2023-06-23

CHAPMAN v. 2278 BPE LLC

Civil Court of the City of New York
County of Bronx: Part 11

Index # **CV-005777-22/BX**

Kevin Chapman
Plaintiff(s)

-against-

2278 BPE LLC
Defendant(s)

Decision/Order
After Trial

Both sides having appeared for trial, and the Court having considered the evidence and testimony presented by the parties, the Decision and Order of the Court is judgment for defendant. Additionally, for the reasons described herein, the Court denies the parties' respective trial and post-trial motions.

Defendant's mid-trial motion pursuant to CPLR 4401 seeking a directed verdict in defendant's favor, which was held in abeyance to allow the completion of the entire trial, is denied as moot as the Court has rendered a verdict in defendant's favor, and also for reasons set forth on the record at trial as every possible inference must be drawn in plaintiff's favor in considering defendant's motion. *See, Bligen v. New York City Tr. Auth.*, 161 A.D.3d 487, 488 (1st Dept. 2018).[1]

To the extent that plaintiff's post-trial emails are to be construed as a motion to re-open the trial record to present further evidence, such motion is also denied on both procedural and substantive grounds. Plaintiff did not specify what evidence or testimony he intended to offer, or why he could not have presented that evidence during his case in chief, particularly where, as here, the vast majority of the two days of trial involved plaintiff giving testimony for many hours in the narrative. Further, in addition to plaintiff's testimony, the Court permitted the parties leave to submit written post-trial summations, which plaintiff submitted and the Court accepted *nunc pro tunc* despite its late submission after having already been granted a one-week extension. In sum, there is simply no basis to re-open the evidentiary record in this action.[2]

Additionally, to the extent that plaintiff's post-trial emails are to be construed as a motion to reconsider the Court's ruling that uncertified copies of medical records, without authentication by the custodian of those records at trial, are excluded from consideration, such motion is denied pursuant to CPLR 2221. In any event, it should be noted that all of the medical evidence plaintiff sought to introduce

[1] In his papers, including in his two post-trial orders to show cause, plaintiff appears to take great issue with the fact that the Court held "in abeyance" the Court's decision on defendant's motion for a directed verdict. It appears that plaintiff might be misunderstanding what this means, which is that the Court was declining to immediately dismiss plaintiff's case before the end of trial (as defendant requested) and instead permitted the trial to continue to its completion (which was to plaintiff's benefit).

[2] Subsequent to submitting his written summation, plaintiff sought two orders to show cause seeking to re-open the record to include various materials, and exclude evidence defendant offered at trial, each of which were declined respectively on June 6, 2023 (Isales, J.) and June 8, 2023 (Zellan, J.).

at trial and sought to compel the Court to consider in his post-trial orders to show cause and written summations, relate entirely to the issue of damages. However, as the Court has found that plaintiff failed to prove liability, the issue of damages is moot. In other words, even if the Court were to have allowed uncertified copies of unauthenticated medical records to be admitted, it would have made no difference in the outcome of the trial.

As to the trial, and as a threshold matter, the Court rejects defendant's argument that it owes no duty to mitigate nuisance behavior by other tenants. The First Department has recognized that a claim exists where "the alleged noise emanating from a neighboring apartment was so excessive that plaintiff [tenant] was deprived of the essential functions that a residence is supposed to provide" and defendant landlord failed to take reasonable steps to abate the neighbor's interference plaintiff's quiet use and enjoyment of the apartment. *See, Armstrong v. Archives L.L.C.*, 46 A.D.3d 465, 465 (1st Dept. 2007) (internal quotations and citations omitted); *see also, Brown v. Blennerhasset Corp.*, 113 A.D.3d 454, 455 (1st Dept. 2014) (affirming a cause of action by a plaintiff-tenant that "adequately alleges that [defendant-landlord] deprived plaintiff of her right to quietly enjoy her apartment by failing to take effective steps to abate allegedly excessive noise emanating from the neighboring...apartment"). Defendant's reliance on *Cortez v. Delmar Realty Co.* and related cases are wholly inapposite and misplaced as *Cortez* and its progeny all concern physical assaults by neighbors in which the courts found that "it cannot be said that the landlord had the ability or a reasonable opportunity to control the assailant." 57 A.D.3d 313, 313 (1st Dept. 2008). That is not this case. As the Court noted in denying defendant's pre-trial motion to dismiss this action, plaintiff's complaint stated a claim for which, if plaintiff could establish the claim at trial, relief could be granted – i.e., that defendant allegedly breached its obligations pursuant to the parties' lease and/or breached the common law warranty of habitability by failing to take reasonable measures to mitigate excessive noise by other tenants. Decision and Order dated Mar. 20, 2023, at 1, *citing Zarate v. A&E Tiebout Realty LLC*, 78 Misc. 3d 1239(A) (Civ. Ct., Bronx Co. 2022), *stay denied*, 2023 NY Slip Op 67716(U) (App. Term, 1st Dept. May 31, 2023) (discussing landlord's obligations to mitigate nuisance behavior by other tenants); *see also 3021 Ave. I LLC v. Starker*, 76 Misc. 3d 1222(A), *5 (Civ. Ct. Kings Co. 2022) ("Noise from neighbors can conceivably entitle a tenant to" relief from their landlord in New York.).

