

400 W. 59th St. Partners LLC v Oyolesi

2021 NY Slip Op 32618(U)

December 8, 2021

Supreme Court, New York County

Docket Number: Index No. 157420/2020

Judge: Paul A. Goetz

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

<p>PRESENT: <u>HON. PAUL A. GOETZ</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>400 WEST 59TH STREET PARTNERS LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>TOBI OYOLESI, TRAVIS LILLEY</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p>	<p>PART 47</p> <p>INDEX NO. <u>157420/2020</u></p> <p>MOTION DATE <u>10/18/2021,</u> <u>N/A</u></p> <p>MOTION SEQ. NO. <u>002 003</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

This is a residential landlord/tenant action. Plaintiff is the owner and landlord of premises located 1 Columbus Place, New York, New York (the building). Defendant Tobi Oyolesi is a tenant in apartment S30C of the building and defendant Travis Lilley is Oyolesi's frequent guest.

On November 29, 2021 and December 3, 2021, the court held a virtual hearing (on consent of the parties) on Plaintiff's order to show cause to hold defendants in contempt of the court's December 31, 2020 order¹ (MS # 2) and plaintiff's order to show cause seeking: 1) a preliminary injunction enjoining defendants from creating a nuisance situation at 1 Columbus

¹ The December 30, 2020 order granted plaintiff's motion for a preliminary injunction (MS # 1) to the extent that defendant Oyolesi was to grant access to his apartment to plaintiff and its workers to inspect and repair a water leak and until such time as the repairs were completed; and to the extent that defendant Lilley was enjoined from assaulting, harassing, menacing, recklessly endangering, intimidating, threatening building staff, tenants and occupants of the building and directing Lilley to comply with the building's rules requiring wearing a mask (NYSCEF Doc No 26).

Place Apartment S30C; 2) to enjoin defendants from harassing, threatening, or menacing other tenants or occupants of 1 Columbus Place or retaliating against any tenants or occupants; 3) leave to amend the complaint pursuant to CPLR 3025(b); and related relief (MS # 3).

Plaintiff appeared by counsel and defendants appeared pro se, however, after the lunch break on November 29, 2021 defendant Lilley did not continue to participate and did not appear on December 3, 2021.

HEARING TESTIMONY & EXHIBITS

At the hearing plaintiff called five tenants and former tenants of the building and five building employees.

The credible evidence at the hearing established the following occurrences since the issuance of the December 31, 2020 order:

The tenant in apartment S31D testified that his apartment is one floor above S30C but not directly above it. The S31D tenant testified that during the period February through April 2021 he heard loud chanting, drumming and moaning coming from apartment S30C.

The tenant in apartment S30B testified that she heard loud banging on the walls that her apartment shares with apartment S30C and screaming and yelling coming from S30C.

The tenant who lived in apartment S29C until May 2021, testified that S29C is directly below S30C and that they heard music, chanting, banging and screaming during the day and night. The tenant testified that the banging was akin to someone dropping large rocks on the floor. Because of the noise coming from S30C she had to be relocated to another apartment in the building.

The tenant in apartment N45B testified that in March 2021 he was in front of the building when Lilley almost hit him and another elderly woman while on his bike. When the N45B

tenant protested to Lilley, Lilley threw his bike nearly hitting the tenant's dog. When the tenant attempted to walk into the building, Lilley followed him shouting obscenities and slurs.

A former tenant in the apartment directly below S30C testified that she moved from the building because of the noise coming from apartment S30C. The former tenant described hearing "scream singing", drumming, hammering, furniture being moved and sounds like demolition work being done in the bathroom during the day and night. She testified that on November 9, 2021 a hole opened up in her bathroom ceiling, leaking brown water into her bathroom and onto her dining table. The former tenant further testified that the front door to apartment S30C is covered in dents and the walls around the door are badly stained. She stated that she had to move from the building because she was getting sick from not sleeping.

A handyman employed by the building testified that on or about October 1, 2021, he told Lilley to bring his bike into the building through the service entrance (not the main lobby). Lilley aggressively approached the handyman who attempted to block him. Lilley then threw his bike to the floor and hit the handyman "very hard" with a toy light saber and threatened to kill him and cursed at him. Building staff called the police and Lilley was arrested. The handyman also testified that there was a similar incident between him and Lilley when Lilley threw his bike at the handyman and cursed at him. Several days after the October 1, 2021 incident, the handyman saw Lilley ride his bike through the lobby "very fast".²

The same handyman testified that he checked for leaks coming from apartment S30C five times in 2021. On one occasion a bathroom sink drain line pipe had been disconnected. During the summer of 2021 he discovered a portable a/c unit draining onto the living room floor in

² Building rules require residents to use the service entrance when bringing their bicycles into and out of the building (Plaintiff's Ex 11 [NYSCEF Doc No 58] § 2,8) and prohibit residents from riding their bikes in the building (*id.* § 3.3).

apartment S30C causing a leak into the apartment below and the parquet floor tiles in apartment S30C to buckle (*see* Plaintiff's Ex 8 photographs of S30C's living room [NYSCEF Doc No 76]).

A doorman/concierge employed by the building testified that he has witnessed Lilly yelling profanities at building residents and riding his bike down a lobby ramp, sometimes at speeds of approximately 20 MPH, and nearly hitting people coming from the north tower of the building. The doorman/concierge further testified that Lilley has threatened him and that neither Lilley nor Oyolesi wear masks when and where required to do so pursuant to building policy (*see* Plaintiff's Ex 12 [NYSCEF Doc Nos 60 – 69] emails to residents regarding face mask requirements).

Another doorman with the building testified that he witnessed the October 1, 2021 incident between Lilley and the handyman and that Lilley rides his bike through the lobby at high speeds at least two times a day.

Another handyman with the building testified about visiting apartment S30C on or about June 22, 2021 and observing the portable a/c unit in the living room draining onto the floor. The same witness visited apartment S30C on or about November 10, 2021 and described the apartment as being "60% demo'd". Photographs he took were entered into evidence. A photograph of one bathroom (the apartment has two bathrooms and two bedrooms) depicts the bathtub clogged with dark water, the walls covered with dark marks, the toilet tank top missing, and a cabinet above the toilet with the door and shelves ripped off (Plaintiff's Ex 4 [NYSCEF Doc No 71]). Photographs of the other bathroom show the toilet seat missing, the cabinet doors and shelves ripped off, and the sink disconnected from the wall with a large chunk of it broken off (Plaintiff's Ex 3 [NYSCEF Doc No 71]). Photographs of the guest bedroom depict most of the parquet floor tiles missing, the bedroom door missing and the steel door frame pulled from

the wall, holes in the walls and the walls covered with dark stains, the closet door missing and the metal track for the door bent, and a missing smoke detector (Plaintiff's Ex 5 [NYSCEF Doc Nos 72 – 73]). A photograph of a hall closet shows the pull for the sliding door missing and the tracks broken (Plaintiff's Ex 6 [NYSCEF Doc 74]). Photographs of the kitchen depict cabinets with missing doors and shelves, grease on other cabinets, the wall and the stove and a broken stove knob, and the walls missing plaster and stained (Plaintiff's Ex 7 NYSCEF Doc 75). Photographs of the living room depict piles of filthy clothing, garbage and missing and buckled parquet floor tiles (Plaintiff's Ex 8 [NYSCEF Doc No 76]).

Building staff also testified that neither Lilley nor Oyolesi wears a face mask in the common areas of the building.

Plaintiff's property manager testified that building policy requires tenants to notify the management company of any occupants in tenants' apartments and fill out and to submit an "occupant rider" form and that Oyolesi has not submitted one for Lilley. The property manager testified that Oyolesi was provided with a renewal lease but he has not returned a signed copy to the management company. Oyolesi's prior renewal lease expired on January 31, 2021 (Plaintiff's Ex 10 [NYSCEF Doc No 86]). The property manager also testified as to the building's face mask requirements and how tenants were notified of the requirements and any changes to them. Because of the noise coming from S30C, the property manager had to relocate tenant in the building residing in apartment S30A to another apartment.³

Other than pointing out minor inconsistencies in the witnesses' testimony, defendant Oyolesi did not dispute the testimony of the tenants, former tenants, and building staff.

Defendant Lilley failed to testify or appear on the second day of the hearing.

³ This is in addition to the tenant who testified at the hearing that they also had to relocate.

During summation, plaintiff's counsel requested that the court imprison Lilley or bar him from the building for his actions in violation of the December 30, 2020. Plaintiff's counsel elected to reserve plaintiff's claim for damages and legal fees and asked for leave to amend the complaint to include a cause of action for ejectment.

DISCUSSION

Plaintiff's contempt motion

Under Judiciary Law § 753(A) "[a] court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced ..." The necessary elements to support a finding of civil contempt are:

[f]irst, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. Second, it must appear, with reasonable certainty, that the order has been disobeyed. Third, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party. Fourth, prejudice to the right of a party to the litigation must be demonstrated.

(*El-Dehdan v El-Dehdan*, 26 NY3d 19,29, 19 N.Y.S.3d 475, 41 N.E.3d 340 [2015][citations and internal quotation marks omitted]). The moving party must establish civil contempt by clear and convincing evidence (*id.*).

Here, the December 30, 2020 order was lawful and unequivocally enjoined Lilley from assaulting, harassing, menacing, recklessly endangering, intimidating, threatening building staff, tenants and occupants of the building and directed Lilley to comply with the building's rules requiring wearing a mask. This court mandate was in effect in March 2021 when Lilley nearly hit another tenant and an elderly woman while riding his bike in front of the building, threw his bike nearly hitting the tenant's dog and then followed the tenant into the building while shouting

obscurities and slurs. The order was still in effect on October 1, 2021 when Lilley aggressively approached a handyman while holding his bike and then throwing it down and hitting the handyman with a light saber while threatening to kill him and cursing at him. Further, the order was in effect on the other occasions when Lilley cursed at building staff and rode his bike on many occasions in the lobby, endangering the safety of other tenants, their guests and building staff. These actions by Lilley establish with reasonable certainty that he violated the December 30, 2020 order. The notice of entry dated January 4, 2021 (NYSCEF Doc No 34) shows that defendants knew about the December 30, 2020 order and defendants do not testify otherwise. Finally, the prejudice to plaintiff has been demonstrated because the safety of other tenants is threatened by Lilley's indoor bike riding and building staff and because tenants are unable to peaceably go about their business when Lilley screams obscenities at them and throws his bicycle. Moreover, Lilley's refusal to wear a face mask when required to do so by the building's rules during the ongoing COVID-19 pandemic threatens the health of tenants, their guests and building staff. While the evidence during the hearing established that Oyolesi also failed to abide by the building's mask rules, the injunction requiring the wearing of a mask only applied to Lilley. Consequently, plaintiff has established by clear and convincing evidence the requisite elements for a finding of civil contempt against Lilley, but not Oyolesi.

Once civil contempt is established, the court is required to impose a penalty that is remedial in nature and effect and that is the least possible exercise of the court's power to achieve the proposed end, compliance with its orders (*McCain v Dinkins*, 84 NY2d 216, 229 [1994]). For this reason, plaintiff's request that the court imprison Lilley must be denied as this remedy would not be the least possible exercise of the court's power. Rather, a more appropriate

penalty under the circumstances is to enjoin Lilley from the entering the building which would achieve the goal of compliance with the December 30, 2020 order.

While the motion seeks to hold both defendants in contempt, the December 30, 2020 order only required Oyolesi to grant access to plaintiff to inspect and repair a water leak. There was no evidence presented at the hearing that Oyolesi failed to do so.

Accordingly, plaintiff's contempt motion will be granted to the extent that Lilley will be held in contempt of the December 31, 2020 order, but not Oyolosi, and Lilley will be enjoined from entering the building.

Plaintiff's motion for a preliminary injunction and to amend the complaint

“A preliminary injunction is an extraordinary provisional remedy which will only issue where the proponent demonstrates (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balance of equities tipping in its favor” (*Harris v Patients Med., P.C.*, 169 AD3d 433, 434 [1st Dept 2019]).

