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Bainbridge Ave. Props. Inc. v Sow
2019 NY Slip Op 52141(U) [66 Misc 3d 1207(A)]
Decided on December 26, 2019
Civil Court Of The City Of New York, Bronx County
Lutwak, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on December 26, 2019

Civil Court of the City of New York, Bronx County

Bainbridge Avenue Properties Inc., Petitioner-Landlord,

against

**Saran Sow, Respondent-Tenant, and "JOHN DOE; "JANE DOE",
Respondents-Undertenants.**

30280/2019

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Diane E. Lutwak, J.

BACKGROUND & PROCEDURAL HISTORY

This is a nuisance holdover proceeding which was commenced by Petitioner Bainbridge Avenue Properties Inc. seeking to recover possession of Apartment 4F at 2555 Bainbridge Avenue, Bronx, New York from Respondent Saran Sow, a Rent Stabilized tenant. The petition is based on a termination notice dated May 23, 2019 which advised Respondent that her [*2] occupancy was being terminated effective June 12, 2019 for "committing or permitting a nuisance" in the form of "constant loud noise emanating" from her apartment for the last seventeen months. Attached to the notice are 33-1/2 pages of dates and times from February 6, 2019 through March 6, 2019 when disturbances allegedly occurred in the form of "stomping", "banging" /"banged", "jumping", "bouncing ball", "throwing something like iron on the floor", "dragging furniture" and "lifting furniture and then dropping it".

The case was originally calendared in a Resolution Part for July 3, 2019 when it was adjourned to August 7 and then transferred to Part X with the notation that Respondent's answer was a "general denial". After unsuccessful settlement conferences in Part T, Respondent secured legal counsel and the case proceeded to trial on November 21, December 11 and December 20, 2019.

TRIAL

Petitioner's Case

Petitioner established its prima facie case through documents and the testimony of four witnesses - its managing agent Carlos Ramirez, its superintendent Elvin De Jesus Medina and Amie and Ndongo Saar, a married couple who live in the apartment directly below Respondent's. Certified copies of the deed, multiple dwelling registration and rent registration history for the premises as well as copies of Respondent's original lease, current renewal lease and rent records reflecting credits and debits were all admitted into evidence without objection. The court took judicial notice of the Notice of Petition, Petition, predicate notice and affidavits of service in the court file.

Mr. Ramirez testified that Respondent has lived in Apartment 4F at 2555 Bainbridge Avenue since April 2011 and that before that she lived in another apartment in the building. This proceeding was commenced because Amie Saar, the tenant in Apartment 3F, complained constantly about loud noise coming from Respondent's apartment and efforts to solve the problem outside of court were unsuccessful. On cross-examination Mr. Ramirez testified that he manages approximately eight to ten properties and that he does not reside in 2555 Bainbridge Avenue, which is a building with thirty-six apartments, six on each floor. He acknowledged that he has no personal knowledge of the allegations in the predicate notice, which were based on a log kept by Ms. Saar.

Petitioner's second witness was Elvin De Jesus Medina, who testified that he cleans the building at 2555 Bainbridge Avenue every day. He has gone to Respondent's apartment for cleaning and to unclog the tub and sink, although he could not say when he did these things. He knows that Apartment 4F is above Apartment 3F but did not know if they have the same floor plan. The tenant in Apartment 3F has complained to him twice about noise.

Petitioner's third witness was Amie Saar, who testified that she has lived in Apartment 3F at 2555 Bainbridge Avenue for the past fifteen years. She lives in this one-bedroom apartment with her husband and four children, ages 25, 19, 18 and 16. She leaves for work at either 9 a.m. or 10 a.m. and returns home at 5 p.m. or 6 p.m. For the past three years she and her family have been bothered by noise coming from the apartment above theirs, mostly above her bedroom and hallway. The noises sound like furniture being dragged, a basketball bouncing, "something that [*3]bangs, like a bat" and stomping. When asked when she hears the noises Ms. Saar testified, "every time I'm in the house, especially at night". When asked when at night she hears the noises Ms. Saar testified, "after 12, sometimes 3:25, sometimes after 4, sometimes after 5, up to 6." She testified that she and her family "are not sleeping at all" because of the noise and that this has gone on every day since 2017 except for four days and including the night before her testimony. Ms. Saar testified that, "before, we used to rest in the afternoon. Since 2017 we cannot sleep in the afternoon" because of the noise. She hears

the noise mostly in her bedroom and in the hallway. She testified that living with this noise has affected her health because she does not get enough sleep. She feels dizzy, gets headaches, has gone to the emergency room four times and is awaiting the results of tests.

Her youngest child has Down's syndrome, "a hole in her heart" and suffers from sleep apnea. She goes to school but misses classes because she doesn't get enough sleep. A notice Ms. Saar received from her daughter's school about five absences was admitted into evidence.

Ms. Saar and Respondent used to be friends until the noise problem arose. Ms. Saar complained to the landlord who then called Respondent in Ms. Saar's presence. After that, Respondent "never stopped, she made it worse when I called the landlord." Ms. Saar has also called "311" and "911" and gone to the police, detective squad, Legal Aid, Housing Court and Mediation Center trying to get help with the noise problem. The only agency that offered to help her is Safe Horizon, who told Ms. Saar they could help her look for a place to move to. However, Ms. Saar does not want to move.

Ms. Saar testified that she withheld her rent payments for eight months because of the noise. When Petitioner took her to court for nonpayment of rent Petitioner's lawyer told her to keep a log for three or four weeks and bring it to his office. On February 6, 2019 Ms. Saar started keeping a hand-written, contemporaneous log of noise incidents in a black-and-white composition book that was admitted into evidence. For each incident she wrote down the date, the time and the type of noise she heard. The log runs through March 6, 2019 with typically 50 or more entries per date, often with only a few minutes in between each entry.

For example, there are 51 entries on Thursday, February 14, 2019, starting with "stomping" at 5:36 a.m., 5:38 a.m. and 5:42 a.m.; "big big banged" at 5:55 a.m.; "stomping" at 6:00 a.m. and 6:15 a.m. with "big big banged" in between those two entries at 6:10 a.m.; "banged" at 6:19 a.m., 6:23 a.m., 6:42 a.m. and 6:44 a.m.; "stomping" at 6:51 a.m.; "banged" at 6:58 a.m. and 7:06 a.m.; "stomping" at 7:11 a.m.; "banged" at 7:16 a.m., 7:20 a.m. and 7:44 a.m.; "stomping" at 7:48 a.m.; "big big banged" at 7:53 a.m.; "dragging furniture" at 7:58 a.m.; "banged" at 8:03 a.m.; "banging front door" at 8:15 a.m. and 8:26 a.m.; "banged" at 8:31 a.m.; "stomping" at 8:34 a.m., 8:39 a.m. and 8:44 a.m.; "banged" at 8:53 a.m.; and "big big banged" at 9:06 a.m. and 9:11 a.m. There is then a break with the explanation "Going to work" followed by "Resume PM"; the entries resume at 8:16 p.m. and 8:23 p.m. with "big big banged" followed by "stomping" at 8:36 p.m.; "banged" at 8:42 p.m.; "stomping" at 9:10 p.m.; "banging front door" at 9:14 p.m. and 9:18 p.m.; "banged" at 9:38 p.m. and 9:40 p.m.; "stomping" at 9:46 p.m. and 9:50 p.m.; "big big banged" at 9:54 p.m.; "banged" at 9:59 p.m.; "stomping" at 10:04 p.m.; "banged" at 10:09 p.m. and 10:21 p.m.; "stomping" at 10:24

p.m.; and "big big banged" at 10:36 p.m. and 10:48 p.m.

For Monday, February 25, 2019 there are 107 entries, starting with "big big banged" at 2:25 a.m. and 5:44 a.m.; "banged" at 6:17 a.m., 6:33 a.m. and 6:37 a.m.; "bouncing ball" at 6:42 a.m. and 6:44 a.m.; "stomping" at 6:48 a.m., 6:51 a.m. and 6:56 a.m.; "banged" at 6:59 a.m., 7:03 a.m. and 7:10 a.m.; "big big banged" at 7:16 a.m. and 7:18 a.m.; "banging door" at 7:21 a.m. and 7:27 a.m.; "stomping" at 7:29 a.m.; "bouncing ball" at 7:34 a.m.; "big big banged" at 7:44 a.m.; "dragging furniture" at 8:01 a.m., 8:04 a.m. and 8:10 a.m.; "banged" at 8:12 a.m. and 8:16 a.m.; "stomping" at 8:18 a.m. and 8:31 a.m.; "dragging furniture" at 8:44 a.m. and 8:52 a.m.; "big big banged" at 8:59 a.m.; and "banged" at 9:03 a.m. There is then a break with the explanation "PM My off Day" and the entries resume with "banged" at 3:48 p.m., 3:51 p.m. and 3:55 p.m.; "stomping" at 3:59 p.m. and 4:03 p.m.; "big big banged" at 4:14 pm and 4:17 p.m.; "stomping" at 4:22 p.m., 4:28 p.m., 4:33 p.m. and 4:37 p.m.; "bouncing ball" at 4:42 p.m.; "banging door" at 4:44 p.m.; "stomping" at 4:47 p.m.; "banged" at 4:52 p.m., 4:56 p.m. and 4:59 p.m.; "big big banged" at 5:10 p.m. and 5:14 p.m.; "stomping" at 5:17 p.m., 5:21 p.m., 5:25 p.m. and 5:37 p.m.; "big big banged" at 5:48 p.m. and 5:53 p.m.; "stomping" at 5:57 p.m. and 6:04 p.m.; "banged" at 6:10 p.m., 6:13 p.m. and 6:18 p.m.; "dragging furniture" at 6:22 p.m., 6:29 p.m. and 6:33 p.m.; "banged" at 6:38 p.m.; "stomping" at 6:43 p.m.; "big big banged" at 6:48 p.m. and 6:56 p.m.; "stomping" at 7:01 p.m. and 7:13 p.m.; "banged" at 7:16 p.m.; "big big banged" at 7:19 p.m.; "dragging furniture" at 7:22 p.m.; "banged" at 7:26 p.m. and 7:31 p.m.; "stomping" at 7:33 p.m.; "bouncing ball" at 7:37 p.m. and 7:40 p.m.; "stomping" at 7:44 p.m. and 7:48 p.m.; "banged" at 7:56 p.m., 7:58 p.m. and 8:14 p.m.; "dragging furniture" at 8:20 p.m. and 8:23 p.m.; "big big banged" at 8:28 p.m. and 8:31 p.m.; "stomping" at 8:34 p.m. and 8:38 p.m.; "banged" at 8:45 p.m., 8:53 p.m., 8:58 p.m., 9:19 p.m. and 9:24 p.m.; "big big banged" at 9:29 p.m.; "stomping" at 9:39 p.m., 9:46 p.m. and 9:52 p.m.; "big big banged" at 9:58 p.m. and 10:12 p.m.; "stomping" at 10:15 p.m. and 10:31 p.m.; "big big banged" at 10:38 p.m., 10:42 p.m. and 10:47 p.m.; and "stomping" at 10:53 p.m. and 11:10 p.m.

As another typical example, there are 57 entries on Saturday, March 2, 2019, starting with "big big banged" at 2:14 a.m. and 4:18 a.m.; "stomping" at 5:20 a.m.; "big big banged" at 6:29 a.m.; "banged" at 6:37 a.m. and 6:48 a.m.; "stomping" at 6:51 a.m. and 6:57 a.m.; "banged" at 7:04 a.m.; "dragging furniture" at 7:10 a.m., 7:15 a.m. and 7:19 a.m.; "banged" at 7:31 a.m., 7:37 a.m., 7:39 a.m. and 7:43 a.m.; "stomping" at 7:51 a.m., 7:53 a.m., 8:04 a.m., 8:10 a.m. and 8:15 a.m.; "banged" at 8:26 a.m.; "dragging furniture" at 8:33 a.m. and 8:41 a.m.; "banged" at 8:45 a.m., 8:49 a.m. and 8:54 a.m.; and "stomping" at 9:10 a.m. There is then a break with the explanation "Going to work" followed by "Resume PM"; the entries resume with "banged" at 8:31 p.m. and 8:34 p.m.; "dragging

furniture" at 8:30 p.m. and 8:45 p.m.; "banged" at 8:49 p.m. and 8:56 p.m.; "stomping" at 8:59 p.m., 9:03 p.m., 9:07 p.m. and 9:11 p.m.; "banged" at 9:17 p.m., 9:31 p.m. and 9:34 p.m.; "big big banged" at 9:42 p.m.; "banged" at 9:46 p.m.; "stomping" at 9:51 p.m.; "banged" at 9:55 p.m.; "stomping" at 10:01 p.m. and 10:10 p.m.; "banged" at 10:17 p.m. and 10:19 p.m.; "big big banged" at 10:32 p.m. and 10:44 p.m.; "stomping" at 10:48 p.m. and 10:52 p.m.; "banged" at 10:55 p.m., 11:09 p.m. and 11:17 p.m.; and "stomping" at 11:21 p.m..

On cross-examination, Ms. Saar testified that her friendship with Respondent had lasted only for a couple of months, "between February and August" and that her friendship with Respondent ended suddenly when the noise began. She testified that there had been no personal [*4]dispute between them before the noise started. Ms. Saar knows both Respondent's current husband and her former husband. Ms. Saar acknowledged that the sleep apnea which her youngest daughter suffers from is a disorder which affects her sleep and testified that this condition is made worse by the noise from upstairs.

Petitioner's final witness was Ndongo Saar, who testified that he has lived in Apartment 3F at 2555 Bainbridge Avenue for fifteen years. He knows that Respondent lives above him and testified that she used to come to his home, that she used to be a friend of his wife's and that she both got married and had a naming ceremony for her child in his apartment. Mr. Saar testified that the friendship between his wife and Respondent ended approximately three years ago and "the noise started when the friendship broke down". The noises happen both in the morning and at night and they are "more painful at night". Mr. Saar testified that the noises interrupt the sleep of himself, his wife and his children; interfere with his work as a preacher of the Koran because he "cannot focus and go mindfully before people at my church"; cause him and his family to have headaches; and interfere with his children's ability to do their homework. He described the noises as "something like sliding on the floor" and "a big thump" and the worst is "something bouncing up and down". When asked how often the noises happen Mr. Saar answered, "each night of the week from 7 pm to 12 and beyond", and he has seen his wife writing them down. The noises come from above and are worst in the master bedroom where he sleeps with his wife and their youngest, ill child. He sometimes also hears the noises "around the kitchen area" which is "where the kids sleep". Mr. Saar testified that the bouncing, thumping and dragging noises are not the sound of people walking upstairs. He was "not accusing [Respondent] of making the noises, but the noises are happening from her premises," although he admitted that he had never personally observed the noises being made.

On cross-examination Mr. Saar corroborated his wife's testimony that his family consists of two

adults and four children. He stated that he thought his oldest child was born in 2000 and that his youngest child, the one who is ill, is "about 5 going on 6". He also explained that he could not accurately state the ages of his children because he is not educated. Mr. Saar testified that his children have played with Respondent's children, and that his wife used to babysit them when they were toddlers, although he could not say when that was. Mr. Saar acknowledged that he and his wife had socialized with Respondent and her husband in the past, and the only reason he knew of for why they were no longer friendly was because of the noises coming from Respondent's apartment. Mr. Saar testified that he works usually from around 7:00 a.m., 8:00 a.m. or 9:00 a.m. until around 7:00 p.m.

Petitioner rested its case and Respondent presented her own testimony as well as that of her husband. Respondent testified that she has lived in the building for ten years. She currently lives with her husband and two children, ages fourteen and six, in a one-bedroom apartment that has wall-to-wall carpeting in the bedroom and area rugs in the other rooms. Photographs of the area rugs in the living room, dining area and bathroom, and of the wall-to-wall carpeting in the bedroom, were admitted into evidence.

Respondent, her husband and her younger child all sleep in the bedroom. They have no pets. Respondent works five hours a day as a home attendant, from 10 a.m. to 3:00 p.m. Respondent's older child is in high school and her younger child is in first grade. One gets home [*5] at 3 p.m. and the other gets home at 4:20 p.m. Respondent testified that her children are doing well in school, have no attendance issues and behave well at home. When they get home from school the older child does his homework and plays games on the computer and the younger child is either on the computer or watching TV. Also, "sometimes the little one runs around." Respondent denied that she is stomping, banging or slamming furniture, and testified that she is not capable of lifting and dropping her furniture.

Respondent testified that she has known Ms. Saar for as long as she has lived in the building, they used to be close friends and Ms. Saar's testimony that she had only known Respondent for a few months was not accurate. They have spent time in each other's homes, including Respondent's "wedding covering", a religious ceremony which took place in the Saars' apartment as an offer of respect to Mr. Saar who teaches in a mosque. Respondent testified that the friendship "went bad" when Ms. Saar started complaining about noise and calling the police. When police came to her home Respondent would let them in to look around and nothing happened as a result of those visits. With guidance from the police, Respondent initiated mediation with Ms. Saar and the landlord in

2018.

On cross-examination Respondent identified the flooring under the area rugs in her living room and dining area as wood and tile and acknowledged that the area rugs only partially cover the flooring.

On redirect Respondent testified that when she walks on the carpeting in her bedroom she doesn't hear anything and denied that she or anyone in her family was making banging noises in her bedroom. Respondent denied having guests in her apartment or having other people from the building over. There was a time in 2018 when Respondent heard banging from an apartment on the sixth floor of the building. She investigated and learned that the tenant was exercising — boxing — in his apartment two floors above hers. That noise only lasted for a week and then stopped.

Respondent's second witness was her husband Abdul Diallo, who has lived in the subject premises since 2016. He works as a security guard from 3 p.m. or 4 p.m. until midnight. He leaves home around 1 p.m. or 2 p.m. and returns around 2 a.m. or 2:30 a.m. Mr. Diallo testified that when he gets home from work he takes a shower, prays and goes to bed. When he gets up he prays, changes his clothes and goes to work. When he walks in the bedroom he doesn't hear anything; he doesn't wear shoes because of the wall-to-wall carpeting, which has been there for as long as he has lived there.

Mr. Diallo knows the Saars through his wife; the families are "not that close — just because all of us are from Africa". Mr. Diallo denied making the banging and stomping noises that the Saars are complaining about and did not know why they are making these complaints. The super has come to talk to him about these complaints twice and Mr. Diallo invited him in to come and look around, which he did. When the super came Mr. Diallo was at home alone sleeping; he testified that, "The super came and banged on the door and woke me up." The landlord also came and talked to Mr. Diallo and told him, "if we are doing so to stop doing it"; Mr. Diallo responded that "we were not doing it." Mr. Diallo also testified about a conversation he had with Mr. Saar whom he met outside of the building three or four months ago, saying that, "We greeted each other, I said we should live together in peace. He said he would tell his wife." [*6] During February and March 2019, the period in which Ms. Saar kept a log, Mr. Diallo testified that there was nothing abnormal happening during that time. "Only the sink was broken, I called the super and he made the repair."

On cross-examination Mr. Diallo testified that when he is awake at home his children are in school and his wife is at work. "I just have tea, put food in my thermos and go to work." When asked

about a photograph showing the bedroom furniture Mr. Diallo testified that it was made of wood and he does not move the furniture around. When asked about a "large TV set" that appears in one of the photographs of the bedroom, and whether he ever moves it, Mr. Diallo responded, "This is a broken TV set. Sitting there for a long time. More than two years." When asked about the "piles of plastic chairs" that can be seen in a photograph of the living room, Mr. Diallo responded that they use them when family members come to visit. They do not entertain in the apartment; the only visitors they have are relatives, on his side of the family and his wife's side.

On redirect when asked about what he does when family members come over Mr. Diallo testified, "We sit down, we talk, we watch TV, and after that we go to bed." He denied that they bang on furniture, bounce balls, stomp on the floor or drag furniture.

DISCUSSION

Under Rent Stabilization Code § 2524.3(b), grounds for eviction will be found where it is established that the tenant has committed or permitted a nuisance. Courts have defined a nuisance as "a recurring or continuing pattern of objectionable conduct by a tenant that threatens the comfort and safety of others in the building." [*Roxborough Apts Corp v Kalish* \(22 Misc 3d 130\[A\]](#), 880 NYS2d 876 [App Term 1st Dep't 2009]), citing [*Domen Holding Co v Aranovich* \(1 NY3d 117](#), 124, 802 NE2d 135, 769 NYS2d 785 [2003]). As explained by the Court of Appeals,

To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land (*see* Restatement [Second] of Torts § 821D; *see also* Copart Indus. v Consolidated Edison Co. of NY, 41 NY2d 564, 568, 394 N.Y.S.2d 169, 362 N.E.2d 968 [1977]). The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance (*see* Restatement [Second] of Torts § 821D, Comment b; *see also* Nussbaum v Lacopo, 27 NY2d 311, 315, 317 N.Y.S.2d 347, 265 N.E.2d 762 [1970]). However, not every annoyance will constitute a nuisance (*see* 2 Dolan, Rasch's Landlord and Tenant—Summary Proceedings § 30:60, at 465 [4th ed]). Nuisance imports a continuous invasion of rights—"a pattern of continuity or recurrence of objectionable conduct" (Frank v Park Summit Realty Corp., 175 AD2d 33, 34, 573 N.Y.S.2d 655 [1st Dept], *mod on other grounds*, 79 NY2d 789, 587 N.E.2d 287, 579 N.Y.S.2d 649 [1991]).

