NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

LI XI a/k/a LI LIANG XI,

Plaintiff,

- against-

YU PING AN a/k/a "YU P. AN" "YUPING AN" "YUPIN AN,"
QING XIN a/k/a "QIN XIN,"
TAI SHAN WANG, and
JOHN DOE OR JANE DOE RESIDING AT 74-64 220TH STREET, 1ST FLOOR, OAKLAND GARDENS, NY 11364,

Defendants.

Index Number 700309/11

Motion Date November 15, 2011[1]

Motion Cal. Number 23

Motion Seq. Number 1

The following papers numbered 1 to 7 read on this motion by plaintiff, Li Xi (Xi), for an order dismissing defendants' counterclaims; and defendants' cross motion for an order, *inter alia*, declaring Chunyu Jean Wang (Wang) a party plaintiff pursuant to CPLR 305 and 1003.

	Papers Numbered
Plaintiff's Notice of Motion - Affirmations - Exhibits.....	1
Defendants' Notice of Cross Motion - Affirmations - Exhibits...	2
Plaintiff's Reply Affirmation.....	3
Plaintiff's Affirmation in Opposition.....	4
Defendants' Reply Affirmation.....	5
W.O.T.C. Tenants' Corp. House Rules.....	6
Summons and Complaint.....	7

Based upon the foregoing papers and oral argument dated April 10, 2012, the decision of the court is as follows:

This cause of action and counterclaims is the result of a number of disputes between

[1]Although initially marked fully submitted on November 15, 2011, by order dated March 3, 2012, this matter was set down for a conference to clarify the issues in this motion and cross motion, as well as additional evidence. The summons and complaint were electronically filed and Xi did not attach a copy to his motion papers. Xi submitted a copy of the summons and complaint to this court on October 1, 2012.

neighbors who have come to this court seeking, *inter alia,* injunctive relief from excessive noise.

The admissible evidence reveals that Xi, is married to Wang, the attorney representing him with respect to this matter. Xi and Wang live at W.O.T.C. Tenants' Corp. in the second floor apartment located at 74-64 220th Street, Oakland Gardens, in the County of Queens, City and State of New York (the premises). Xi owns the cooperative shares associated with the second floor premises. Defendants, Yu Ping An (An), Qing Xin (Xin) and Tai Shan Wang (T.S. Wang), are father, mother and son, respectively. They live in the first floor cooperative apartment at the premises directly below Wang and Xi. An owns the cooperative shares associated with the first floor apartment at the premises.

On June 15, 2011, Xi commenced this action by filing a summons and complaint and served defendants on July 1, 2011. The complaint alleges four causes of action and seeks injunctive relief, as well as damages. Xi claims that defendants are banging on their ceiling, cursing and screaming at Xi and Wang in the middle of the night, harassing and assaulting Xi and his guests, and conducting an illegal babysitting service at their home. Xi also avers that defendants slashed the four tires on his car.

On July 15, 2011, defendants interposed an answer to the complaint, as well as counterclaims. Pursuant to CPLR 1003, they joined Wang as a party, alleging that Xi and Wang produce excessive noise by stomping, screaming, moving furniture, and slamming doors in the middle of the night. Defendants contend that Xi's bathroom leaked into defendants' apartment on June 11, 2011, and caused damage. Defendants aver that they made a complaint to the cooperative board concerning the leak, but Xi refused to cooperate. On June 17, 2011, An commenced a small claims action against Xi in Queens County, Civil Court, Index No. 2988 SCQ 2011 1, seeking damages caused by the water leak.

Xi moves this court for an order dismissing each of defendants' counterclaims for failure to state a cause of action pursuant to CPLR 3211 (a) (7) and directing defendants to pay costs pursuant to CPLR 3211 (a) (4).

Defendants' counterclaims are as follows: (1) Wang maliciously commenced a frivolous cause of action to punish defendants for filing a complaint with the co-op board about the noise and water leak; (2) Xi and Wang negligently and unlawfully caused the water to leak and damage defendants' property; (3) Xi and Wang create excessive noise caused by their defective flooring; (4) Xi and Wang slam their entrance door on a daily basis, decreasing the value of the property; (5) (mislabeled as 6) Xi and Wang intentionally stomp on their floor and scream, creating excessive noise; (6) they are entitled to a judgment enjoining and restraining Xi and Wang from making excessive noise; and (7) Wang uttered false words about defendants, T.S. Wang and Xin, in public.

That branch of Xi's motion seeking to dismiss the first and second counterclaims pursuant to CPLR 3211 (a) (4) is denied. Xi correctly claims that there is another cause of action pending for the same relief in small claims. However, defendants initiated the small claims action prior to being served with the summons and complaint in this case. In opposition, defendants move for this court to remove the action from the Civil Court to the Supreme Court

and to consolidated it with this action pursuant to CPLR 602 (a). In Xi's reply, he now asserts that the small claims cause of action should be dismissed pursuant to CPLR 3211 (a) (4). The small claims cause of action in Queens County, Civil Court, Index No. 2988 SCQ 2011 1, is hereby dismissed. That cause of action by defendants is based on the same series of transactions and relief as defendants' first and second counterclaims, and this complaint was filed first.

That branch of Xi's motion to dismiss the second, third and fourth counterclaim, is denied. Xi claims that these actions are based in negligence and that he owes no duty to defendants. In opposition, defendants aver that the causes of action sound in private nuisance. To recover damages based on the tort of private nuisance, a party must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the other party's conduct (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564 [1977]). Discomfort and inconvenience caused by the disturbance of property are valid grounds for recovery in an action for nuisance (*Dixon v New York Trap Rock Corp.*, 293 NY 509 [1944]). To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property or to render its enjoyment uncomfortable or inconvenient (*Copart Indus. v Consolidated Edison of N.Y. supra*; *Lawrence Wolf v Kissing Bridge Corp.*, 288 AD2d 935 [4th Dept 2001]). Defendants pleaded the necessary elements for causes of action in private nuisance.

That branch of Xi's motion to dismiss the fourth and fifth counterclaim is denied. Xi avers that there can be no cause of action in which to obtain a permanent injunction from a person creating intentional noise. Defendants assert that this counterclaim is an equity action for an injunction against Xi and Wang for making excessive noise. Defendants maintain they have no remedy at law and the continued acts of Wang and Xi creating excessive noise are causing irreparable injury to defendants (*Margolis v Encounter, Inc.* 42 NY2d 475 [1997]). An equity cause of action for an injunction lies where a party has no adequate remedy at law and such relief is necessary to avoid irreparable injury.

That branch of Xi's motion seeking to dismiss the sixth counterclaim is granted. Xi claims that defendants failed to state a cause of action for defamation as the particular statements attributed to Wang were not in writing and defendants have no special damages. Defendants maintain that this counterclaim makes out a *prima facie* case of slander per se.

As a rule, slander is not actionable unless a party suffers special damages (*Aronson v Wiersma*, 65 NY2d 592 [1985]). Defendants have not alleged special damages, and the slander claims are not sustainable unless they fall within one of the exceptions to the rule. The four established exceptions consist of a statement (1) charging plaintiff with a serious crime; (2) that tends to injure another in his or her trade, business or profession; (3) that person has a loathsome disease; or (4) imputing unchastity to a woman. When statements fall within one of these categories, the law presumes that damages will result and they need not be alleged or proven. (*Moore v Francis*, 121 NY 199 [1890].)

Defendants assert that the statements were slanderous per se inasmuch as they charged them with criminal conduct. However, the law distinguishes between serious and relatively minor offenses and only statements regarding serious crimes are actionable without proof of

damage. Wang did not accuse defendants of committing a serious crime. The alleged words spoken by Wang, "I just got hurt! I have an injury! I am going to call the police on you!" are insufficient to support a cause of action in slander. As a matter of law, the sixth counterclaim must be dismissed because the statements uttered are not slanderous per se (*Liberman v Gelstein*, 80 NY2d 429 [1992]).

Defendants cross-move for an order (1) declaring Wang a necessary party to this action; (2) disqualifying Wang from representing Xi; (3) consolidating Queens County, Civil Court, Small Claims Index No. 2988 SCQ 2011 1 with this action; (4) leave to replead their counterclaims; and (5) a preliminary injunction against Xi and Wang from engaging in stomping, door slamming, yelling and screaming.

That branch of defendants' cross motion which seeks to add Wang as a party to this action is granted. Pursuant to CPLR 305 and 1003, defendant filed a supplemental summons on July 26, 2011, with their verified answer and counterclaims that added Wang as a party. On August 6, 2011, this supplemental summons was served on Wang. Wang lives with Xi on the second floor and allegedly participated in the series of transactions relating to this litigation. Thus, Wang was properly joined as a party plaintiff. The caption has been amended as a matter of right by the filing of the supplemental summons attached hereto and previously filed with the Clerk of Queens County on July 26, 2011.

The amended caption is:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

LI XI a/k/a LI LIANG XI and CHUNYU JEAN WANG

Plaintiffs,

- against-

YU PING AN a/k/a "YU P. AN" "YUPING AN"
"YUPIN AN,"
QING XIN a/k/a "QIN XIN,"
TAI SHAN WANG, and
JOHN DOE OR JANE DOE RESIDING AT
74-64 220TH STREET, 1ST FLOOR,
OAKLAND GARDENS, NY 11364,

Defendants.

That branch of the defendants' cross motion which seeks to disqualify Wang from representing Xi pursuant to the New York Rules of Professional Conduct, the advocate witness rule, is denied. The disqualification of an attorney is a matter that rests within the sound

discretion of the court (*Calandriello v Calandriello*, 32 AD3d 450 [2d Dept 2006]). A party's right to be represented by counsel of his own choosing is a valued substantive interest which should not be interfered with absent a clear showing that disqualification is warranted (*In re Epstein*, 255 AD2d 582 [2d Dept 1998]).

Initially, defendants' cross motion sought to have this court add Wang as a necessary party and now defendants seek to disqualify Wang as the attorney for Xi. This court has examined the facts of this case, weighing Xi's right to the counsel of his choice against the need to maintain the highest standards of the legal profession. Wang and Xi are husband and wife, sharing the same interest in the outcome of this case, and defendants' motion to disqualify Wang as attorney for Xi is denied.

That branch of defendants' cross motion seeking to consolidate the small claims action with this action, is denied. The small claims action is dismissed pursuant to CPLR 3211 (a) (4) as defendants first and second counterclaims are based on the same series of transactions and seek the same relief.

That branch of defendants' cross motion seeking a preliminary injunction against Xi and Wang pursuant to CPLR 6301 is denied. The law is clear that a preliminary injunction may be granted where a party can demonstrate: (1) a likelihood of success; (2) irreparable injury; and (3) that the equities are in its favor (*Doe v Axelrod*, 73 NY2d 748 [1988]). This court finds that defendants have not satisfied the three-pronged test for the granting of a preliminary injunction.

"To prevail upon a cause of action for a preliminary injunction based on private nuisance, defendants must prove that Xi and Wang's interference with their right to use and enjoy their property was substantial in character, and that it was caused by Xi and Wang's conduct or failure to act" (*Stiglianese v Vallone*, 168 Misc. 2d 446 [1995]). Evidentiary proof of unusual noises or of a type or volume that a reasonable person under the circumstances would not tolerate is required (*Spinale v 10 West 66th Street Corporation*, 232 AD2d 317 [1st Dept 1996]).

On the facts, the parties' controverted affidavits seem to negate defendants' ability to demonstrate a likelihood of success on the merits which is necessary to invoke the drastic remedy of preliminary injunctive relief (*Aetna Insurance Co. v Capasso*, 75 NY2d 860 [1990]).

While preliminary injunctive relief is unwarranted, the court may appropriately balance the equities in order to maintain the status quo pending a final resolution (*Besser v Beckett*, 253 AD2d 648 [1st Dept 1998]). Xi and Wang, as well as defendants, are directed to strictly comply with the relevant portion(s) of the cooperative by-laws concerning noise and the quiet enjoyment of their respective units. The request by each party for attorney fees and costs is denied.

Accordingly, Xi's motion and defendants' cross motion are granted in part and denied in part.

Dated: December 7, 2012

DARRELL L. GAVRIN, J.S.C.