LANDLORD/TENANT

Court Grapples With Noise In the City That Never Sleeps

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New York City has a reputation as the city that never sleeps. As a recent decision by Supreme Court, New York County Justice Joan M. Kenney in *Kahona Beach LLC v. Santa Ana Restaurant Corp.*[1] demonstrates, balancing that 24/7 vitality against competing quality of life concerns can sometimes be problematic and require court intervention. In *Kahona Beach*, the limited liability company owning a condominium apartment in Manhattan, and the individual residing there, sued a restaurant/lounge located directly below the apartment, the principal of the restaurant/lounge and the restaurant/lounge's landlord.[2] The suit sought damages and permanent injunctive relief based on defendants' allegedly having created a private nuisance by playing music too loudly.

As summarized in Justice Kenney's decision, another Supreme Court Justice (Walter B. Tolub, J.) had initially granted plaintiffs' request to preliminarily enjoin defendants from playing music above the sound levels described in the noise code and had directed a hearing. At the hearing, Justice Tolub instructed the defendants to propose a plan that would ensure compliance with the noise code requirements. Approximately three months later, the parties appeared before Justice Tolub concerning the preliminary injunction motion and a contempt motion made by plaintiffs. After an evidentiary hearing, Justice Tolub denied plaintiffs' application to enjoin the restaurant/lounge from operating in the late evening and early morning hours and, "finding only a minor violation of the injunction, denied plaintiffs' contempt motion."

A default judgment had been granted against the restaurant/lounge's landlord, but, by stipulation, that default judgment was vacated and the landlord appeared in the action. Subsequently, the landlord was granted leave to amend its pleading to interpose a cross-claim against the restaurant/lounge for contribution, contractual and common-law indemnification and for failure to procure insurance. The plaintiffs moved for summary judgment on liability, and also for permanent injunctive relief, and requested that the case be set down for inquest or trial as to damages. In the decision that is the subject of this article, Justice Kenney denied that motion.

In support of the motion, the individual plaintiff had submitted an affidavit that "chronicle[d] her inability to fall asleep, nighttime awakenings, experiences with sound emanating from [the restaurant/lounge] and calls to [the restaurant/lounge] about noise from June 2009 through March 2010." She stated that the "level of the bass frequencies severely degrade[d] her quality of life" and that she not only heard sound, but also felt vibrations from the music in her apartment.

She asserted that the music disturbed her studies, and led to exhaustion, extreme stress and physical harm, so that she spent as much time away from the apartment as possible and had listed it for sale. She further contended that nothing was done to change the restaurant/lounge's sound system and that plaintiffs' expert's proposed solutions, such as installing adequate soundproofing and sound limiters on the sound equipment, were ignored. The court noted, however, that the individual plaintiff had also "remark[ed] that the instances of unbearable noise have diminished since November 2009, and that the Noise Code violations are more infrequent now."

Plaintiffs also had submitted the affidavits and testimony of an expert, who opined that he had measured the sound levels in the apartment from April 28, 2009 through May 5, 2009, on May 9, 2009, and again from Oct. 14, 2009 through Nov. 2, 2009. Additionally, plaintiffs had included in support of their motion an affidavit from a house guest who stated that on July 8, 2009 loud music was playing from 6:45 to 8:30 p.m., he called and asked a restaurant employee to turn the music down, but it was not turned down until 10:50 p.m. and that at 12:05 a.m. he was awakened by vibrations and loud music again being played. He also stated he called the restaurant the next day, asking that the music be turned down and that bass vibrations could be felt throughout the apartment.

In opposition to the motion, the restaurant/lounge argued that the developer had failed to properly insulate the condominium, and plaintiffs' real dispute, therefore, was with the developer. Further arguments made by the restaurant/lounge were that: the restaurant had responded to every one of the individual plaintiff's calls, and always turned down the music; the restaurant has never been given a violation for noise; it provided a noise amelioration plan when directed to do so by the court but plaintiffs were not satisfied with the plan; and the restaurant followed various recommendations made by plaintiffs' expert and subsequent testing showed that the restaurant was within legal noise limits.

