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3021 Ave. I LLC v. Starker

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[*1]

3021 Ave. I LLC v Starker
2022 NY Slip Op 51020(U)
Decided on August 22, 2022
Civil Court Of The City Of New York, Kings County
Stoller, J.
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This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 22, 2022

Civil Court of the City of New York, Kings County

3021 Avenue I LLC, Petitioner,

against

Jan K. Starker, Respondent.

Index No. 300690/2021

For Petitioner: Mark McMillan

For Respondent: Darren Kirton

Jack Stoller, J.

3021 Avenue I LLC, the petitioner in this proceeding ("Petitioner"), commenced this proceeding against Jan K. Starker, the respondent in this proceeding ("Respondent"), seeking a money judgment and possession of 3021 Avenue I, Apt. B5, Brooklyn, New York ("the subject premises") on an allegation of nonpayment of rent. Respondent interposed an answer containing an affirmative defense seeking a rent abatement. The Court held a trial of this matter on May 12, 2022, June 21, 2022, and August 2, 2022.

The trial record

The parties stipulated that Petitioner is a proper party to commence this proceeding; that the parties are in a landlord/tenant relationship with one another; that Petitioner has complied with the registration requirements of MDL §325; that the subject premises is subject to Rent Control; that the monthly rent is $408.83; that arrears through May 31, 2022 are $11,856.07, and that Petitioner demanded the rent pursuant to RPAPL §711(2) before commencing this proceeding.

Respondent testified that he is in his seventies; that he is a college graduate; that he has been an IT manager for over twenty years; that he has lived in the subject premises for over twenty years; that because of the COVID-19 pandemic, he was working at home from around 7:30 a.m. until 5 p.m. or 6 p.m.; that he has never had issues paying rent; that the building in which the subject premises is located ("the Building") is a residential apartment building; that the subject premises has one bedroom, one living room, and one kitchen; that he lives alone; that on September 9, 2018, the new tenants for apartment C5 ("the Upstairs Unit") knocked on his door and told him that they would be the new tenants ("the Upstairs Tenants") moving in above; that significant amounts of continuous noise happened since they moved in; that there was a disregard for everyone around them; that he would hear kids screaming and bouncing; that he could not eat his breakfast without intrusive noise; that he wrote a letter on July 31, 2019 to [*2]Petitioner; and that he got no response from the letter.

Respondent submitted into evidence letters that he and his attorney wrote to Petitioner complaining about noise, dated July 31, 2019, January 21, 2020, and February 4, 2021 complaining about noise. Respondent submitted into evidence an invoice dated September 7, 2021 to the Upstairs Tenants for $4,500, a flyer that Respondent had received underneath his door advertising a child daycare center run in the Upstairs Unit, social media posts from the daycare center in the Upstairs Unit, and advertisements for the daycare in the Upstairs Unit. Respondent submitted into evidence recordings of sounds that he had heard in the subject premises, although the sounds are indiscriminate and hard to discern.

Respondent testified that he looked for an attorney on October 10, 2019; that he stopped paying rent because of the lack of response; that the Upstairs Tenants are running a major commercial day care center there; that it has ruined his life; that no one came to the subject premises to see about the noise; that Jose Rosado, the super ("the Super") came to the subject premises; that he let the Super hear the noise; that nothing changed; that the Super called the office around 5:30 p.m. and told the office what was going on; that someone named "Nancy" at the office and then "Olivia" were supposed to send a letter to the Upstairs Unit, but it was never sent; that the living room, the kitchen, and the bedroom were affected by the noise; that

he cannot use the rooms because the noise is so intrusive; that the noise interferes with any conversations he has having; that the noise starts around 7:30 a.m. and goes until 5:00 or 5:30 p.m. from Monday through Friday; that the noise affects his ability to work from home; that he got notice that soundproofing was paid for by someone who he does not know; that Petitioner said to him that the Upstairs Tenant paid for half of it; that there is some dispute about who paid for the flooring; that the new flooring that allows someone to fall on a floor and be protected but it is not soundproofing; that the new flooring did not alleviate the noise; that he has been to the Upstairs Unit when there was noise; that he could not tolerate that level of jumping around and screaming; that he asked them to please stop the noise; that he could see into the Upstairs Unit; that he saw a whole bunch of kids screaming and running; that there must have been four or five kids in the hallways with one of the sisters and about ten kids running around in the living room jumping and screaming; that he called police; that he researched social media for the service they were rendering; that he got a leaflet that they handed out; that on social media sites, he saw photographs of the Upstairs Unit's living room, which he recognized from when he had peeked in; that they had no furniture in the living room except for kids' furniture; that the Upstairs Tenants are named Brenda Moreno and Ramona Valdez; that no one checked to see if the sound improved after the soundproofing was put down; that he did not used to have problems with sound before the Upstairs Tenants moved in; that the subject premises is miserable; that he constantly has to stop what he is doing; that it totally interrupts everything he is doing; that he cannot eat; and that he has not had the full use of the subject premises.

