

Lipkin v Pando

2021 NY Slip Op 33018(U)

November 18, 2021

Supreme Court, Richmond County

Docket Number: Index No. 152118/2020

Judge: Lisa Grey

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

ANDREW G. LIPKIN,
Plaintiff,

IAS 4
Present:
Hon. Lisa Grey

-against-

JIOVANA PANDO a/k/a JIOVANA GORDON
TAYLOR a/k/a/ JIOVANA MARIA GORDON
and NIXON ROGER MONTERO,

DECISION AND
ORDER

Defendants.

Index No: 152118/2020
Motion No. 001

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The following documents numbered 1-3 were marked fully submitted on September 28, 2021.

Plaintiff’s Notice of Motion for Summary Judgment to dismiss action and counterclaim pursuant to CPLR 3211 and 3212 with Supporting Papers (dated April 10, 2021)	1
Defendants’ Affirmation in Opposition (dated August 6, 2021)	2
Defendants’ Reply (dated August 24, 2021)	3

Upon the foregoing, the plaintiff’s motion is denied for the reasons set forth below.

This cause of action arises from a private nuisance claim where plaintiff alleges he has been denied the use and quiet enjoyment of his property because his defendant neighbors have frequently been playing music too loudly.

Plaintiff now moves for an Order pursuant to CPLR 3212 for summary judgment as to the underlying cause of action, as well as for an order dismissing the “counterclaim” set forth in the defendant’s papers as affirmative defenses. In support of his motion, the plaintiff attaches a certified letter dated July 23, 2019, sent to the defendants to notify them that their music was

unreasonably loud enough to constitute a nuisance, receipts of seven complaints lodged about the noise to 311.nyc.gov, and a compact disc of the alleged loud music recorded from the plaintiff's home on numerous occasions.

The defendants deny the allegations in their answer, as well as in their sworn affirmation in opposition to the motion.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [Ct App 1985]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, [Ct App 1986] [citations omitted]).

To establish a private nuisance there must be an intentional and unreasonable interference by a defendant with a plaintiff's right to use and enjoy the premises he or she occupies (*Ward v City of New York*, 15 AD3d 392, 393 [2d Dept 2005]; *Weinberg v Lombardi*, 217 AD2d 579 [2d Dept 1995]). The elements of the cause of action 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 NY*, 41 NY2d 564, 570 [Ct App 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* at 579). When it depends upon an inference from peculiar, numerous, or complicated circumstances, it is usually a question of fact (*McCarty v Natural Carbonic Gas Co.*, 189 NY 40, 47 [Ct App 1907]). The aggrieved party must establish substantial annoyance or discomfort to the ordinary reasonable person, and more than mere discomfort or minor inconvenience (*Dugway, Ltd. v Fizzinoglia*, 166 AD2d 836 [3d Dept 1990]).

In the instant case, the plaintiff has failed to establish a prima facie entitlement to summary judgment as a matter of law, especially in the light of the fact that discovery has not yet been conducted. Whether the noise level of the defendants’ music constitutes an intentional and unreasonable interference with the plaintiff’s right to quiet enjoyment of his property is a question of fact for a jury.

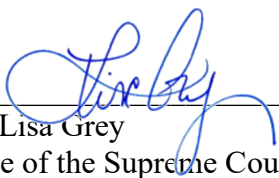
The plaintiff has also failed to establish entitlement to dismissal of the defendants’ counterclaim. When a court is considering a motion to dismiss for failure to state a cause of action, the complaint should be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true (*Leon v Martinez*, 84 NY2d 83, 87-88 [Ct App 1994]). Initially, the sole criterion is whether the pleading states a cause of action, and if, from the pleading’s four corners, the court discerns factual allegations that, when taken together, manifest any cause of action cognizable at law, the motion will fail (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [Ct App 1977]). The question is whether the plaintiff has a cause of action, not whether the plaintiff has stated one (*Steve Elliot, LLC v Teplitsky*, 59 AD3d 523 [2d Dept 2009], citing *Guggenheimer v Ginzburg*). In determining whether the defendants have a cause of action, the Court looks to the New York Civil Rights Law, which gives an owner of residential real property a private right of action for damages against anyone who installs or affixes a video imaging device on property adjoining their residential real property, with “the purpose of video taping or taking

moving digital images of the recreational activities which occur in the backyard of the residential real property without the written consent thereto of such owner,” when such action is taken “with intent to harass, annoy or alarm another person, or with intent to threaten the person or property of another person” (Civil Rights Law § 52-a [a]). In this case, the defendants have a cause of action for a potential violation of their right of privacy under the Civil Rights Law.

Therefore, the plaintiff’s motion is denied in its entirety.

Accordingly, it is hereby ORDERED that the plaintiff’s motion for summary judgment is denied.

Dated: November 18, 2021
Staten Island, New York



Hon. Lisa Grey
Justice of the Supreme Court