The restaurant/lounge also contended that: the plaintiffs had chosen to purchase a unit "in an up-and-coming neighborhood in 'the city that never sleeps'"; the restaurant had been continuously operating in the same place for a long time, had not changed its operations and generated no unusual noise; any decrease in value in the plaintiffs' apartment was attributable to the economic downturn; and it was only upon the death of the individual plaintiff's father that she asked for consideration concerning noise levels.

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The Court's Analysis

The court began its analysis by stating the criteria for establishing a private nuisance. Citing the Appellate Division, Second Department decisions in *Ward v. City of New York*,[3] *Weinberg v. Lombardi*[4] and *JPMorgan Chase Bank v. Whitmore*,[5] the court stated:

> To establish a private nuisance there must be an intentional and unreasonable interference by a defendant with a plaintiff's right to use

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and enjoy the premises he or she occupies... 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."[6]

Quoting from *Weinberg,* and citing *State v. Fermenta ASC Corp.*[7] and *Dugway, Ltd. v. Fizzinoglia,*[8] the court continued as follows in laying out the legal standard:

"[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"... Residents are not required to seek medical care or move in order to demonstrate injury... but must establish substantial annoyance or discomfort to the ordinary reasonable person, and more than mere discomfort or minor inconvenience.[9]

The court concluded that the case presented issues of fact for trial, and characterized that result as being "generally the case in nuisance suits." The court stated that the primary dispute concerned "the reasonableness of the noise that has emanated from [the restaurant/lounge]." The court further explained:

Despite what appears to be the [restaurant/lounge] Defendants' contention otherwise, plaintiffs have no obligation to tolerate any violation of the Noise Code. Indeed, it is [restaurant/lounge] Defendants that are required to operate their business within the confines of the law. In a noise nuisance case, however, while sound level is certainly a significant factor, the unreasonableness of an alleged interference with a property owner's rights also requires the evaluation and weighing of multiple other factors, including the duration of the allegedly offending sound, the times at which it is made, whether the condition is recurring, and, if so, with what frequency... In addition, the character of the neighborhood must also be considered.... Whether or not a plaintiff came to the nuisance is also a factor, but of less significance than the level, duration and frequency of occurrences of sound...and of little, if any, significance concerning a violation of the law...[10]

The Courts Conclusions

The court concluded that the plaintiffs' own submissions demonstrated that there were "fact issues, from which inferences must be drawn, as to the level, frequency, duration and other factors concerning the noise." The court explained that for many of the occasions of noise mentioned in the affidavit of the individual plaintiff, she did not adequately quantify the level of noise to permit the court to determine whether the noise code limits had been exceeded. Further, the court stated, although describing the volume of sound in the apartment as exceeding noise code limits on five occasions, she did not state the basis for her knowledge of this assertion or specify how long the noise had exceeded the noise code limits on those occasions.

The court also found deficiencies in the two reports of plaintiffs' expert. One report contained two graphs, one demonstrating a six-minute period of music, and the second demonstrating a three-minute period on a different day, when the sound level in the apartment exceeded the noise code level. The court concluded that it "is not clear whether the plaintiffs' expert is opining that the level of sound generated by the [restaurant/lounge] exceeded the Noise Code on multiple occasions, or only for the three- and six-minute periods illustrated or measured in the graphs on [that particular] Friday and Saturday night."

As to the second report from plaintiffs' expert, that addressed a different nineteen-day period. The court commented, however, that the record revealed that at the prior hearing before Justice Tolub, plaintiffs' expert had testified that out of the hours of recordings over the nineteen-day period, the sound only exceeded the noise code on one day. The court also pointed to testimony of the plaintiffs' expert at that prior hearing stating that, as to one of the graphs in his report illustrating 2½ minutes of sound, there were "approximately ten seconds in which the noise level exceeded the Noise Code, followed by a remaining period in which the music was not audible for the remaining time except for a couple of spots." The court concluded that "other than the Noise Code violations discussed, the record, without further explanation, does not lend itself to meaningful assessment of the duration and frequency of Noise Code violations."

Plaintiffs had cited cases in which, as characterized in the decision, "courts have commented negatively about those who, concerning a nuisance, callously disregard the rights of others," and plaintiffs had argued that defendants similarly ignored pleas and took no steps to ameliorate the problem. The court pointed out that plaintiffs' own submissions, however, revealed that the principal of the restaurant/lounge had testified that since the original hearing in the case, repairs had been made to a ceiling, sheetrocking and certain limited insulation work had been performed and all the speakers in the restaurant were lowered from the ceiling. He had further testified that he had measured sound in the restaurant and marked the volume levels so the sound did not exceed 50 decibels within the restaurant and hired someone to monitor the music level when customers submitted their own music.

Relying on the basic principles that on a summary judgment motion evidence must be viewed in favor of the non-moving party, and where there is conflicting testimony as to what occurred, the court may not evaluate the parties' credibility to decide whose version is true, the court held that:

While the [restaurant/lounge] Defendants' submissions by no means satisfactorily demonstrate the abatement of any sound problem, issues of fact preclude summary judgment and the granting of a permanent injunction of the magnitude sought by plaintiffs.[11]

Given the fact questions about plaintiffs' nuisance claim, the court also denied plaintiffs' motion for summary judgment against the landlord, a motion based on their contention that the landlord had notice of the restaurant/lounge's acts.

The court viewed the scope of the permanent injunctive relief sought by plaintiffs as far exceeding what the evidence supported. The court stated:

...[P]laintiffs seek injunctive relief of a far greater magnitude than merely the curtailment of bass frequencies, despite that their expert did not opine that there has been a violation of the Noise Code other than the specific section that concerns bass frequencies. In fact, plaintiffs seek an order enjoining [the restaurant] from playing music at all from 9:00 p.m. until 11:00 a.m. every day.[12]

In short, the decision in *Kahōna Beach* is a useful primer on legal issues in a noise nuisance case and evidentiary issues on which counsel in such a case should focus. The case also underscores the importance, when an injunction is involved, of the movant's carefully crafting, and the opponent rigorously analyzing, the wording and scope of what is sought.

1. 2010 NY Slip Op 32347, NYLJ, 1202471893173, at 1 (Sup. Ct. N.Y.Co., Index No. 105937/09, decided 8/26/10).

2. According to the decision, the individual plaintiff "aver[red] that she purchased her apartment through Kahona Beach, LLC, from the building's sponsor."

3. 15 A.D.3d 392, 789 N.Y.S.2d 539 (2d Dept. 2005).

4. 217 A.D.2d 579, 629 N.Y.S.2d 280 (2d Dept. 1995).

5. 41 A.D.3d 433, 838 N.Y.S.2d 142 (2d Dept. 2007).

6. NYLJ, 1202471893173, at 5-6.

7. 166 Misc.2d 514, 630 N.Y.S.2d 884 (Sup. Ct. Suffolk Co. 1995), aff'd in part, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dept. 1997)

8 . 166 A.D.2d 836, 536 N.Y.S.2d 175 (3d Dept. 1990).

9. NYLJ, 1202471893173, at 6. In juxtaposition to its quote from *Weinberg*, the court also quoted from *McCarty v. Natural Carbonic Gas Co.*, 81 N.E. 549 (1907), where the court stated that "[w]hat is reasonable is sometimes a question of law and at others a question of fact. When it depends upon an inference from peculiar, numerous or complicated circumstances it is usually a question of fact."

10. NYLJ, 1202471893173, at 8-9. To support the principles stated in the above-quoted passage from the *Kahona Beach* decision, the court cited *Futerfas v. Shultis*, 209 A.D.2d 761, 618 N.Y.S.2d 127 (3d Dept. 1994), *Matter of Twin Elm Management Corp. v. Banks*, 181 Misc. 96, 46 N.Y.S.2d 952 (Mun. Ct. Queens Co., 2d Dist. 1943), and *Graceland Corp. v Consolidated Laundries Corp.*, 7 A.D.2d 89, 180 N.Y.S.2d 644 (1st Dept. 1958) aff'd, 6 N.Y.2d 900 (1959).

11. Id. at 13.

12. Id. at 11.