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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Kahona Beach LLC

-v-

Santa Ana Restaurant

INDEX NO. 105937/09

MOTION DATE

MOTION SEQ. NO. 009

The following papers, numbered 1 to 35, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1-20

Answering Affidavits — Exhibits + Memo of Law | No(s). 21-34

Replying Affidavits | No(s). 35

Upon the foregoing papers, it is ordered that this motion is

FILED

JAN 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION;

and it is further

ORDERED that the parties appear for mediation as scheduled.

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

Dated: January 25, 2012

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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KAHONA BEACH LLC and YAMILEE BONGO,

Plaintiffs,

-against-

Index No.: 105937/09

SANTA ANA RESTAURANT CORP., 344 BOWERY RETAIL LLC, and ROBERT LOMBARDI,

Defendants.

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KENNEY, J.:

Plaintiffs, Kahona Beach LLC and Yamilee Bongo, the owner and the resident of a condominium apartment in Manhattan, seek damages based on their allegations that defendants have created a private nuisance by playing music too loudly. Defendant 344 Bowery Retail LLC (Bowery), the landlord of defendant Santa Ana Restaurant Corp. (Sala), moves for an order granting summary judgment, dismissing the complaint and on its cross claims against Sala and defendant Robert Lombardi (CPLR 3212).

The facts of this case are explained in detail in this court's decision of August 26, 2010, familiarity with which is presumed. In brief, Bongo, who lives in a condominium unit owned by Kahona Beach LLC, complains that she was injured because her downstairs neighbor, Sala, created a noise nuisance by playing excessively loud music. Bowery owns and leased to Sala the condominium unit in which Sala operated its restaurant/bar business, and has interposed cross claims against Sala and Lombardi for contribution, contractual and common-law indemnification and for failure to procure insurance. Sala and Lombardi have also asserted a cross claim against Bowery. In it, they assert that Bowery controls the structural elements of the premises in which Sala operated

its business and caused work on the premises which caused the injury that plaintiffs assert.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*id.* at 544; *Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]).

In support of its motion, Bowery maintains that Sala ceased operations in January 2011 and, therefore, plaintiffs' claim for a permanent injunction is moot. Plaintiffs assert that they are withdrawing the claim. Thus, it is deemed withdrawn.

As to a damages claim for nuisance, a cause of action for nuisance requires the proponent to demonstrate "a substantial, intentional and unreasonable interference with plaintiff's use and enjoyment of" his or her property (*Handler v 1050 Tenants Corp.*, 295 AD2d 238, 239 [1st Dept 2002]). The elements of the claim are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*JP Morgan Chase Bank v Whitmore*, 41 AD3d 433, 434 [2d Dept 2007]), quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]). "[E]xcept for the issue of whether the plaintiff has the requisite property interest,

each of the other elements is a question for the jury, unless the evidence is undisputed" (*Weinberg v Lombardi*, 217 AD2d 579, 579 [2d Dept 1995]; *see McCarty v Natural Carbonic Gas Co.*, 189 NY 40, 47 [1907]) [what is reasonable can be a question of law or fact, but "[w]hen it depends upon an inference from peculiar, numerous or complicated circumstances it is usually a question of fact"]).

Bowery argues that the record is devoid of proof that defendants' acts were intentional, unreasonable or caused substantial interference with Bongo's use and enjoyment of her unit. Summed up, Bowery's argument is that there was no nuisance, which is based on its contention that plaintiffs can not demonstrate continuing violations of section 24–231 of the Administrative Code of the City of New York (the Noise Code) after August 2009, sufficient to establish a nuisance claim. Regardless of how many Noise Code violations plaintiffs' expert asserts occurred after August 2009, Bowery does not address the period before then, including April and May 2009, during which the expert opined that the sound level violated the Noise Code.[1] Plaintiffs' expert's assertions, with Bongo's testimony, demonstrate that there is a fact issue as to whether there was substantial and unreasonable interference with Bongo's use and enjoyment of her unit that an ordinary reasonable person would have found annoying or the cause of discomfort (*see e.g. 61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [1st Dept 2010] [on preliminary injunction motion residents demonstrated that interference was substantial as the noise exceeded allowable levels under ordinance, unreasonable because of the time of night and intentional as it was in furtherance of bar's

[1]Bowery asserts that it was not advised of purported *continued* noise complaints, but its witness testified that Lombardi contacted Bowery about plaintiff's noise complaint and plaintiff has submitted a letter, from February 2009, to support her contention that she notified Bowery of her complaint.

commercial purposes]).

"'An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct'" (*Copart Indus.*, 41 NY2d at 571, quoting Restatement of Torts § 825). If plaintiffs prove that Sala, a bar/restaurant, played music as loudly as they claim it did, in light of plaintiff's complaints to Sala, the conduct would be intentional (*id.*, *see also 61 W. 62 Owners Corp.*, 77 AD3d at 334).

Bowery cites to *Anderson v Elliott* (24 AD3d 400 [2d Dept 2005]) for support. *Anderson* deals with the occasional presence, during the filming of a show, of an excessive number of cars on a street, as well as a dumpster and mattresses. "[T]hings merely disagreeable . . . which simply displease the eye . . . no matter how irritating or unpleasant, are not nuisances" (*Dugway, Ltd. v Fizzinoglia*, 166 AD2d 836, 837 [3d Dept 1990], quoting 81 NY Jur 2d, Nuisances §17). This case is distinguishable from *Anderson*, as it is about music allegedly blaring into plaintiffs' apartment during all hours of the night (*see e.g. 61 W. 62 Owners Corp.*, 77 AD3d at 334).

Bongo avers that the music Sala played was unbearable, with vibrations substantial enough to make her furniture shake; music that her expert testified violated the Noise Code. A plaintiff is not required to seek medical care or move in order to demonstrate injury (*see State of New York v Fermenta ASC Corp.*, 166 Misc 2d 524, 533 [Sup Ct, Suffolk County 1995], *affd in part* 238 AD2d 400 [2d Dept 1997]), but must establish substantial annoyance or discomfort to the ordinary reasonable person, and more than mere discomfort or minor inconvenience (*see Dugway, Ltd.*, 166 AD2d at 837). Plaintiffs have raised an issue of fact concerning injury through their submissions. Bowery notes, repeatedly, that plaintiffs have withdrawn the claim for damages for Bongo's physical

or emotional distress, but this does bar a claim for any damages (*see JP Morgan Chase Bank*, 41 AD3d at 435 ["court did not err in limiting [condominium unit owner's] damages to the diminished rental value of her unit between 2000 and 2005, as she failed to offer evidence of the rental value of her unit prior to 2000"]).

While plaintiffs, in opposition, argue that defendants have raised no issue regarding the nuisance that existed during the period from November 2008 to August 2009, this will be plaintiffs' burden to prove at trial. Plaintiffs argue that, in the event that the trier of fact determines that there was a nuisance, Bowery's motion makes clear that Bowery is liable to plaintiffs for damages. Bowery, however, did not move on the ground that it is not a party that can be held liable for the nuisance, and as it did not raise the issue in moving, it is not a ground for summary judgment (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993] [impermissible, in reply papers, to introduce new grounds or arguments in support of movant's motion]), but may be raised at trial.[2] Therefore, at this juncture, the court has made no determination as to whether or not Bowery may be held liable.

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[2] The court notes that the cases to which plaintiffs cite do not address the issue of Bowery's potential liability. For example, *Cohen v Weiner* (85 Misc2d 341, 341 [App Term, 2d Dept 1975]), concerns a tenant's claim of constructive eviction against the tenant's own landlord, which had a duty to make the tenant's apartment habitable and to provide for its tenant's beneficial enjoyment of the premises (*see also Home Life Ins. Co. v Breslerman*, 168 Misc 117, 117-118 [App Term 1938] [constructive eviction of tenant]). Unlike the tenant in *Cohen*, Bowery is not plaintiffs' landlord, and Bowery leased the premises to another. In *First Ave. Owners, Inc. v Valentina Enters., LLC* (25 Misc 3d 1219[A] [Sup Ct, NY County [2009]), the defendants installed the machine that created the alleged nuisance. *Handler* (295 AD2d at 238), concerns a tenant whose air conditioning system flooded the apartment of the tenant below, but does not discuss the issue of the liability of the cooperative corporation. In *JP Morgan Chase Bank* (41 AD3d at 433-435), it appears that the offending exhaust fans were maintained or operated by the defendant condominium corporation, and those who create or maintain a nuisance are liable for injuries caused by it (Kreindler, Rodriguez, Beekman and Cook, New York Law of Torts § 4:11 [West's NY Prac Series, 2011]).

The parties dispute facts concerning the alleged offensive sound and the extent of the ameliorative efforts made by Sala.[3] These fact issues existed when plaintiffs moved for summary judgment, and they have not been resolved, as a matter of law, here.