Respondent testified on cross-examination that he worked full-time remotely during the pandemic; that before that he worked remotely some of the time; that he has to wait until the evening to work; that he has lost employment as a result of this; that on October 20 Joseph Rosenfeld ("the Site Manager") showed up; that he spoke with the Upstairs Tenants on January 8, when a huge amount of kids were banging and screaming; that it was unbearable; that one of the Upstairs Tenants came to the door; that he asked her to stop the noise; that there were ten or fourteen children in the Upstairs Unit running around, screaming, and banging; that she did nothing; that he is unaware of any efforts to decrease the noise; that he recently became aware of [*3]some installation of flooring upstairs; and that he heard that there was an invoice for the installation of flooring.

Respondent testified on redirect examination that October 20, when someone showed up, was after the commencement of this proceeding; that he had written Petitioner about that; that nothing was done; that he continued to pay rent after the letter that he sent which was dated July 31, 2019; and that he never received any response.

One of the Upstairs Tenants, Brenda Moreno ("the Upstairs Tenant") testified that she has lived in the Upstairs Unit since 2018; that she started the daycare after she moved in; and that she has a nine-month-old daughter. Petitioner submitted into evidence the Upstairs Tenant's license for day care, issued by the State of New York, and effective from December 5, 2020 through December 4, 2024 for the Upstairs Unit, for no more than twelve children, aged six weeks to twelve years, and four additional school-aged children. The license provides that the Upstairs Tenant must have one caregiver for every two children under the age of two years in attendance.

The Upstairs Tenant testified that in order to obtain the license, she had to provide information and create a safety plan; that an inspection follows; that she had to show the inspector a fire extinguisher, two means of egress, and gates; that she had to take a class in health and safety and CPR and be fingerprinted; that she, her sister, and another person took the course; that the daycare is inspected every year; that the last inspection for her was in May; and that she was told to close in 2020 because of the COVID-19 pandemic. Petitioner submitted into evidence a document called a compliance history issued by the New York State Office of Children and Family Services.

The Upstairs Tenant testified that group family daycare has to be in a residential premises, as opposed to a group center which is in a commercial premises; that the daycare was not operational from March of 2020 until July of 2021; that she is now open from 7:30 a.m. to 4:30 p.m. in part because of Respondent's complaining to parents; that she knows that the Upstairs Unit is directly above the subject premises; that she has had conversations with Respondent when he knocked very angrily; that she asked Respondent to come back at a later time when he knocked; that they called police; that she tried to speak with Respondent outside of business hours; that the daycare is operating during business hours; that there is no noise at night or on the weekend; that Respondent has said that he would take her to Court; that Respondent approached a lot of families and asked them what would happen if there was a fire; that Respondent called regulators on her to say that there was a termite infestation; that she effectuated an installation of a soundproof floor and a laminate floor on top; that she had caused the installation of laminate flooring at the inception of the business; that the floor now has three layers; that Petitioner spoke to her about the issue; that there are about eight children day-to-day although they are licensed for more; that she only uses the living room and the bathroom for the daycare; that she does not use the bedrooms for the daycare; that only adults enter the kitchen; that children are there from 12 noon to 3 p.m.; that during spring and summer they spend most of their days at the park from 9 a.m. to 12 noon; that

they have breakfast and lunch and play outdoors; that they come back to wash up and for napping; that dismissal starts at around 3 p.m.; that 12 p.m. to 3 p.m. is naptime depending on when they have lunch; that the kids are between one and four years old; that some days there are only three children; that the daycare does not consistently have eight children; that a lot of children leave early for other activities their parents plan, like swimming; that she has not talked to Respondent since this case started; that she [*4]emailed Petitioner when this case started; that Petitioner asked her if the business was legal and whether she could put something down on the floor; that she installed a new layer when Petitioner questioned her; and that the flooring was installed was around July of 2021 because the complaints began again.

