

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 32

-----X
CHRISTIAN EWEN and BRETT EWEN,

Plaintiffs,

-against-

FEDERICO MACCHERONE and CATERINA
INTERNATIONAL, LTD.,

Defendants.
-----X

DECISION AND
ORDER

Index No.
31580/09

HON. ANIL C. SINGH, J.:

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This is a nuisance and negligence action by the owners of a condominium unit against the owner and occupant of a neighboring unit. Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1), (7), (8) and (10), contending that: a) this action is precluded by the by-laws, rules and regulations of the condominium association; b) the complaint fails to state causes of action for negligence and nuisance; c) the court lacks personal jurisdiction over defendant Caterina International, Ltd.; and d) the action should not proceed in the absence of

the condominium association as a party. Plaintiffs oppose the motion.

Plaintiffs Christian and Brett Ewen own and occupy Unit 7C at 200 Chambers Street in Manhattan. Defendant Federico Maccherone resides alone in Unit 7D, which is adjacent to plaintiffs' unit. Co-defendant Caterina International, Ltd., owns unit 7D.

Plaintiffs commenced this action by filing and serving a summons and verified complaint in July 2009. The complaint alleges that defendant Maccherone and his guests smoke cigarettes in his unit and that secondhand smoke is invading plaintiffs' unit. The problem is allegedly exacerbated by construction and design defects in the building that cause odors, dust and fumes to "migrate" throughout the structure. Plaintiffs seek damages in the amount of \$25,000.

The eleventh paragraph of the rules and regulations of the condominium states in pertinent part as follows:

No Unit Owner shall make or permit any disturbing or objectionable noises, odors or activity in the Building, or do or permit anything to be done therein, which will interfere with the rights, comforts or conveniences of other Unit Owners or their tenants or occupants.

(Affidavit of Christian Ewen, exhibit B, p. A-2, para. 11).

The rules and regulations expressly prohibit smoking in two specific areas

of the building (Maccherone Aff., exhibit B). Paragraph 40(G) states that smoking is absolutely prohibited in the playroom. Likewise, paragraph 41(O) states that smoking is not permitted in any area of the health club.

Defendants' first contention is that the complaint should be dismissed pursuant to CPLR 3211(a)(1), because documentary evidence substantiates that plaintiffs are prohibited from maintaining the instant action. Defendants assert that the bylaws, rules and regulations permit smoking in individual units and many other parts of the condominium. According to the defendants, the documents do not prohibit smoking in all of the residential units, the commercial units, the eighth floor roof deck, and the ground floor plaza. Furthermore, defendants argue that plaintiffs have no right to commence the instant action based on an alleged breach of the condominium rules, or the condominium Declarations and By-Laws, as the latter specifically reserve that right to the condominium board.

Section 6.19 of the condominium by-laws bears the heading "Remedies for Violations of By-Laws or Rules and Regulations by Unit Owners." It states as follows:

6.19.1 The violation of any of the Rules and Regulations or the breach of any By-Law contained herein, or the breach of any provision of the Declaration, shall give the Board the right, in addition to any other rights set forth in these By-Laws or the Declaration, (i) to enter the Unit or Common Elements in which, or as

to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Unit Owner, any structure, thing or condition resulting in such violation or breach and the Board shall not thereby be deemed guilty or liable in any matter of trespass, and/or (ii) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such violation or breach, provided that the Board gives the Unit Owner notice ... that such violation exists, that repairs or replacements are necessary and that the Board will complete such repairs or replacements in the event the Unit Owner does not promptly act or complete the repairs or replacements, and/or (iii) to levy such fines and penalties as the Board may deem appropriate, and the Board shall have the same remedies for non-payment of such fines and penalties as for non-payment of Common Charges.

6.19.2 The violation or breach of any of the provisions of these By-Laws, any of the Rules and Regulations or the Declaration with respect to any rights, easements, privileges or licenses granted to Sponsor or its designee shall give to Sponsor and its designee the right, in addition to any other rights set forth in these By-Laws or the Declaration, to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such violation or breach.

(Maccharone Aff., exhibit C).

On a motion to dismiss based upon CPLR 3211, the complaint is to be afforded a liberal construction (CPLR 3026). The allegations in the complaint are to be accepted as true, and the non-movant is to be afforded the benefit of every possible favorable inference (Zumpano v. Quinn, 6 N.Y.3d 666, 681 [2006]).

CPLR 3211(a)(1) provides that a party may move to dismiss a cause of action asserted against him on the ground that "a defense is founded upon

documentary evidence....” Under the rule, a dismissal is warranted only when the documentary evidence conclusively establishes a defense to the asserted claim as a matter of law (Leon v. Martinez, 84 N.Y.2d 83 [1994]). To defeat a pre-answer motion to dismiss, the opposing party is only required to allege facts that fit within any cognizable legal theory (Ladenberg Thalman & Co., Inc. v. Tim’s Amusements, Inc., 275 A.D.2d 243, 246 [1st Dep’t 2000]; Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 262 A.D.2d 188, 188 [1st Dep’t 1999]). Furthermore, if any question of fact exists with respect to the meaning and intent of the document, based on the documentary evidence supplied to the court, a dismissal pursuant to CPLR 3211(a)(1) is precluded (Khayyam v. Doyle, 231 A.D.2d 475, 476 [1st Dep’t 1996]).

The bylaws, rule and regulations on their face are silent regarding whether smoking is permitted or prohibited in individual units. On the one hand, the fact that the documents expressly prohibit smoking only in specific public areas of the building implies that smoking is allowed in private areas, such as individual units. On the other hand, paragraph 11 of the rules and regulations clearly states that unit owner are not allowed to permit objectionable odors to interfere with the “rights, comforts and conveniences” of other owners, tenants, or occupants. Such language implies that smoking is not allowed in individual units if secondhand

smokes invades other units, as is alleged in this case.

In light of the above analysis, it is clear to the court that the documentary evidence does not conclusively establish a defense to the asserted claim as a matter of law.

Defendants contention that the condominium board has the exclusive right to address an alleged breach of the condominium rules is equally meritless. While the by-laws state that the board has the right to commence legal action to remedy a violation of the bylaws, rules and regulations, the bylaws do not state that the board has the sole and exclusive right to commence an action. Nor do the documents expressly prohibit an owner, tenant, or occupant of a unit from commencing a nuisance action of this nature against the owner or occupant of another unit.

Defendants next contention is that the action should be dismissed for failure to state a cause of action for negligence and nuisance. They argue that all of plaintiffs' allegations relate to, and should be determined by, the terms and provisions of the condominium rules, which permit smoking in all areas of the condominium other than the children's playroom and the health club. Further, defendants contend that a "mere annoyance" of a smoking neighbor cannot rise to the actionable level of negligence or nuisance, especially when it is permitted by

the condominium rules.

“The elements of a private nuisance 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” (Donnelly v. Nicotra, 55 A.D.3d 868, 868-9 [2d Dep’t 2008]; Copart Industries, Inc. v. Consolidated Edison Company of New York, Inc., 41 N.Y.2d 564 [1977]).

There are no reported cases of a residential condominium owner/occupant instituting a nuisance action against the owner/occupant of an adjoining unit due to secondhand smoke. However, a commercial tenant commenced a nuisance action in the Supreme Court against an adjoining tenant as a result of second-hand cigarette smoke from the adjoining unit (Herbert Paul, CPA, PC v. 370 Lex, L.L.C., 7 Misc.3d 747 [Sup.Ct., N.Y. County, N.Y., 2005]). Additionally, odors emanating from a tenant’s premises may constitute a nuisance warranting eviction (see Zipper v. Haroldon Court Condominium, 39 A.D.3d 325 [1st Dep’t 2007]). It has also been held that second-hand smoke may give rise to a claim of breach of the implied warranty of habitability based on a constructive eviction (Poyck v. Bryant, 13 Misc.3d 699 [Civ. Ct. N.Y.C., N.Y. County, 2006]).

In short, the court finds that the facts set forth in the complaint are clearly

sufficient to state all of the elements of a cause of action for nuisance.

“To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause” (Kenney v. City of New York, 30 A.D.3d 261 [1st Dep’t 2006]).

The verified complaint in the instant matter alleges that engineer reports regarding the odor migration problem were sent to all unit owners, so that defendants were aware of the problem (Verified Complaint, para. 55). Plaintiffs allege that, pursuant to paragraph 6.14 of the condominium by-laws, the defendants were duty-bound not to engage in any activity that would interfere with the “rights, comforts or conveniences” of other unit owners/occupants (Verified Complaint, para. 57). The complaint alleges further that by allowing defendant Maccherone and his guests to smoke in Unit 7D, defendant Caterina permits disturbing and objectionable odors and activity in the building, and permits actions that interfere with the rights, comforts and conveniences of the plaintiffs (Verified Complaint, para. 58). Plaintiffs allege that as a result of secondhand smoke, as exacerbated by the odor migration problem, and as a result of defendant Caterina’s failure to abide by the by-laws, they have been forced to vacate their unit repeatedly. Finally, they allege that the smoke has caused their daughter to become ill and that they have incurred medical costs to treat the child’s ailments.

Accepting the allegations of the complaint as true and affording the plaintiffs the benefit of every possible favorable inference, the court finds that the specific facts alleged in the complaint are sufficient to make out all of the elements of a cause of action sounding in negligence.

Defendants' third contention is that the court does not have jurisdiction of co-defendant Caterina International, Ltd. While the Notice of Motion states that defendants are moving for an order to dismiss on the grounds that the court lacks personal jurisdiction over the entity, it appears that the moving papers fail to discuss the issue. In the absence of such a discussion, the court assumes that this prong of defendants' motion has been abandoned and is, therefore, without merit.

Defendants' final contention is that the complaint should be dismissed pursuant to CPLR 3211(a)(10), for failure to name the 200 Chambers Street Condominium and/or the board of managers to this action. According to defendants, it is clear from the declaration, bylaws, and condominium rules that the condominium and board of managers are necessary parties to any litigation concerning the building, construction defects, the condominium rules and enforcement and/or lack of enforcement of the rules.

Defendants' contention is meritless for two reasons. First, we reiterate that neither the bylaws nor the rules and regulations state that the board of managers or

the condominium possess the exclusive right to institute legal proceedings to abate a nuisance.

Second, the rules themselves state that unit owners are responsible for enforcing the rules. The rules state:

35. Notwithstanding any reference to "Unit Owner" in these Rules and Regulations, the Rules and Regulations of the Condominium shall be binding upon all tenants, guests and other occupants of the Condominium. Unit Owners shall be responsible for enforcing compliance with, and liable for any violation of, the Rules and Regulations by members of their families, guests, invitees, tenants, employees, agents, visitors and any other occupants of their Units.

(Affidavit of Christian Ewen, exhibit B, p. A-6, para. 35).

Here, the complaint names the owner of the offending unit as a co-defendant. Accordingly, defendants have not offered a persuasive reason why the board of managers and the condominium should be a party.

For the above reasons, defendants' motion is hereby denied. Defendants shall serve an answer within twenty (20) days of today.

The foregoing constitutes the decision and order of the court.

Date: December 1, 2009
New York, New York


Anil C. Singh

ANIL C. SINGH
JUDGE, CIVIL COURT