Plaintiff seeks, *inter alia*, to enjoin both defendants from creating, maintaining, or permitting a nuisance in apartment S30C; enjoin both defendants from harassing tenants and occupants of the building, and enjoin both defendants from acts that create an unreasonable health and safety risk to residents and occupants of the building. As to plaintiff's nuisance claim, the third cause of action in the complaint and the proposed amended complaint, it only refers to “specified acts by Defendant Lilley” (NYSCEF Doc No 1 ¶ 39 & NYSCEF Doc No 49). Since, as discussed above, Lilley will be enjoined from entering the building, there is no longer a necessity for a preliminary injunction enjoining Lilley from creating a nuisance in apartment S30C because he will no longer be permitted to enter apartment S30C. As to Oyolesi, plaintiff's

nuisance claim in its current and proposed form does not pertain to him. Thus plaintiff cannot show a likelihood of success on the merits on this claim with respect to Oyolesi.

Plaintiff's second cause of action is more broadly worded and seeks a declaration of the parties' rights. Article 12 of Oyolesi's lease prohibits objectional conduct, meaning behavior that makes the building or the tenant's apartment less fit to live in. Objectional conduct is also defined by Article 12 as conduct that interferes with the rights of others to properly and peacefully enjoy their apartments or causes conditions that are dangerous, hazardous, unsanitary and detrimental to other tenants in the building (NYSCEF Doc No 43). Even though the evidence at the hearing established that Oyolesi's lease has expired, "(w)here, as here, a tenant . . . remains in possession on the expiration of a [lease] granting exclusive possession, (he) is a holdover and, pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument (*Zheng v Fu Jian Hong Guan Am. Unity Assoc., Inc.*, 168 AD3d 511, 514 [1st Dept 2019] [internal quotation marks omitted]). The evidence presented at the hearing establishes that plaintiff is likely to succeed on its claim for a declaration that Oyolesi violated Article 12 of his lease by allowing unreasonable noise to emanate from his apartment, causing or permitting unsanitary and unsafe conditions in his apartment, and continuing to have Lilley as his guest even after he became aware of his troubling behavior (*see* NYSCEF Doc No 19). Plaintiff has established irreparable injury in the absence of a preliminary injunction through the testimony of its tenants and former tenants on how Oyolesi's actions and failure to act has affected them. Money damages will not compensate for the lost sleep, ill health, and anxiety suffered by plaintiff's tenants as a result of Oyolesi's behavior. Finally, a balancing of the equities tips very heavily in plaintiff's favor.

Accordingly, a preliminary injunction will issue against Oyolesi and not Lilley, enjoining Oyolesi from creating, maintaining, allowing, suffering, or permitting loud noise to emanate from his apartment and from permitting conditions in his apartment which pose an unreasonable risk to his health, safety, or welfare and to that of other tenants, staff, and occupants of the building.

As to that branch of plaintiff's motion seeking leave to amend the complaint, defendants have not opposed this request and pursuant to CPLR § 3025 (b) leave to amend should be freely granted unless defendants are prejudiced or surprised (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]) or the proposed amendment is palpably meritless (*Goodwin v Empire City Subway Co., Ltd.*, 124 AD3d 559 [1st Dept 2015]). Accordingly, since neither of the defendants have demonstrated prejudice and the proposed amendments to the complaint to include a cause of action for ejectment is not palpably meritless, leave will be granted.

CONCLUSION

ORDERED that plaintiff's motion to hold defendants in civil contempt of the December 31, 2020 order (MS # 2) is granted to the extent that defendant Travis Lilley is in contempt of the December 31, 2020 order and is otherwise denied; and it is further

ORDERED that defendant Travis Lilley is enjoined from entering 1 Columbus Place, New York, New York or from being within 50 feet of any entrance of 1 Columbus Place, New York, New York; and it is further

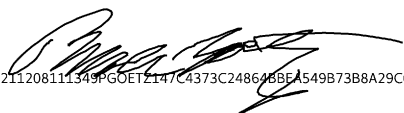
ORDERED that plaintiff's motion for a preliminary injunction (MS # 3) is granted to the extent that defendant Tobi Oyolesi is enjoined from creating, maintaining, allowing, suffering or permitting loud noise to emanate from his apartment and from permitting conditions in his

apartment which pose an unreasonable risk to his health, safety or welfare and to that of other tenants, staff and occupants of the building, and is otherwise denied; and it is further

ORDERED that plaintiff's motion (MS # 3) for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon defendants; and it is further

ORDERED that defendants shall answer the amended complaint within 20 days after service of a copy of this order with notice of entry upon them.


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12/8/2021

DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE