-C by construction performed in 2006.

The gist of plaintiffs' complaint is that Restaurant Daniel on many occasions, has permitted the restaurant to play excessively loud music which has greatly disrupted the plaintiffs in and interfered with their enjoyment of their apartment. Plaintiffs now sue, alleging:

- continuing nuisance caused by excessive, unreasonable and illegal noises emanating from the Restaurant Daniel in violation of the various provisions of the Condominium's By-Laws;
- damages resulting from installation of sound-deadening materials inside their units;
- personal injury to plaintiffs resulting from the continuing nuisance caused by the noise; and
- negligence in failing to prevent such excessive, unreasonable and illegal noises, and failing to take appropriate steps to prevent the continuing noise problem, and such negligence is the proximate cause of the continuing noise.

The Pildes assert separate causes of action for private nuisance seeking permanent injunctive relief (First Cause of Action) and damages (Second Cause of Action), Negligence (Third Cause of Action) and Breach of the Condominium By-Laws, Rules and Regulations in the Pildes' capacity as an intended beneficiary thereof (Fourth Cause of Action).

Restaurant Daniel moves herein for summary judgment dismissing the complaint.

Background

As set forth in the Condominium Offering Plan (as amended, the "Plan"), the Condominium consists of 70 residential units on the second through fifteenth and penthouse

floors, three commercial units on the ground floor, 17 storage units and the common elements. The Plan also provides that Commercial Unit 1 will be required to operate as an upscale restaurant for a specified period following the first unit sale.

The Sixth Amendment to the Plan states that Restaurant Daniel entered into a purchase agreement for Commercial Unit 1 in or about December 1997, agreed to operate a high-quality, full-service restaurant in accordance with certain covenants (the "Covenants") for a minimum of six years after its opening, and that the Plan, the Declaration of the Condominium and the By-Laws were amended to incorporate the Covenants. The Eighth Amendment to the Plan states that closing of title to Commercial Unit 1 occurred on April 29, 1998.

Defendant's Contentions

Plaintiffs knew or should have known at the time of their purchase of Unit 2-C that, *inter alia*, Unit 2-C was located one floor above Restaurant Daniel, the restaurant could operate seven days a week from 7:00 a.m. to 2:00 a.m., and the Covenants allow live music. It in fact is open to the public six days a week from 5:30 p.m. to 11:00 p.m. (11:30 p.m. on Friday and Saturday) with private parties sometimes booked on Sundays.

Restaurant Daniel understands the provisions of the Rules and Regulations, By-Laws and initial Covenants, including those regulating hours during which music playing is permitted, and abides by them. Restaurant Daniel has never been issued a violation or citation with respect to noise emanating from Commercial Unit 1.

In the three years preceding the filing of this lawsuit on December 29, 2006, Restaurant Daniel has received two unrelated complaints regarding noise emanating from Commercial Unit 1. The Pildes complained about New Year's Eve, December 31, 2005 by letter dated March 30,

2006 from their attorneys. The other complaint had been received more than a year earlier by letter dated March 21, 2005 from the managing agent. In response to the latter, defendant immediately provided proof that this complaint by unidentified unit holders, relating to Sunday, March 20, 2005, was unfounded. No further noise complaint followed in either case. There is no record of any frequent, recurring or continuous conduct by Restaurant Daniel causing excessive noise.

After the Pildes complained to the Condominium Board several years ago (at a time outside the controlling period of limitations) about noise from Restaurant Daniel, the Board reviewed the facts and determined in or about April 2002 that any disturbance was not pervasive, related to a few isolated occasions and that no other tenants complained. The Board found that Restaurant Daniel had not violated the By-Laws and that the drastic relief then sought by the Pildes (compelling Restaurant Daniel to install sound proofing) was not warranted.

Approximately two years after the Board judged that the Pildes' (time-barred) complaint lacked merit, the Pildes bought the adjoining Unit 2-B on July 20, 2004. Thereafter, the Pildes made the further choice to combine Units 2-B and 2-C by construction performed in 2006. Notwithstanding these further investments signaling their contentment with the Building and without bringing any new complaints to the Board to defendant's knowledge, or requesting that defendant take any action, the Pildes started this case in December 2006.

Restaurant Daniel is not a night club and has never operated as such.

Plaintiff's Opposition[1]

Triable issues of fact exist. Even if, *arguendo*, no triable issues of fact exist, it should nevertheless be noted that defendant's motion is based upon a misstatement of the facts. Defendant cherry picks those facts purportedly favorable to its position while virtually ignoring other equally important facts which refute its arguments.

And, dispositive motions at this time are premature, as no depositions have been held, and as a deposition of the defendant is necessary to plaintiffs' case.

On various occasions since 1998, Restaurant Daniel has either played loud recorded music or permitted musicians to perform in the restaurant, and on numerous occasions where such music was permitted in the restaurant, the plaintiffs have endured loud, pounding music and vibrating walls in their apartment.

According to Robert Pildes, the music was heard on numerous occasions between 1998 and 2006. While some of those incidents of loud music resulted in the plaintiffs forwarding written complaints to the restaurant, the Condominium's Board of Managers and the Building's managing agent, that was not always the case, as other incidents of loud music resulted in only verbal complaints from the plaintiffs.

Defendant's counsel also misrepresents the contents of plaintiffs' counsel's letter to the restaurant of March 30, 2006. In referring to that letter, defendant's counsel erroneously states in paragraph 5 of his affirmation that "the complaint letter pertains specifically to only one date, the

[1]Ignoring completely the rules governing motion practice, plaintiffs insert as an afterthought a request to amend their Complaint, "since an incorrect sum of monies expended by the plaintiffs to have sound tests performed and to install sound-deadening materials in their apartment as a result of the excessive noise caused by defendant was inadvertently inserted therein. Plaintiff would like to substitute the correct amount in the Complaint...." In light of this court's ultimate decision herein, this informal request is not addressed by the court.

preceding New Year's Eve, December 31, 2005." In making this wildly inaccurate statement, defendant's counsel completely fails to advise the court that the letter explicitly refers to numerous incidents of excessive noise during 2006, and the continuous nature of the nuisance.

And, defendant fails to mention that in a letter of March 21, 2005 from the Building's management company to Restaurant Daniel, a date well within the three-year period preceding the commencement of this action, the manager complained to Marcel Doron of Restaurant Daniel that "Several unit owners at 610 Park Avenue condominium complained vehemently to the Resident Manager...about loud music emanating from Daniel's restaurant, this past Sunday evening [March 20, 2005]." Referring to the loud music as "this disturbance," the manager complained that since the restaurant is located within a residential building, "there are strict limits to the playing of loud music, late at night. This is not the first time that residents of this building have complained about the late night noise emanating from your restaurant." The letter requested that the restaurant abide by the Building's rules "by restricting the playing of music after 10:00 p.m."

Plaintiffs submit an affidavit from Bonnie Schnitta ("Schnitta") an acoustical consultant and president of SoundSense, LLC, an acoustical engineering firm. On New Year's Eve, December 31, 2005-January 1, 2006, she conducted a sound test inside the plaintiffs' unit 2B/2C at the Condominium. She determined that the decibel level of the music coming from the restaurant exceeded the level of noise permitted under the New York City Department of Environmental Protection 24-221, which states that "No person shall operate or use or cause to be operated or used any sound signal device so as to create an unreasonable noise."

Schnitta later conducted a separate test in the Pildes' apartment the following New Year's

Eve, December 31, 2006-January 1, 2007. The second sound test, however, followed the installation of sound-deadening materials in the Pildes' unit by a contractor. Since the installation of the sound-deadening materials was successful, the second sound test showed that the decibel level of the music coming from the restaurant far exceeded code at the elevator in the hallway; however, it was now inaudible in the Pildes' unit and thus within code.

The written complaints that the plaintiffs annexed to their discovery responses do not reflect the only incidents of loud music from the restaurant. Plaintiffs specifically pointed out in their answer to interrogatories that in addition to the incidents described in the written complaints, there were other, separate occurrences where excessively loud music had been heard, but that the plaintiffs did not recall the exact dates of those incidents.

In sum, the parties disagree as to whether the excessive noises from Restaurant Daniel occurred on a few occasions or on many occasions. The parties further disagree as to whether most of the noise incidents occurred more than three years prior to the commencement of this action or whether numerous incidents occurred throughout that three-year time period preceding the action's commencement. Accordingly, triable issues of fact exist which should preclude summary judgment.