Domen Holding Co v Aranovich, supra (1 NY3d at 123-124, 802 NE2d at 139, 768 NYS2d at 789).

Certainly, the court could find eviction to be warranted if Petitioner had proven by a

preponderance of the evidence that Respondent had caused or permitted the excessive and frequent noise stated in its predicate notice and in Ms. Saar's log. Persistent incidents of loud banging, stomping and dragging of furniture following one another often in two- to four-minute intervals at all hours of the night and day are more than a mere annoyance that other building [*7] residents should be required to live with.

However, the court finds the testimony of the Saars about the noises allegedly emanating from Respondent's apartment, and Ms. Saar's log recording those noises, to be an exaggeration and not believable. For example, Ms. Saar testified broadly that she hears the noises "every time I'm in the house", that she and her family "are not sleeping at all" and that this has occurred every day — including the night before she took the witness stand - except for four days in the last three years. A typical day in her logbook records an incident or two of noise around 2:30 a.m. and then stomping, banging and dragging of furniture every few minutes beginning around 5:30 a.m. and continuing until around 9:15 a.m. and then again all evening up until midnight. Mr. Saar — for whom the worst noise was "something bouncing up and down" - similarly testified that he gets woken up by the sound of bouncing "each night of the week." If the noises are actually as pervasive and persistent as the Saars described them to be their testimony easily could have been corroborated by Petitioner's employees or other residents of the building; yet no one other than Mr. and Ms. Saar testified about noise. While Ms. Saar testified about calls to the landlord's office, police and other agencies, nobody from any of those entities was called as a witness to support her testimony. Nor did any of the Saars' three adult children testify. The court finds the Saars' overblown and uncorroborated testimony to lack credibility.

The court finds more credible the categorical denials of the Saars' allegations by Respondent and her husband which were supported by their testimony about the specific actions they each took to address their neighbors' complaints: Respondent initiated mediation as a means to address her neighbors' complaints at the suggestion of the police who came to her door; Respondent's husband spoke to Mr. Saar in the street and told him "we should live together in peace". Respondent and her husband have allowed police and the landlord's agents to come in to their apartment to look around whenever they come to their door.

Further, the court finds credible the testimony of Respondent and her husband about how they spend their time at home. The court credits Respondent's explanation that her children are well-behaved, doing well in school and can be found sitting in front of the computer doing homework or watching television when they get home in the mid- to late afternoon. The court also credits

Respondent's husband's testimony that he gets home from work at around 2 a.m. or 2:30 a.m. every night and then goes to bed. It does not make sense that Respondent's children are both engaged after school in the activities Respondent described and, at the same time, making the loud and frequent noises Ms. Saar complained of and recorded in her logbook. It also does not make sense that Respondent's husband would allow the banging, stomping and dragging of furniture that Ms. Saar's log indicates to be especially persistent every day between the hours of 5 a.m. and 9 a.m. to take place in his home while he is trying to sleep after his daily twelve-hour stretch of work and commuting. The court further credits the testimony of Respondent and her husband that they do not have guests over other than family and does not credit Petitioner's speculation that the set of plastic chairs stacked up in the living room implies that Respondent and her family constantly entertain large groups of people who are making the alleged noises. The court credits the explanation of Respondent's husband that the chairs are there for members of their extended families to sit on when they come over.

While none of the witnesses knew whether the layouts of Apartments 3F and 4F are the [*8]same, it was undisputed that they each have just one bedroom and both are in the building's "F" line. Accordingly, the court finds it a reasonable inference that the Apartment 3F bedroom is directly below the Apartment 4F bedroom. The photographs showing wall-to-wall carpeting in the Apartment 4F bedroom, which Respondent's husband testified has been there since 2016 when he moved in, belie the Saars' testimony that the loudest banging, stomping and dragging of furniture can be heard coming from above their bedroom.

A high threshold of proof is required for eviction based on nuisance, *Domen Holding Co, supra* (1 NY3d at 124, 802 NE2d at 139, 769 NYS2d at 789). As explained by the Hon. Sabrina Kraus in a post-trial decision dismissing a nuisance holdover petition based on noise allegations, *Goldman v Flynn* (2015 NY Misc LEXIS 2901, 2015 NY Slip Op 31489[U] [Civ Ct NY Co]),

Generally, where noise has been found to establish nuisance, the noise disturbed multiple residents in the building [[see eg *Brodcom West Dev. Co. v Best* 23 Misc 3d 1140\[A\]](#), 889 N.Y.S.2d 881, 2009 NY Slip Op 51208[U]; *Roaj Realty Inc. v Ortega* 2002 NY Slip Op 50214[U]; *Carnegie Park Associates v Graff* 2003 NY Slip Op 51198[U]].

[See also *Prince George Assoc LP v Mais* \(44 Misc 3d 1202\[A\]](#), 997 NYS2d 100 [Civ Ct NY Co 2014])(dismissing nuisance holdover proceeding and finding landlord failed to meet its burden of establishing by a preponderance of credible evidence that tenant's behavior constituted a nuisance where only one tenant testified and the court found that tenant to be an unreliable witness); *Louisiana Leasing Co v Sokolow* (48 Misc 2d 1014, 266 NYS2d 447 [Civ Ct Qns Co 1966])(in dismissing after

trial a nuisance holdover proceeding based on the downstairs neighbors' noise complaints, noting that "they are all nice people and a little mutual forbearance and understanding of each other's problems should resolve the issues to everyone's satisfaction").

When it comes to noise and odors, the long-standing prevailing philosophy is that these "are an inescapable reality of urban life," *Stiglianese v Vallone* (168 Misc 2d 446, 452, 637 NYS2d 284, 288 [Civ Ct NY Co 1995], *rev'd*, 174 Misc 2d 312, 666 NYS2d 362 [App Term 1997], *rev'd*, 255 AD2d 167, 680 NYS2d 224 [1st Dep't 1998]). In dismissing a nuisance holdover based on noise in 1943, Municipal Court Judge Crawford noted, "Apartment-house living in a metropolitan area is attended with certain well-known inconveniences and discomforts. The peace and quiet of a rural estate or the sylvan silence of a mountain lodge cannot be expected in a multiple dwelling. Mutual forbearance and the golden rule should, but unfortunately in many cases do not, act as the yardstick for the conduct of tenants in apartment houses. Reasonable consideration of the comforts of neighbors should be exercised by the occupants." *Twin Elm Management Corp v Banks* (181 Misc96, 97, 46 NYS2d 952, 953 [Municipal Ct Qns Co 1943]).

Even if the court were to find each couple — Respondent and her husband, and Mr. and Ms. Saar — to be equally credible, Respondent's eviction would not be warranted as the evidence against her does not preponderate over her own credible evidence to the contrary. The court finds it baffling that none of the witnesses could provide any explanation for why what once had been a friendly and respectful relationship between two neighboring families deteriorated so badly that the Saars have pressed their landlord to seek their neighbors' eviction. However, it is not necessary for the court to understand the motivation in order to find that Petitioner simply failed to establish by a preponderance of the evidence at trial that Respondent and her family [*9] should be evicted because of the complaints of their downstairs neighbors. It is hard to fathom how the noises described by the Saars would not bother neighbors in adjoining apartments and the absence from the trial of anyone complaining about noise other than Mr. and Ms. Saar is striking.

CONCLUSION

For the reasons stated above, and based on the credible evidence adduced at trial, the petition is dismissed, with prejudice. This constitutes the Decision and Order of this Court, copies of which will be mailed to the parties' respective attorneys. Counsel may pick up their documents that were submitted into evidence as trial exhibits from the Part T/S Clerk in Room 409 or 410 within thirty

days. If the exhibits are not picked up by January 26, 2020, they may be disposed of in accordance with Administrative Directives.

Diane E. Lutwak, Hsg. Ct. J.
Dated: December 26, 2019
Bronx, New York

[Return to Decision List](#)