[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART 10

Index Number : 110757/2010
CARROLL, WILLIAM
vs.
RADONIQI, MAHIR
SEQUENCE NUMBER : 006
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

Motion denied as moot, case dismissed. See order dated 9/7/12.

FILED

SEP 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/19/12

HON. JUDITH J. GISCHE, 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

[* 2]

SCANNED ON 9/12/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10
Justice

Index Number : 110757/2010
CARROLL, WILLIAM
vs.
RADONIQI, MAHIR
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

FILED
SEP 12 2012
NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 9/7/12

_____, J.S.C.
HON. JUDITH J. GISCHE 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: PART 10

---X

WILLIAM CARROLL, individually, and derivatively on behalf of THE CHARLES HOUSE CONDOMINIUM;

Plaintiff,

-against-

MAHIR RADONIQI and THE CHARLES HOUSE CONDOMINIUM,

Defendants.

---X

Decision/Order
Index #.: 110757/10
Seq. #: 004, 005

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Motion Seq. 004	
Pltf n/m [3124, 3126] w/BFS affirm, exhs	1, 2
Def opp w/ BCW affirm, MR affid, exhs	3, 4
Motion Seq. 005	
Def n/m [3212] w/GMC affirm, MR affid, exhs	1, 2
Pltf opp w/ TDB affirm, WC affid, exhs	3, 4
Def reply w/ GMC affid, exhs	5

Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, William Carroll ("Carroll" or "Plaintiff") has commenced this action, individually, and derivatively on behalf of The Charles House Condominium ("CHC"), sounding in breach of the duty of loyalty and nuisance, against defendants CHC and Mahir Radoniqi ("Radoniqi" sometimes "super"), CHC's superintendent. A prior motion for summary judgment by defendant CHC was granted, and the case was thereafter continued against Radoniqi only. Now, before the court, is Radoniqi's motion, pursuant to CPLR §3212, to dismiss plaintiff's second cause of action for private nuisance against him.

Plaintiff opposes the motion and in a separate sequence moves to compel discovery from Radoniqi. Issue has been joined and the note of issue has not yet been filed. Summary judgment relief is, therefore, available. CPLR § 3212; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept. 2001].

Facts and Arguments

Plaintiff is an owner and shareholder of CHC. The court now considers whether Radoniqi is entitled to summary judgment on the second cause of action against him.

The second cause of action consists of a nuisance claim that Plaintiff brought, in his individual capacity, against Radoniqi. Carroll alleges that Radoniqi caused excessive amounts of noise in carrying out the "unlawful" repair and renovation work within Unit 12C fo the Condominium, that the noise interfered with the quiet enjoyment of the unit owners on the 11th, 12th, and 13th floors, and that Carroll was particularly affected. Carroll alleges that the work was conducted during business hours, for about four months, beginning January of 2008. Carroll claims that the annoyance and inconvenience from the repairs to his neighbor's property amount to an actionable private nuisance and he seeks damages that include the diminished value of the use and occupancy of his unit during the relevant time period. Carroll sued Radoniqi for damages that include sums for the loss of use of Carroll's unit.

Radoniqi claims that there is no evidence that he created an actionable nuisance. Radoniqi claims that: [1] the use of the renovated property was reasonable, [2] the evidence does not support an objective finding of nuisance, [3] the tort may not be based solely on the Carroll's subjective perceptions, [4] single or non-recurring amounts of even excessive amounts of noise cannot comprise an actionable nuisance, [5] the lack of

permits or approvals for Radoniqi's work does not give rise to a nuisance cause of action, and [6] Radoniqi cannot be liable under nuisance law for the absence of a kitchen in Unit 12C. Finally, Radoniqi claims that Carroll has not established special damages because he was not constructively evicted from his property, that Carroll cannot otherwise prove any compensable damages, and that Carroll lacks standing to assert a nuisance cause of action on behalf of others.

Carroll reasserts his claims in the complaint and argues that Radoniqi engaged in "illegal" construction by utilizing a reciprocating saw and rotary sanders. Plaintiff claims that such use cause significant noise pollution, which amounts to a nuisance to Carroll. Furthermore, plaintiff claims that pursuant to 3212(f), there remain questions of fact as the to extent of Radoniqi's construction activity and his alleged non-compliance with statutorily required noise mitigation policies.

Discussion

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); Sun Yau Ko v. Lincoln Sav. Bank, 99 A.D.2d 943 (1st Dept., 1984), aff'd 62 N.Y.2d 938 (1984); Andre v. Pomeroy, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the

proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Preliminarily, the court addresses Radoniqi's argument that Carroll lacks standing to assert a nuisance cause of action on behalf of others. Although Radoniqi claims that Carroll has no standing to bring this claims on behalf of the other tenant shareholders, it is clear from the complaint the second cause of action is brought only by Carroll, as an individual, in his own capacity. Thus, there is no need to grant any relief on the basis of standing on behalf of any other shareholder tenants.