The Upstairs Tenant testified on cross-examination that there are bedrooms in the Upstairs Unit; that she lives with her daughter; that she moved there in August of 2018; that it was not her intention to open a daycare when she first moved in; that she started the day care licensing process in December of 2018; that Petitioner did not know when she moved that she wanted to start a daycare business; that Petitioner offered her a commercial lease but she wanted to keep a residential lease; that Respondent complained about the noise; that Respondent did not complain from the time that she moved in, but he started to complain when the daycare started; that Respondent complained several times since they began; that Respondent rang their bell and followed her into the Building; that Respondent put his foot in the door; that no other tenant complained; that tenants live to the right and left of the Upstairs Unit; that only the subject premises is below the Upstairs Unit; that Petitioner informed her about a noise complaint; that she did not have a daycare until January of 2019; that Respondent started complaining when one child came for that daycare; that her daughter is now not with the daycare because her daughter goes to school; that her daughter would stay with her daughter's grandmother so the Upstairs Tenant could work; that a professional soundproofer did work in the subject premises; that she was present when the soundproofing was installed; that the installation took more than seven hours; that she did not rip up the floors underneath; that the soundproofer installed two layers of a thick underlayment, plus laminate flooring on top; that Respondent would not allow someone in the subject premises to check to see if it worked; that she told Petitioner that the problem was fixed; that she does not know if the complaints continued; that she does not know what, if anything, the contractor did to check on the efficacy of the soundproofing; that the contractor installed the flooring and left; that she has a master's degree in school counseling; that group family centers must be in residential setting; that group family means a child care business that is run in a residential building; that the maximum is twelve plus four; that she could have up to

sixteen children; that on a sunny day the children are outside from 9 a.m. to 12 p.m.; that in the winter the children are inside; that everyone is napping from 12 p.m. to 3 p.m.; that both she and her sister were there when Respondent put his foot in the door; that she does not have a police report; and that Respondent was not arrested.

The Upstairs Tenant testified on redirect examination that she was unaware of complaints before January of 2019; that her daughter was about nine months when she moved in; that her daughter was not walking when she moved in; that Respondent did not go further into the Upstairs Unit at the time that he put his foot into the door; that Respondent did not have a camera when he put his foot in the door; and that twelve is the maximum number of children she has ever had.

The Site Manager testified that he is the site manager for Petitioner; that he is familiar with Respondent; that he has been to the subject premises in 2022; that he knocked on the door; that he met Respondent; that he knows that Respondent was complaining; that Respondent let him in; that he waited 15 to 20 minutes but he did not hear anything; that this was around 10 or 11 a.m.; that he never went inside the Upstairs Unit; and that he looked in to see that the Upstairs Tenants installed the carpet.

The Site Manager testified on cross-examination that he did not come back to the subject [*5]premises in the afternoon of the day of his visit and that his office notified him of noise complaints.

Discussion

Noise from neighbors can conceivably entitle a tenant to a rent abatement. *Nostrand Gardens Co-Op v. Howard*, 221 AD2d 637 (2nd Dept. 1995). Be that as it may, a resident of a large city cannot reasonably expect to be "surrounded by the stillness which prevails in a rural district." *Carroll v. Radoniqi*, 2012 NY Misc. LEXIS 4423 (S. Ct. NY Co. 2012) (Gische, J.), *aff'd*, 105 AD3d 493, 494 (1st Dept. 2013). To be actionable, then, such noise must be "so excessive as to deprive a tenant of the essential functions that a residence is supposed to provide", *Armstrong v. Archives LLC*, 46 AD3d 465, 466 (1st Dept. 2007), *Kaniklidis v. 235 Lincoln Place Hous. Corp.*, 305 AD2d 546, 547 (2nd Dept. 2003), for example, when the noise continues through the late night and early morning. *Nostrand Gardens Co-Op*, *supra*, 221 AD2d at 637.

The particular facts of this case warrant a review of daycare in a residential setting. In

recognition of a serious shortage of child-care facilities throughout New York State, the Legislature sought to expand the availability and accessibility of such day care facilities, Quinones v. Bd. of Managers of Regalwalk Condo. I, 242 AD2d 52, 56-57 (2nd Dept. 1998), in part by limiting municipalities from restricting the operation of licensed group daycare in multiple dwellings. Soc. Servs. Law §390(12)(a). This policy operates to deprive landlords of a cause of action to evict residential tenants who maintain licensed group daycare in their apartments. *Marick Real Estate, LLC v. Ramirez*, 11 Misc 3d 42, 43 (App. Term 2nd Dept. 2005), *S. Blvd. 1 v. Escoto*, 2015 N.Y.L.J. LEXIS 5955 (Civ. Ct. Bronx Co.), *Dempsey Apts. Assocs. v. Santana*, 2014 N.Y.L.J. LEXIS 7486 (Civ. Ct. NY Co.), Riverdale Osborne Towers Hous. Assocs., LLC v. Keaton, 41 Misc 3d 537 (Civ. Ct. Kings Co. 2013). Group daycare is therefore an acceptable use of the Upstairs Unit.