In moving, Bowery has not addressed Sala's cross claim against it, that Bowery or its predecessor performed work, objected to at the time by Sala, which damaged the structure of the premises and caused the nuisance. To obtain summary judgment the moving party "must demonstrate . . . that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d at 306). A showing of entitlement to judgment as a matter of law is generally not demonstrated where the substance of the non-moving party's cause of action is not addressed, in moving, by the party seeking judgment.

Bowery seeks summary judgment on its cross claims against Sala and Lombardi. For its claim for contractual indemnification, Bowery relies on its lease with Sala (the Lease). The Lease contains a clause, the relevant portion of which states that:

> "Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance,[4] including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agents, contractors, employees, invitees, or licensees, of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees, or licensees. . . . In case any action or proceeding is brought against

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[3]For example, Bongo complains of a reverberating bass music line that traveled up the walls and through the floor of her apartment, but a Sala witness testified that, at a certain point, apparently during the time when Bongo complained, the bass was turned off entirely. There is also testimony that a Sala employee went into plaintiffs' apartment to investigate Bongo's complaint about loud music, but heard no music.

[4]The papers do not discuss whether or not Bowery has or will be reimbursed by insurance.

> Owner by reason of any such claim, Tenant, upon written notice from Owner, will, at Tenant's expense, resist or defend such action or proceeding by Counsel approved by Owner in writing, such approval not to be unreasonably withheld."

(Bowery Mov. Aff., Exh. C, ¶ 8). The indemnification provision is triggered by a breach of the lease, or the negligent, careless or improper conduct of the tenant. Bowery maintains that there was no nuisance, which is the improper conduct alleged by plaintiffs, and there has been no determination, as a matter of law, that a nuisance existed (*see Mohammed v Silverstein Props., Inc.*, 74 AD3d 453, 454 [1st Dept 2010] [contractual indemnification correctly denied where contract required indemnitor to indemnify indemnitee for its negligent performance under contract, and there was no finding that indemnitor was negligent]; *D'Angelo v Builders Group*, 45 AD3d 522, 525 [2d Dept 2007] [since it had not been determined that plaintiff's accident was caused by an act or omission by the subcontractor, contractual indemnification was premature]). In addition, Bowery does not make a showing that it provided Sala written notice to defend the action, or assert that Sala breached a covenant of the Lease.[5] Therefore, at this juncture, Bowery's motion for indemnification is premature.

In addition, as to Lombardi, the Lease, which contains the indemnification clause, is between Bowery and Sala, with Lombardi apparently signing in his corporate capacity. Bowery has not demonstrated, or discussed, how Lombardi is personally bound to the Lease's indemnification clause, and therefore has not met its burden on the motion. Despite Lombardi's failure to oppose, the instant motion, the court is obligated to construe the evidence liberally in a light most favorable to the non-movant (*Kesselman v Lever House Rest.*, 29 AD3d 302, 304 [1st Dept 2006]), and if the moving

[5]Bowery also does not point to anything to demonstrate that it provided Sala with a notice of default pursuant to paragraph 17 of the Lease.

party does not demonstrate the absence of any material issue of fact, the motion must be denied (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

While Bowery seeks common-law indemnification against Sala and Lombardi, in moving, it discusses the basis for its contractual indemnification claim only, and not common-law indemnification claim. Bowery also does not address Sala's alleged failure to procure insurance claim, and, therefore, has not met it burden of demonstrating entitlement to summary judgment on these claims (*see id.; see also Dallas-Stephenson*, 39 AD3d at 306).

Plaintiff's demand for punitive damages is dismissed against Bowery as such damages "are awarded in tort actions [w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime" (*Prozeralik v Capital Cities Communications,* 82 NY2d 466, 479 [1993], quoting Prosser and Keeton, Torts 2, at 9 [5th ed 1984]). Bowery included in the Lease provisions intended to help to ensure that the tenant did not allow sound to cause discomfort to others in the building, and plaintiff claims to have contacted Bowery only once about the noise. The record evidence does not demonstrate conduct by Bowery of the nature discussed by the Court of Appeals in *Prozeralik* (*id.*).

In light of the foregoing, it is

ORDERED that defendant 344 Bowery Retail LLC's motion for summary judgment is granted to the extent of dismissing the plaintiffs' demand for punitive damages and is otherwise denied.

Dated: January 24, 2012

ENTER:

J.S.C.
JOAN M. KENNEY
J.S.C.