CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART H

---------- X

MAUTNER-GLICK CORPORATION and
L. WAY CHARLTON, LLC,
Petitioner/Landlord,

Index No. 66180/2015

- against -

DECISION/ORDER AFTER HEARING

DIEGO RODRIGUEZ,
"JOHN DOE" and "JANE DOE,"
Respondents/Tenants.

---------- X

Present:
Hon. Heela D. Capell
Judge, Housing Court

After hearing, the court makes the following findings and determination:

Mautner-Glick Corporation and L. Way Charlton, LLC ("Petitioner") commenced the instant nuisance holdover proceeding against Diego Rodriguez ("Respondent"). Prior to the commencement of the proceeding Petitioner served Respondent with a Seven Day Notice of Termination dated April 5, 2015 (the "Notice"). The Notice provided that Respondent's tenancy was being terminated because he engaged in behavior in contravention of §2524.3 of the Rent Stabilization Code ("RSC"). The Notice alleged specifically:

> Multiple tenants of the subject building have complained that you have confronted them with loud, vile and vulgar language threatening them with bodily harm for doing no more than living in their apartments.
>
> A tenant in the subject building complained that you have repeatedly pounded on the wall to her apartment to intentionally vex, harass and disturb her.

> A tenant in the subject building felt so threatened by your conduct that a police report was filed (Complaint Report No. 6936) because the tenant believed that you were going to cause bodily harm.

The proceeding first appeared on the court's calendar on June 12, 2015. The court made a referral to Adult Protective Services ("APS) on Respondent's behalf and appointed Joan Hogarth as Respondent's Guardian Ad Litem ("GAL") on January 14, 2016. Respondent is also represented in this proceeding by Mobilization for Justice and Petitioner is represented by the Price Law Firm, LLC.

The matter was settled by a stipulation entered into by attorneys for both parties, as well as Respondent's GAL, dated May 6, 2016 (the "Stipulation"). In the Stipulation, Respondent agreed to "refrain from engaging in any course of conduct similar to that described in the Notice of Termination and/or Petition which constitutes a nuisance and/or breach of lease, as set forth in the rent stabilization code and applicable law" from May 6, 2016 through May 5, 2018 ("Probationary Period"). If Petitioner alleged in good faith that the agreement had been breached, Petitioner could file a motion "for a hearing on the issue of whether Respondent has engaged in such conduct." The Stipulation further required that "[t]he allegations forming the good faith basis for Petitioner's motion shall be set forth in an affidavit attached to such motion." If the court found that Respondent breached the terms of the Stipulation, the court could award Petitioner a judgment of possession against the Respondent, along with the forthwith issuance of the warrant of eviction, with a stay on the execution for at least thirty days.

On December 26, 2016, Petitioner moved to restore the proceeding to the calendar for a hearing to determine whether Respondent breached the Stipulation (the "Motion"). The Motion was predicated upon an affidavit sworn to by Alexa Bonaros dated November 15, 2016. In the

affidavit, Ms. Bonaros explained that she is a tenant in the subject building and that on the morning of October 7, 2016 Respondent came to her apartment and pounded loudly on the door until she opened it. Ms. Bonaros represented that when she opened the door, Respondent yelled at her, "stomp[ed] in anger" and complained that she had been making noise in the apartment on various occasions. The affiant stated that she was at work on the dates and times that Respondent complained she was making noise, and that "Mr. Rodriguez's verbal assault has left me frightened in my own home. I am constantly worried of another unjustified and unacceptable confrontation."

In an order dated January 11, 2017, the Honorable Michelle Schreiber denied the Motion. Judge Schreiber rendered a decision on the record finding that "the affidavit in support of this motion to restore is woefully lacking in anything that would warrant restoration." The decision continued, "[a]nd to the extent that [the affiant] asserts a single incident, I don't see how that single incident is sufficient for purposes of bringing the case back to court that alleges a pattern. A single incident would not a pattern make by definition."

Petitioner filed a Notice of Appeal of the January 11, 2017 order on January 12, 2017. In a decision dated December 6, 2017, the Appellate Term reversed the order and remanded the case back to this court for a hearing consistent with its decision. *Mautner-Glick Corp. v. Rodriguez,* 2017 NY Slip Op 51650(U)(App. Term 1st Dept.). The Appellate Term held, "[u]pon landlord's timely motion to restore the matter, based on an affidavit of tenant's upstairs neighbor alleging multiple recent incidents of harassing behavior by tenant, Civil Court should have set the matter down for a hearing pursuant to the terms of the stipulation" which terms should be strictly enforced. *Id.*

Petitioner moved again to restore the proceeding to the calendar for a hearing on December 26, 2017. Respondent filed a cross-motion for a stay pending a merit determination by the Appellate Term of Respondent's leave to appeal to the Appellate Division. The motion and cross-motion were granted by the Honorable Evon Asforis who adjourned the proceeding to March 16, 2018. Respondent was denied leave to appeal by the Appellate Term and the proceeding was adjourned to April 20, 2018 at 2:15pm for hearing. Respondent's counsel filed a motion returnable April 20, 2018 for a stay pending a merit determination by the Appellate Division of Respondent's leave to appeal and for discovery. In the discovery motion Respondent sought a list of witnesses that Petitioner intended to call at the hearing, and copies of exhibits, including logs, communications and photo or video evidence, Petitioner sought to offer at the hearing. In a decision and order dated April 20, 2018 this court granted the branch of Respondent's motion staying the proceeding pending a determination by the Appellate Division of Respondent's leave to appeal the Appellate Term's decision and denied the branch of the motion seeking discovery. Specifically the court found that discovery, "could pose a risk to Petitioner's witnesses, Respondent's neighbors" as Petitioner represented in opposition that its witnesses were afraid Respondent would retaliate against them if he knew they planned to testify at the hearing. On April 24, 2018, the Appellate Division denied leave to appeal. This court conducted a hearing on June 1, 2018 and the parties submitted post-hearing briefs on June 27, 2018.

At hearing, Petitioner called Alexa Bonaros as a witness. Ms. Bonaros testified that she is an attorney licensed to practice law in New York State, who had resided in apartment 6J at the subject building for nearly 3 years prior to moving to Jersey City, New Jersey on February 20,

2018. The witness explained that she had " a number of interactions" with the Respondent during the Probationary Period and that he was "negative, aggressive and frightening."

Specifically, she recalled that on October 7, 2016 Respondent banged on her door, and after she opened the door, proceeded to shout at her. Respondent admonished Ms. Bonaros that she and the other "girl" who lived in the apartment needed to stop "yelling and making so much noise." The witness maintained that she was confused, because she had never met Respondent before, and apologized. During that same interaction, Respondent accused her of having many people in her apartment and making a lot of noise during the day. Ms. Bonaros explained that Respondent's accusations were not plausible. She had resided in a small studio apartment at the building with her boyfriend, worked outside of the home during the day, and never had more than three people in her apartment at a time. Further, the area between her bed and futon had been carpeted. She stated that she had experienced these "aggressive interactions" with Respondent on more than occasion during the Probationary Period, and that in one instance the Respondent accused her of following him when he saw her in the building. These interactions with the Respondent made her hesitant to move around in her apartment and eventually precipitated her decision to vacate the building.

Ms. Bonaros also stated that during the Probationary Period she heard Respondent screaming during the hours of 11pm through 2am or 3am, via a pipe in her apartment, which regularly kept her awake. The witness recalled that Respondent yelled such things as "leave me alone," "get out of here white spirit," or "devil" and "I'm going to kill you" once or twice a week. She attested that the night episodes eventually became more violent in nature so that in January 2018 she called the police and filed a police report against the Respondent. The witness

explained that she had grown frightened that Respondent may cause physical harm to her or the children residing in the building.

Petitioner called two additional witnesses to testify at the hearing, Paul Nicosia, a tenant at the subject building, and Dominick Rutigliano, a member of Petitioner. Respondent moved to strike the testimony of these witnesses on two grounds: because he was not aware they would testify at hearing as their affidavits were not included in the Motion and because the court denied the motion for discovery. This court reserved decision on the motion to strike the testimony and permitted the witnesses to testify.

Disclosure in a summary proceeding is obtained through leave of court only. *See CPLR 408*. Furthermore, courts have broad discretion in determining whether to permit such leave. *See 148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co.,* 62 A.D.3d 486 (1st Dept. 2009). This court, in its discretion, denied Respondent's motion seeking a list of witnesses who would testify at hearing because the risk to Respondent's neighbors outweighed Respondent's need for pre-hearing discovery. Additionally, the testimony offered by Paul Nicosia, Respondent's neighbor, merely corroborated Alexa Bonaros' testimony and therefore did not pose an unfair surprise to the Respondent at hearing. Lastly, Respondent could readily anticipate that Petitioner would call as a witness one of its members. Accordingly, Respondent's motion to strike the testimony of Paul Nicosia and Dominick Rutigliano is denied as he was not hindered in the preparation of his defense at the hearing. *People v. Carroll,* 95 N.Y.2d 375, 385 (2000).

However, after review of the testimony and the parties' post trial briefs, the court finds it would reach the same decision based upon the testimony of Alexa Bonaros and the Respondent alone. Mr. Nicosia testimony echoed the statements made by Ms. Bonaros and Respondent. He

testified that he has resided at Apartment 6M at the subject building for the past ten years with his wife and two children and that the Respondent lives in the apartment down the hall and up one flight of stairs from them. He maintained that during the Probationary Period, and specifically on January 7, 2018, he heard Respondent screaming in the apartment and stating things such as, "leave me alone, what kind of spirit are you?" The witness stated that it sounded like Respondent was screaming at someone in his apartment, however, he never heard anyone respond to the Respondent. The screaming continued to occur every two weeks between January 7, 2018 and May 5, 2018 and typically took place between 10:30pm and 1am, woke him up at night and disturbed his sleep.

Dominick Rutigliano, who owns the building with his brother but does not reside at the building, explained that he received complaints from other tenants in the building about Respondent's behavior during the Probationary Period. Mr. Rutigliano did not testify about the nature of the complaints and did not produce any evidence of the complaints in writing.[1] At the conclusion of Petitioner's witnesses' testimony, Respondent moved to dismiss the case because Petitioner failed to establish that Respondent breached the terms of the Stipulation and the Probationary Period had expired. The court reserved decision. For the reasons more fully stated below, Respondent's motion is denied.

Respondent's counsel called as its only witness Respondent, Diego Rodriguez. Respondent testified that he resides at 30 Charlton Street, 5J, New York, New York and has been

---

[1] The court does not afford any probative value to Mr. Rutigliano's testimony that he witnessed Respondent in the building wearing only his boxer shorts. The court finds Respondent's testimony credible that he only wears a certain style of shorts around the building, and was indeed wearing that style of short in court on the date of hearing. The court took notice that such shorts were of the athletic variety, rather than boxer shorts.

a tenant there for 29 years. He has always lived by himself and his rent is $742.47 per month. Although he has a mental health diagnosis, he does not know what it is. He is 72 years old, retired, and maintained that he was not involved in any prior litigation in the apartment. When questioned about Ms. Bonaro's testimony he stated that Ms. Bonaros "was making a lot of noise with her roommate," he told her to "stop making noise with her furniture," he tried to take her to court but he never did and "she took me to court." Respondent also testified that went to Ms. Bonaros' prior apartment a few weeks ago, but that she did not open the door.

On cross-examination, Respondent asserted that he speaks and yells to himself in the apartment and that he yells "crazy things." He does not know why but he yells at different times during the day and at night. He also stated that he was not very angry with Ms. Bonaros but threatened to take her to court.

After hearing, the court finds that Respondent breached the terms of the Stipulation by engaging in acts expressly prohibited by the Stipulation during the Probationary Period. The Stipulation provided that Respondent agreed to "refrain from engaging in any course of conduct similar to that described in the Notice of Termination . . . " The Notice of Termination alleged *inter alia*, "[M]ultiple tenants of the subject building have complained that you have confronted them with loud, vile and vulgar language threatening them with bodily harm for doing no more than living in their apartments . . . A tenant in the subject building felt so threatened by your conduct that a police report was filed (Complaint Report No. 6936) because the tenant believed that you were going to cause bodily harm." Alexa Bonaros' testimony at hearing is consistent with the allegations asserted in the Notice of Termination.

Alexa Bonaros testified credibly that Respondent came to her door in October 2016 and shouted at her for making noise on dates and times that she was not at home. Ms. Bonaros maintained that Respondent's behavior intimidated her to the point where she purposefully refrained from moving around in her apartment in order to avoid additional confrontations from the Respondent. Ms. Bonaros also explained that Respondent's yelling frightened her and disturbed her sleep once or twice a week during the Probationary Period, and that she eventually called the police and filed a police report against Respondent because she feared for her own safety as well as the safety of other tenants in the building. Respondent's testimony at hearing supported Ms. Bonaros' credible testimony. Respondent acknowledged that he screams in his apartment at night, that he visited Ms. Bonaros' apartment on multiple occasions and yelled at her, and that he threatened Ms. Bonaros. Finally, Ms. Bonaros testified that Respondent played a "fair part" in her decision to move out of the building.

As the Appellate Term noted in *Mautner-Glick Corp. v. Rodriguez,* 2017 NY Slip Op 51650(U) (App. Term 1st Dept.), "[s]tict enforcement of the parties' stipulation . . . is warranted based upon the principle that the parties to a civil dispute are free to chart their own litigation course." *citations omitted.* In the *Mautner-Glick* decision, the Appellate Term found that the allegations asserted in Ms. Bonaros' affidavit were sufficient to establish that Respondent breached the terms of the Stipulation and therefore warranted a hearing. At hearing, Ms. Bonaros testified credibly that Respondent engaged in a "course of conduct similar to that described in the Notice of Termination" during the Probationary Period.

This court also finds that the acts committed by the Respondent constitute nuisance behavior. The Rent Stabilization Code ("RSC") defines nuisance behavior where a tenant

"engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same …building…by interfering substantially with their comfort or safety." RSC § 2524.3(b). The Appellate Division, First Department, has described nuisance as "a continuing or recurrent pattern of objectionable conduct or a condition that threatens the comfort and safety of others in the building." *Domen Holding Co. v. Aronovich*, 302 A.D.2d 132, 134 (A.D. 1st Dept. 2003), *affd.* 1 N.Y.3d 117 (2003) (citing *Frank v. Park Summit Realty Corp.*, 175 A.D.2d 33, 36 (1st Dept. 1991)). This inquiry involves consideration of the totality of evidence. *17th Holding, LLC v. Rivera,* 21 Misc.3d 55, 57 (App. Term 2nd Dept. 2008).

Petitioner established at hearing Respondent engaged in a pattern of behavior that substantially interfered with the comfort and safety of other tenants in the building. Respondent's own testimony, that he visited Ms. Bonaros' apartment on multiple occasions, threatened her, and screams at all hours of the night, supports this finding. Respondent's behavior in the building is a recurrent pattern of conduct and is not comprised of one single, isolated incident, as Respondent argues. The statements made at hearing by Ms. Bonaros, Respondent and Mr. Nicosia portray an ongoing situation where Respondent disturbs the sleep of other residents in the building, as well as verbally threatens and frightens his neighbors. As the Appellate Term found, Ms. Bonaros credibly asstered "multiple recent incidents of harassing behavior by tenant." *Mautner-Glick Corp. v. Rodriguez, Supra.* Such incidents were alleged in the Notice dated April 8, 2015 and continue unabated. Where an "intolerable burden" is placed on "neighboring tenants and the building staff" their interests should be balanced against that of the

individual accused of nuisance. *405 East 56th Street, LCC v. Morano*, 9 Misc.3d 62, 63 (App. Term 1st Dept. 2008). While this court is empathetic towards Respondent, who acknowledged at hearing that he suffers from a mental illness, and who required the appointment of a GAL in order to adequately defend his rights in this proceeding, the court must consider the undue burden that Respondent's behavior places on his neighbors' security. Upon doing so, the court finds that Petitioner is entitled to a judgment against Respondent, along with the issuance of a warrant forthwith as Respondent has breached the Stipulation, and by his own admission at hearing, continues to engage in conduct specifically barred by the terms of the Stipulation.

Respondent argues that he should be afforded an opportunity to cure his breach of the Stipulation, if any, pursuant to RPAPL § 753(4) and CPLR 2201. Generally, nuisance behavior is not curable and therefore a cure notice is not required. *See* RSC § 2524.3(b). Furthermore, Respondent was already afforded a cure when the parties entered into the Stipulation. *See Matter of 222 E. 12 Realty v. Yuk Kwan So*, 158 A.D.3d 414, 414 (1st Dept. 2018) (In a nuisance proceeding settled by stipulation, no additional cure was required as "[i]n effect, the stipulation was the cure."). If this court awarded Respondent a further cure period, it would in essence nullify the Stipulation and render it unenforceable as it would deprive Petitioner of the bargained for recourse upon Respondent's breach. *See Walber 72nd St. Assocs v. Sutcliffe,* 2018 N.Y. Slip Op 50860(U) (App. Term 1st Dept.); *Hotel Cameron, Inc. v. Purcell,* 35 A.D.3d 153 (1st Dept. 2006); and *1029 Sixth v. Riniv Corp.,*9 A.D.3d 142 (1st Dept. 2004) *appeals dismissed* 4 N.Y.3d 795 (2005).

The facts in this case are similar to those in *Hotel Cameron*, a nuisance holdover proceeding that was settled by a probationary stipulation entered into by the attorneys for both

parties, as well as the GAL for the respondent. The respondent in *Hotel Cameron,* as here, suffered from a mental illness. The Appellate Division held that strict enforcement of the stipulation was required and that upon a breach of the stipulation, whether the breach was deemed "substantial" or not, the landlord was entitled to execute upon the warrant of eviction. While sensitive to the respondent's mental condition, the court found that if it failed to enforce the stipulation, landlords would be discouraged from resolving Housing Court matters through stipulations of settlement. *Hotel Cameron, Inc. v. Purcell,* 35 A.D.3d 153. *See also Pinehurst Constr. Corp. v. Schlesinger,* 12 Misc.3d 26 (1st Dept. 2004) (recurrent banging on the apartment ceiling and yelling epithets at night placed an intolerable burden on other tenants, resulting in the respondent's eviction.).

Respondent argues that this court should grant a stay so that APS, his counsel, and GAL can help him "start receiving the mental health treatment he needs and cure any offensive conduct he may have engaged in." Notably, in *Pinehurst Constr. Corp.,* the court found that there was no basis by which to conclude that effectuating a course of treatment for the respondent prior to eviction "would remedy the long-standing, acute problems posed by tenant's aggressive, antisocial behavior" *Id. at 27.* Here too, this court does not find a stay is warranted for such purpose, particularly where Respondent has been an APS client, and was appointed his GAL, nearly two and a half years ago. Had APS or the GAL wanted to effectuate an alternate treatment plan for Respondent so that he could curb his behavior, they had ample time to explore this option.

Respondent relies on *I4G Realty LLC v. Vitulli*, 773 N.Y.S.2d 776 (App. Term 2nd Dept. 2003), in support of his argument that this court should fashion a post-judgment cure. However,

in *I4G Realty LLC v. Vitulli,* the court found that a ten day cure period had elapsed for the respondent to abate the clutter in his apartment, and affirmed the judgment. Respondent argues that city dwellers should not expect complete silence from their neighbors at night and cites *Prince George Assoc. L.P. v Cyslyn Mais,* 44 Misc.3d 1202(A) (Civ. Ct. N.Y. Co. 2014) and *Matter v. Twin Elm Mgmt. Corp. v. Banks,* 181 Misc. 96 (Mun. Ct. Qns. Co. 1943) (reasonable for neighbors to hear a minimal level of noise emanating from each other's apartments). However, unlike the foregoing cases, it is not reasonable to hear a neighbor screaming throughout the night, especially where the content is frightening and threatening. Further, New York City dwellers have certainly not become so callous that they reasonably expect their neighbors to confront and threaten them in their own apartments and buildings, as Respondent has done here.

The facts in the other cases cited by the Respondent in support of a post-judgment cure are also distinguishable from the facts in this case. Respondent's behavior caused a greater disturbance to tenants in the building than mere eyesores consisting of graffiti as in *Sumer I Assocs. v. Irizarry,* 103 A.D.3d 653 (2nd Dept. 2013) or unsightly dumpsters in *Rustico v. Swaine,* 17 A.D.3d 560 (2nd Dept. 2005). Rather, Respondent's behavior was so severe that it caused his neighbor, Alexa Bonaros, to fear for her safety, file a police report, and eventually vacate the building completely. Accordingly, a cure, which is generally not afforded in nuisance proceedings, is not warranted here.

The court also notes that behavior does not need to be intentional to rise to the level of statutory nuisance. *See 301 East 69th St. Assoc. v. Eskin,* 156 Misc.2d 122, 123 (App. Term 1st Dept. 1993) ("the dispositive issue in this [nuisance holdover] proceeding is not tenant's state of

mind, but the nature of tenant's conduct and its effect upon the comfort and safety of other tenants and building staff."); *but see JP Morgan Chase Bank v. Whitmore*, 41 A.D.3d 433, 434 (2nd Dept. 2007) cited by the Respondent, which involves an issue of private nuisance rather than a nuisance holdover proceeding pursuant to the RSC.

Accordingly, Petitioner is awarded a final judgment of possession against the Respondent, Diego Rodriguez. The warrant of eviction may issue forthwith. Execution of the warrant is stayed for sixty (60) days after service of a copy of this decision on Respondent's GAL and attorneys, along with Notice of Entry, so that the Respondent may vacate the premises with dignity. Execution of the warrant is also stayed upon the continued payment of use and occupancy as well as Respondent's compliance with the terms of the Stipulation. Upon default, the warrant shall execute upon service of a marshal's Notice on Respondent, his GAL and his attorneys. As it is undisputed that Respondent resides at the subject apartment alone, the proceeding is dismissed without prejudice against "John Doe" and "Jane Doe."

This constitutes the decision and order of this Court.

Dated: New York, New York
July 3, 2018

HON. HEELA D. CAPELL
J.H.C.