A private nuisance is a continuous or persistent condition that threatens the comfort and safety of neighboring tenants and which is likely to recur. Domen Holding Co. v. Aranovich, 1 N.Y.3d 117 (2003). A private nuisance requires a showing of an intentional and substantial interference with the right to use or enjoyment of land. Copart Inds. v. Consolidated Edison Co. of NY, 41 N.Y.2d 564, 570 (1977). The law of private nuisance involves a balancing of interests. Persons who live in organized communities have to tolerate some damage, annoyance or inconvenience from each other. Nussbaum v. Lacopo, 27 N.Y.2d 311 (1970).

The prevailing philosophy has been that noise and odors are an inescapable reality of urban life; indeed, mere annoyance in and of itself does not create a nuisance. Twin Elm Management Corp. v. Banks, 181 Misc. 96, 98 (NY Mun.Ct 1943). Stiglianese v Vallone, 168 Misc 2d 446, 452 [Civ Ct 1995] *rev'd*, 174 Misc 2d 312 [App Term 1997] *rev'd*, 255 AD2d 167 [1st Dept 1998]. "A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. No one is entitled

to absolute quiet in the enjoyment of his property; he may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells." People on Complaint of Gershberg v Arkow, 204 Misc 635, 639 [NY Magis Ct 1953] (internal citations and quotations omitted).

In determining whether a defendant's use of property is a nuisance, the court must weigh the gravity of the harm to plaintiff against the utility and necessity for defendant's conduct. Little Joseph Realty, Inc. v. Babylon, 41 N.Y.2d 738 (1977). The interference must be substantial, not trifling, material and actual not fanciful or sentimental. Copart Inds. v. Consolidated Edison Co. of NY, 41 N.Y.2d 564, 572 (1977). A plaintiff must, however, come forward with proof sufficient to demonstrate a triable issue of fact to avoid summary judgment. See Langan v. Bellinger, 203 A.D.2d 857, 858 (3d Dept 1994).

Radoniqi has established his *prima facie* case, the work done to apartment 12C was routine, not extraordinary and within business hours. Plaintiff, however, argues that Radoniqi's renovation work gave rise to an actionable nuisance since Radoniqi did not post a Construction Noise Mitigation Plan throughout the building. NYC Noise Codes 28-100, 30-102, *et seq*. Generally, ordinary repairs and minor alteration of the interior of buildings, which do not materially affect structural features, do not necessitate building permits. 19 NYCRR 1203.3. He does not dispute that the noise at issue was a short-term use of an electric saw and electric sander (which plaintiff did not dispute sounds like a vacuum cleaner). Agor v Bennett, 271 AD 1024 [2d Dept 1947]; University Towers Associates v. Gibson, 18 Misc. 3d 349, 352 (NY Sup King Co 2007); Metropolitan Life Insurance Co v. Moldoff, 187 Misc. 458 (App Term 1946) affd, 272 AD 1039, 74 NYS2d 910 (1st Dept 1947). There are no reported violations. Here, there is no indication that plaintiff was

prohibited from using or enjoying their property or that defendants exercised unreasonable control over the property. Plaintiff's failure to support his claim at this juncture with any expert testimony or empirical evidence is fatal. See Bd. of Managers of Waterford Ass'n, Inc. v Samii, 73 A.D.3d 617, 618 (1st Dept 2010); Holy Name of Jesus Roman Catholic Church v. New York City Transit Authority, 28 AD3d 520, 521 (2d Dept.2006); Lopez v. Insurance Co. of North America, 289 A.D.2d 205 (2d Dept.2001); Twin County Recycling Corp. v. Yevoli, 224 A.D.2d 628 (2d Dept.1996), *aff'd* 90 N.Y.2d 1000 (1997); Guzzardi v. Perry's Boats, 92 A.D.2d 250, 254 (2d Dept 1983).

Plaintiff alleges various violations of the Noise Code, and claims that further discovery is necessary to determine what tools defendant used in the remodeling. However, he already has that information, and in any event, he knows from his own personal knowledge what he heard. Yet he still is unable to demonstrate facts that show the noise was at unacceptable levels, rising to a private nuisance. His own affidavit is bare boned and conclusory. It does not describe the noise level, nor is there specificity about when it occurred. Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 (1st Dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93 (1st Dept 2006) (internal citations omitted). The court rejects the contentions that additional discovery from Radoniqi is needed. The mere hope that the parties can uncover useful evidence is an insufficient reason to postpone consideration of plaintiff's motion, and the defendants have failed to demonstrate how further discovery might yield material facts that

would warrant the denial of summary judgment at a later time. Seelig v. Burger King Corp., 66 A.D.3d 986 (2d Dept 2009). Therefore, this motion is not premature although brought before discovery is complete.

For the reasons stated above the defendants motion for summary (motion sequence 005) is granted and plaintiff's motion to compel disclosure (motion sequence 004) is denied as moot. In view of this courts prior order (dated October 20, 2011) this action is finally resolved by this motion.

Conclusion

In accordance herewith, it is hereby:

ORDERED that motion sequence 005, defendant Mahir Radoniqi's motion, is granted as to summary judgment dismissing the complaint against him, on the second Cause of Action; and it is further

ORDERED that motion sequence 004, Plaintiff, William Carroll's motion is denied as moot; and it is further

ORDERED that any requested relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED this shall constitute the decision and order of the court.

Dated: New York, New York
September 7, 2012

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.