As the noise nuisance from Restaurant Daniel continued for years without defendant having taken any steps to reduce the noise level or to stop the playing of music in its restaurant, plaintiffs were forced to (a) hire an acoustical company to perform sound tests to determine the decibel level of the blaring music coming from Restaurant Daniel; and (b) have a contractor, under the supervision of the acoustical company, install sound-deadening materials throughout plaintiffs' unit so that the excessive noise coming from Restaurant Daniel would be reduced or

eliminated. Plaintiffs have spent $214,781.35 to have the sound-deadening materials installed, and $172,098.38 to have sound tests performed and to have the acoustical company service the installation of the sound-deadening materials by the contractor.

Defendant's Reply

Restaurant Daniel's motion should be granted because isolated instances of noise in New York City are insufficient to support a cause of action for nuisance as a matter of law. The record shows that the noise complaint underlying this action stems from one letter dated March 30, 2006 that the Pildes' attorneys sent to Restaurant Daniel, which refers specifically to a single date only, the preceding New Years Eve, December 31, 2005.

Since the Pildes have failed to bare their proof and demonstrate a recurring noise nuisance within the applicable three-year limitations period, summary judgment dismissing the complaint is warranted.

To the extent the Pildes attempt to present any facts contradictory to those asserted by Restaurant Daniel, they make only bald, conclusory allegations and fail to specify any particulars as to any incident of allegedly excessive noise other than New Year's Eve 2005.

Robert Pildes attempts to excuse the wholesale failure of proof by alleging that the Pildes made verbal complaints in addition to the single written one. However, the Pildes affidavit fails to identify any date other than New Year's Eve 2005 on which noise allegedly exceeded reasonable levels. The Pildes affidavit also establishes that the Pildes have no contemporaneous note, log, memorandum, police report or any record whatsoever as to any other purported incident within the limitations period. Further, no other condominium unit holder corroborates the Pildes' allegations.

The Pildes argue that paragraph 15(a) of the Interrogatory Answers is evidence of a continuity or recurrences of objectionable conduct. A review of that response, however, shows that it is entirely equivocal and does not identify any incident of excessive noise.

Analysis

Nuisance

Then Appellate Term Judge Lippman explained "private nuisance" best in his dissent in the case of *Iny v Collom*, 13 Misc.3d 75, 827 N.Y.S.2d 416 N.Y.Sup.App.Term,2006:

> As explained by the New York Court of Appeals, "[n]uisance is based upon the maxim that a man shall not use his property so as to harm another.... It traditionally required that, after a balancing of risk-utility considerations, the gravity of the harm to a plaintiff be found to outweigh the social usefulness of a defendant's activity" (*Little Joseph Realty v. Town of Babylon,* 41 N.Y.2d 738, 744, 395 N.Y.S.2d 428, 363 N.E.2d 1163 [1977] [citations omitted]). The Court of Appeals has further differentiated between a private and public nuisance by stating that "[a] private nuisance threatens one person or a relatively few ... an essential feature being an interference with the use or enjoyment of land" (*Copart Indus. v. Consolidated Edison Co. of N.Y.,* 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 362 N.E.2d 968 [1977], *rearg. denied* 42 N.Y.2d 1102, 399 N.Y.S.2d 1028, 369 N.E.2d 1198 [1977]). The interference with the use or enjoyment of land must amount to an injury in relation to a right of ownership in that land (*Kavanagh v. Barber,* 131 N.Y. 211, 213-214, 30 N.E. 235 [1892]).
>
> To establish a cause of action for private nuisance, the plaintiff must show that the defendant's conduct causes substantial interference with the use and enjoyment of plaintiff's land and that defendant's conduct is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the laws governing liability for abnormally dangerous conditions or activities (*Copart Indus.,* 41 N.Y.2d at 569, 394 N.Y.S.2d 169, 362 N.E.2d 968). The interference can be caused by an individual's actions or failure to act (*id.* at 571, 394 N.Y.S.2d 169, 362 N.E.2d 968). Thus, it has been held that when a defendant has been put on notice that his activity is interfering with plaintiff's use and enjoyment of his land and defendant fails to remedy the situation, the defendant will be found to have acted intentionally and unreasonably (*see e.g. National R.R. Passenger Corp. v. New York City Housing Authority,* 819 F.Supp. 1271, 1278-1279 [1993]).