Defendant further argues that the only damages available to plaintiff in a case such as this would be in the form of rent abatement, and that because plaintiff's rent is heavily subsidized (in plaintiff's case 100% of his rent) through a public assistance program, he is precluded from an award of any damages, even if he were able to prove his prima facie case. The Court disagrees. Although reported cases discussing potential breaches by a landlord principally discuss remedies framed as abatements of rent (and often thought of as reducing an existing responsibility for unpaid rent), there is no indication in reported

case law (either in defendant's submissions of the Court's own research) that an abatement of rent is *exclusive* of other forms of monetary damages for an alleged breach of a tenant's right to use and enjoy their property and that plaintiff is foreclosed from seeking such monetary damages merely by virtue of his participation in a rent subsidy program. Indeed, closing the courthouse door to plaintiff and those similarly situated because he receives public rental assistance would be repugnant to the public policy the State. Accordingly, the Court will not preclude relief, to the extent plaintiff is entitled to any, based upon the source of plaintiff's rent payments.[3]

That said, the full record developed at trial does not establish any basis for relief. As stated, for plaintiff to be entitled to damages, plaintiff must first prove (1) that the alleged noise from the neighboring apartment was so excessive as to deprive plaintiff of the essential functions that a residence is supposed to provide, and (2) that defendant landlord failed to take reasonable steps to abate the neighbor's interference plaintiff's quiet use and enjoyment of the apartment. Plaintiff failed to meet his burden at trial on either of these issues.

While unreasonable noise can support a claim, such claim does not include "noises that are incidental to normal occupancy, including heavy footsteps, snoring, and using a dishwasher." *Brown*, at 454. Courts have cited *Brown* and noted that "excessive noise caused by the persistent running, jumping and playing of defendants' children…does not rise to the level of substantial and unreasonable interference with plaintiffs' enjoyment of their apartment because it is incidental to normal occupancy in an apartment building." *Bacarach v. Board of Mgrs. of the Brooks-Van Horn Condominium*, 76 Misc. 3d 1221(A), *2 (Sup. Ct., New York Co. 2022). *See also, 3021 Ave. I LLC*, at *5. Upon careful review and consideration of plaintiff's evidence of the alleged disturbances to his quiet use and enjoyment, including particularly the recordings presented at trial, the Court finds that the alleged noise simply does not rise to the level of substantial and unreasonable interference with plaintiff's use and enjoyment required to sustain such a

[3] Over 100,000 New Yorkers receive Section 8 housing subsidies (just one type of public housing assistance), which have "been a pillar of rental support for many American families." Matthew Haag, *'She Wants Well-Qualified People': 88 Landlords Accused of Housing Bias*, New York Times, (Mar. 16, 2021), at § A, p. 18. Such a rule would have the effect of perpetuating source-of-income discrimination in housing law, which the Legislature and enforcing agencies have expressly sought to eradicate. *See e.g.*, Lawful Source of Income Non-Discrimination Act of 2019; and N.Y.S. Div. of Human Rights, *Guidance on Protections From Source of Income Discrimination in Housing Under the New York State Human Rights Law* (2020). The law in this area is unequivocal that it "shall be construed liberally for the accomplishment of the remedial purposes thereof." *Guidance on Protections From Source of Income Discrimination in Housing Under the New York State Human Rights Law*, at 2 (citations omitted). To be clear, there is no indication that defendant is engaging in or seeks to engage in source-of-income discrimination (and counsel has advocated for its client in good faith), but the slippery slope of defendant's position risks the social fabric of the City in a way that the Court cannot abide. *See, Zarate v. A&E Tuebout Realty LLC*, 2023 NY Slip Op 50551(U), *2 n. 1 (Civ. Ct., Bronx Co. Jun. 7, 2023).

claim. This is not to say that plaintiff is insincere when he claims the acute disturbance he personally experienced on these occasions, but the standard for relief must be both objective as well as subjective.

Additionally, even if the level of disturbance proved in Court was more substantial, plaintiff would still not be entitled to damages as defendant took reasonable steps to abate the neighbor's alleged interference with plaintiff's quiet use and enjoyment of the apartment, if any. In stark contrast to the defendants in *Zarate*, defendants in the instant action offered competent witness testimony and a substantial amount of authenticated documentary evidence detailing repeated and sustained efforts to address plaintiff's concerns. Neither the common law nor the lease agreement necessarily requires that a landlord commence eviction proceedings (although it is conceivable such measure could be required depending on the severity of the nuisance) against an alleged offending tenant. Rather, a landlord must engage in good faith efforts to mitigate the alleged nuisance that are reasonable under the circumstances, which the Court finds they were in this instance.

Accordingly, the Court finds that plaintiff has not established a claim for relief.

Therefore, it is

ORDERED that defendant's motion for a directed verdict is denied; and it is further

ORDERED that plaintiff's motion to re-open the trial record is denied; and it is further

ORDERED that plaintiff's motion to reconsider the exclusion of certain damages evidence ruled upon during the trial is denied; and it is further

ORDERED that the clerk is directed to enter judgment after trial in favor of defendant dismissing this action.

This constitutes the Decision and Order of the Court.

Date: June 23, 2023

Hon. Jeffrey S. Zellan
Civil Court Judge (NYC)