The Upstairs Tenant testified that she served a smaller number of children than one would expect if one credited Respondent's testimony about the extent of the noise he experienced. Be that as it may, any operation of a daycare for small children will foreseeably entail at least some noise. Sounds from a neighboring apartment do not breach the warranty of habitability when they are incidental to normal occupancy, such as a use of a washer/dryer, *Kaniklidis*, *supra*, 305 AD2d at 546, snoring, *Brown v. Blennerhasset Corp.*, 113 AD3d 454 (1st Dept. 2014), or as is particularly relevant to this matter, heavy footsteps, banging, *Kaniklidis*, *supra*, 305 AD2d at 546, and children "stomping." *O'Hara v. Bd. of Dirs. of the Park Ave. & Seventy-Seventh St. Corp.*, 206 AD3d 476 (1st Dept. 2022). Another incident of a daycare is that it does not operate at night, which is consistent with Respondent's testimony. A failure to allege that noise occurred after 9 p.m. is a factor in determining that the noise did not breach the warranty of habitability. *Green Garden Corp. v. Mansoor*, 64 Misc 3d 128(A) (App. Term 2nd Dept. 2019).

Assuming *arguendo* that the daycare in the Upstairs Unit deprived Respondent of the essential functions of the subject premises, the response to Respondent's complaints also factors into a determination of a breach of the warranty of habitability. A landlord's failure to take any steps to abate a nuisance entitled a tenant to a rent abatement. Cameron v. Christopher St. Owners Corp., 2019 NY Slip Op. 31839(U), ¶ 5 (S. Ct. NY Co.)(Cannataro, J.), *Nostrand Gardens Co-Op*, *supra*, 221 AD2d at 637. However, the record at this trial does not show a failure to respond. Petitioner followed up on Respondent's complaints. More importantly, the [*6]Upstairs Tenants installed additional flooring. Such attempts to ameliorate noise demonstrate that a landlord has not breached the warranty of habitability. *See*, *e.g.*, *Armstrong*, *supra*, 46 AD3d at 466 (a landlord does not breach the warranty of habitability when it called an offending tenant and set up meetings to explore relocation

options), Green Garden Corp., *supra*, 64 Misc 3d at 128(A)(a landlord did not breach the warranty of habitability when it took steps to procure the laying of carpeting or rugs on the floor of an offending apartment).

To a great extent, landlords are strictly liable for breaches of the warranty of habitability. *McBride v. 218 E. 70th St. Assocs.*, 102 Misc 2d 279, 283 (App. Term 1st Dept. 1979), *Leris Realty Corp. v. Robbins*, 95 Misc 2d 712, 714 (Civ. Ct. NY Co. 1978), *citing Reichick v. Matteo*, N.Y.L.J. January 23, 1978, at 13:2 (App. Term 2nd Dept.), *George v. Bd. of Dirs. of One W. 64th St., Inc.*, 2011 NY Slip Op. 32325(U), ¶ 9 (S. Ct. NY Co.), *Brooks Family Holdings Llc v. Morrison*, 2017 N.Y.L.J. LEXIS 657, *5 (Civ. Ct. Queens Co.). However, the above authority relieving landlords from rent abatements on efforts to address noise indicate a qualification to that strict liability. Petitioner cannot evict the Upstairs Tenants for operating a daycare. Some noise will inevitably result from the operation of a daycare. Petitioner and the Upstairs Tenants took some measures to address the noise. The authority therefore indicates that they have discharged their responsibilities as such.

Accordingly, it is ordered that the Court dismisses Respondent's defenses. It is ordered that the Court awards Petitioner a final judgment in the amount of $11,856.07, representing rent arrears through May 31, 2022. Issuance of the warrant of eviction is stayed through August 29, 2022 for Respondent to pay Petitioner $11,856.07.[FN1] On payment, issuance of the warrant shall be permanently stayed. On default, the warrant may issue and execute after service of a marshal's notice.

This constitutes the decision and order of this Court.

Dated: August 22, 2022
Brooklyn, New York

_____
HON. JACK STOLLER
J.H.C.

Footnotes

Footnote 1: After a judgment in a nonpayment proceeding, the issuance of the warrant can be stayed for five days. RPAPL §732(2). Five days from this writing is August 27, 2022, a Saturday. If a period of time according to which an act is to be done falls on a Saturday, the act may be done on the next business day. General Construction Law §25-a(1). The next business day after August 27, 2022 is August 29, 2022.