> Furthermore, "[u]nder New York law, a party is liable for failing to abate a nuisance [under a theory of negligence] upon learning of it and having a reasonable opportunity to abate it" (*National R.R. Passenger Corp.*, 819 F.Supp. at 1279, citing *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 [1985]).[FN1]
>
> FN1. It is axiomatic that a defendant "cannot be held liable for the nuisance if [he] did not know of the condition" (*National R.R. Passenger Corp.*, 819 F.Supp. at 1278). However, a court will find that the complaint sufficiently alleges defendant's intentional conduct where plaintiff alleges that he/she informed defendant of the condition caused by the nuisance and that the "invasion was resulting or was substantially certain to result from defendant's failure to remedy the situation" (*id.* at 1279).

"Conduct which is either reckless or negligent in character may form the basis of a nuisance claim, but whether characterized as either negligence or nuisance, [it] is but a single wrong, and negligence must be proven." (*Chenango, Inc. v County of Chenango,* 256 A.D.2d 793, 794 (3d Dept.1998), quoting *Copart Indus. v Consolidated Edison Co. of NY,* 41 N.Y.2d 564, 569 (1977), rearg den. 42 N.Y.2d 1102 (1977)).

With respect to a nuisance actively created by the defendant, so long as the condition continues, so may the liability of its creator (Restatement, Second, Torts § 834, comment 1). It is a well-settled principle that continuous injuries to real estate caused by the maintenance of a nuisance create separate causes of action barred only by the running of the statute against the successive trespasses (*Jensen v General Elec. Co.*, 82 N.Y.2d 77 [1993]; *509 Sixth Ave. Corp. v New York City Transit Authority,* 15 N.Y.2d 48 [1964]; *Galway v Metropolitan El. Ry. Co.*, 128 N.Y. 132 [1891]).

And, the statute of limitations for injuries under the continuous invasion element of a nuisance claim must be proved with evidence of acts occurring within three years. CPLR §

214(4); *Alamio v Town of Rockland,* 302 A.D.2d 842, 844 (3d Dept 2003) ("With the water damage to this property apparent more than three years prior to the commencement of this action, the claim [based on a theory of continuing trespass and nuisance] was properly dismissed as untimely").

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima*

facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Restaurant Daniel has established that there were only isolated documented instances of noise complaints. Further the record shows that the documented noise complaint underlying the plaintiffs' causes of action, from the plaintiffs, stems essentially from one letter dated March 30, 2006.

Robert Pildes gives as an example of "here again, an incident of loud music,... " a note received from Restaurant Daniel on the occasion of an event for Ms. Oprah Winfrey:

> Dear Mrs. Pildes,
>
> I am planning a party on behalf of Oprah Winfrey at Daniel on the evening of the 28th December. We are going to have live music and I would not want you to be disturbed. Ms. Winfrey has asked me to extend an invitation for you to spend the night at the Peninsula Hotel including any spa services if you wish....."

If anything, this is an example of defendant's attempt to accommodate plaintiffs on the *occasion* of loud music.

There is no evidence that Restaurant Daniel has ever been issued a violation or citation with respect to noise emanating from Commercial Unit 1. And, there is no evidence that the Board of the Condominium ever found Restaurant Daniel in violation of the By-Laws related to noise emanating from Commercial Unit 1.

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the

proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

The gravamen of all of the causes of action in the complaint is an alleged continuing nuisance caused by excessive, unreasonable and illegal noises emanating from Restaurant Daniel. The documentary evidence shows, however, that there is only one documented complaint by the Pildes within the three-year limitation period. No other complaint by them is attached to the opposition papers.

Plaintiffs have failed to bare their proof and demonstrate a recurring noise nuisance. The affidavits in opposition do no substantiate any other alleged noise incidents, complained of by plaintiffs, other than New Year's Eve. Arguing that "On various occasions since 1998, Restaurant Daniel has either played loud recorded music or permitted musicians to perform in the

restaurant...," [Goldberg Aff. ¶10] is insufficient to establish a recurring nuisance.

Although plaintiffs argue that "While some of those incidents of loud music resulted in the plaintiffs forwarding written complaints to the restaurant, the condominium's board of managers and the building's managing agent,..." [Goldberg Aff. ¶11] substantiation of these multifarious writings is lacking. And, plaintiffs offer no specifics as to dates, times and recipients of verbal complaints.

In their response to interrogatories, plaintiffs identify ten (10) individuals and/or Board members (other than their hired acoustical engineers) who were aware of their complaints about the recurring noise from Restaurant Daniel; however,

1. there are no affidavits from other unit owners in support of plaintiffs' claims;
2. there are no logs, memoranda, diary entries or other writings to support plaintiffs' claims; and
3. there is no further correspondence from plaintiffs to substantiate the complaints.

Plaintiffs point out that defendant fails to submit the writings that support plaintiffs' responses to this interrogatories; however, plaintiffs, too, fail to supply these alleged writings, other than the building manager's March 21, 2005 letter, which is not plaintiffs' complaint.

Plaintiffs argue that dispositive motions at this time are premature, as no depositions have been held, and as a deposition of the defendant is necessary to plaintiffs' case. However, the mere hope that evidence sufficient to establish defendant's liability may be obtained during discovery does not fulfill plaintiffs' obligation to demonstrate the likelihood of such disclosure (*see Steinberg v Abdul,* 230 AD2d 633 [1966]; *Jones v Gameray,* 153 AD2d 550 [1989]). Accordingly, that discovery has not been completed is insufficient reason to deny defendant's

motion for summary judgment (*see Chemical Bank v PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983]).

Although a motion for summary judgment may be denied if the facts essential to establish opposition "may exist but cannot then be stated" (CPLR 3212[f]), "'[m]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis . . . for postponing a decision on a summary judgment motion" (*Fulton v Allstate Ins. Co.*, NYLJ Jan. 18, 2005 p 26 col 3, citing *Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.,*, 133 AD2d 669 [1987]).

In opposing the instant motion, the Pildes make only bald, conclusory allegations and fail to specify any particulars as to any incident of allegedly excessive noise other than New Year's Eve 2005. However, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Conclusion

This court finds that the conduct of the defendant does not constitute a private nuisance in that it did not substantially and unreasonably interfere with the plaintiffs' use of their property. Further, the element of "recurring" nuisance is sufficiently discounted by the movant and

unsubstantiated by the plaintiffs.

What is established herein are isolated instances of objectionable conduct by defendant. What is not established herein are continuous invasions of plaintiffs' rights necessary to support a finding of nuisance.

The concrete evidence of unreasonable noise is the one occasion on New Year's Eve, December 31, 2005-January 1, 2006, when plaintiffs' acoustic engineer conducted a sound test inside the plaintiffs' unit 2B/2C at the Condominium. She determined that the decibel level of the music coming from the restaurant exceeded the level of noise permitted under the New York City Department of Environmental Protection 24-221.

One occasion - *on New Year's Eve* - does not a continuing, recurring nuisance make.

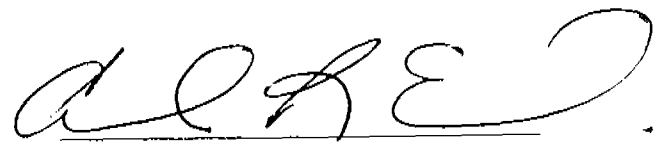
In sum, the Pildes fail to plead the requisite dates, times, noise levels or other factual information regarding the recurring nuisance with any specificity. As noted above, isolated incidents of objectionable conduct are insufficient as a matter of law to support a finding of nuisance. Since the Pildes cannot show a triable issue of fact as to the existence of a noise nuisance as a matter of law, there can be no valid claim for negligence or breach of the Condominium By-Laws, as alleged in the complaint. Based on the foregoing, it is hereby

ORDERED that the motion of defendant 65th Street Restaurant, LLC d/b/a Restaurant Daniel, for an Order granting summary judgment dismissing the complaint of plaintiffs Robert Pildes and Frances Pildes, is **granted** and the Complaint herein is dismissed in its entirety. It is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

Dated: October 5, 2007



Carol Robinson Edmead, J.S.C.