

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

[All Decisions](#)

[Housing Court Decisions Project](#)

2024-01-16

71 Wash. Place Owners, Inc. v. Resnicow

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"71 Wash. Place Owners, Inc. v. Resnicow" (2024). *All Decisions*. 1310.
https://ir.lawnet.fordham.edu/housing_court_all/1310

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

71 Wash. Place Owners, Inc. v Resnicow

2024 NY Slip Op 30185(U)

January 16, 2024

Supreme Court, New York County

Docket Number: Index No. 151602/2022

Judge: Joel M. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X 71 WASHINGTON PLACE OWNERS, INC., <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> NORMAN RESNICOW, BARBARA RESNICOW <p style="text-align: center;">Defendants.</p>	<table border="0" style="width: 100%;"> <tr> <td style="width: 150px;">INDEX NO.</td> <td style="border-bottom: 1px solid black; text-align: right;">151602/2022</td> </tr> <tr> <td>MOTION DATE</td> <td style="border-bottom: 1px solid black; text-align: right;">N/A</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black; text-align: right;">005</td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	151602/2022	MOTION DATE	N/A	MOTION SEQ. NO.	005
INDEX NO.	151602/2022						
MOTION DATE	N/A						
MOTION SEQ. NO.	005						

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 212 were read on this motion to SUPPRESS EVIDENCE.

Defendants Norman Resnicow and Barbara Resnicow (the “Resnicows” or “Defendants”) move to suppress certain recordings made by their fellow tenant-shareholders of 71 Washington Place, New York (the “Building”), which were submitted by 71 Washington Place Owners, Inc., (the “Co-op” of “Plaintiff”) in support of its motion for Summary Judgment (Mot. Seq. 003) in this ejectment action. For the following reasons, Defendants’ motion to suppress the recordings is denied, as the recordings were “freely overheard” and thus do not fall within CPLR 4506’s prohibition on evidence obtained by illegal eavesdropping.

CPLR 4506 provides that any evidence obtained by illegal eavesdropping (as defined by CPL 250.05 as when a person “unlawfully engages in wiretapping [and/or] mechanical overhearing of a conversation”) is inadmissible in every type of civil, criminal, administrative and legislative proceeding in New York. An “aggrieved person” under CPLR 4506(2)(b), as relevant here, is a “party to a conversation or discussion which was intentionally overheard or

recorded, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” (*id.*). “An aggrieved person who is a party to a civil trial, hearing or proceeding before any court, ... may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom, on the ground that: (a) The communication, conversation or discussion was unlawfully overheard or recorded” (CPLR § 4506[3]).¹

It is well established that “[t]hose who talk in the presence of a nonparticipating ‘third party,’ can have no expectation of privacy with respect to the statements overheard by the third party. . . . irrespective of whether that person is a party to the conversation or discussion” (Practice Commentaries: Penal Law § 250.05; see *People v Kirsh*, 176 AD2d 652, 652-653 [1st Dept 1991] [“absent a reasonable expectation of privacy, the recording of conversations, *per se*, is not illegal”; where a “witness freely heard the subject conversation, he was not guilty of illegal electronic surveillance” within the meaning of CPL 250.05, and CPLR 4506 does not apply]; *People v McFarland*, 106 AD3d 1129, 1131 [3d Dept 2013] [a police officer who overheard a defendant’s phone conversation with his sister by standing near the defendant was not eavesdropping within the meaning of N.Y. Penal Law § 250.05 when he recorded the conversation]).

Of particular relevance here, the First Department has noted that “it would seem that anyone who talks inside an apartment loud enough to be heard through the door in the public hall cannot really be believed to have an expectation of privacy” (*People v Volpe*, 89 AD2d 510, 511 [1st Dept 1982], *affd.*, 60 NY2d 803 [1983]; see also *United States v Llanes*, 398 F2d 880, 883

¹ Defendants’ motion is timely because it was made “before a justice of the supreme court of the judicial district in which the trial, hearing or proceeding is pending” (CPLR 4506[4]).

[2d Cir 1968] [holding that an individual who speaks in a tone audible to a person outside his door does not have a reasonable expectation of privacy; although the defendant expected that conversations spoken in his apartment would be private, his expectation of privacy was not reasonable] [applying fourth amendment analysis]).

Here, in support of its motion for summary judgment, the Co-op submitted audio recordings from May 3, 2020, and May 23, 2023.² Portions of the May 3, 2020 recording were quoted in the Second Objectable Conduct Letter, dated August 25, 2021 (NYSCEF 83), and the May 23, 2023 recording is referenced in David McCorkle’s moving affidavit, dated June 23, 2023 (NYSCEF 67 [“McCorkle Aff.”] ¶ 23). The recorded conversations consist of high-volume, profanity-laced arguments between the Resnicows inside their apartment that were overheard by tenant-shareholders Theroux and McCorkle in public areas of the building (NYSCEF 86 at ¶¶29-47; NYSCEF 67 at ¶23). Defendants have raised no material issues of fact as to whether the recordings were “freely overheard” by Theroux and McCorkle.

Since at least 2019, the Resnicows were told several times that their neighbors could hear the Resnicow’s arguments outside of their apartment in the common areas of the building. Specifically, in connection with a 2019 motion for contempt in a separate lawsuit, it was made known to Defendants that their screaming matches could be heard by their neighbors (*see Theroux v Resnicow* (Index No. 154642/2017 [Civ Ct, NY County], NYSCEF 186 ¶¶3-6). In response to that contempt motion, Mr. Resnicow admitted that he was not surprised that he can be heard outside his apartment, noting that “Barbara has worn hearing aids full-time for a number of years . . . I often have to raise my voice for her to hear me. Even without raising my

² The recordings were provided to the Court via flash drive.

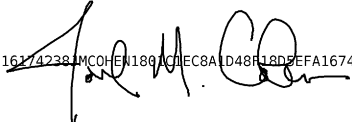
voice, I tend to speak at a volume higher than typical” (NYSCEF 180 ¶6). Furthermore, the First Objectionable Conduct Letter, dated May 29, 2019, details several occasions where “loud screams and abusive language” emanating from the Resnicow’s apartment could be heard in the hallways of the Building (NYSCEF 80). Thus, prior to the subject recordings being made, Defendants were notified and aware that other tenants in the building could hear them clearly in public areas of the building. Given this, the Resnicows cannot reasonably argue that they believed their arguments were private at the time the recordings were made. The Resnicows’ expectation of privacy, if any, was not reasonable.

Second, Defendants’ assertion that Theroux or McCorckle moved from one public space to another to obtain a clearer recording does not create an issue of fact. Defendant’s novel theory that there is a meaningful difference between recording sounds “freely overheard” in a single location versus recordings made while moving from one publicly accessible location to another to hear the sounds more clearly is not supported by the caselaw. Nor do Defendants cite any caselaw to support their contention that the Court must look at the intent of the party making the recording. Rather, the focus of CPLR 4506 and CPL 250.05 is on whether the party being recorded has a reasonable expectation of privacy.

Accordingly, it is

ORDERED that Defendants’ Motion to Suppress is **DENIED**.

This constitutes the Decision and Order of the Court.

20240116174238JMC0HEN18070CEC8A1D48F18DDEFA1674A460F1


JOEL M. COHEN, J.S.C.

1/16/2024
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: