SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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GRECIA GROSS,

Plaintiff,

- v -

133 EAST 80TH STREET CORPORATION, JOE & THE JUICE NEW YORK LLC

Defendants.

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INDEX NO. 155888/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 28, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 87, 88, 89, 90, 91, 92

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this residential real estate action, plaintiff Grecia Gross moves for a preliminary injunction enjoining defendants 133 East 80th Street Corporation (the building) and Joe & The Juice New York LLC (Joe & The Juice or store) from creating or allowing noise into plaintiff's apartment in excess of what is permitted under the New York City Noise Code. By order dated July 21, 2021, this court granted plaintiff's request for a temporary restraining order, which sought the same relief as the underlying motion (NYSCEF Doc No 22).

BACKGROUND

Plaintiff owns shares of stock in the building corporation appurtenant to cooperative apartment 2A (the apartment) and is also the lessee under a proprietary lease (Gross Aff at ¶ 1, NYSCEF Doc No 3). The building is located on the corner of Lexington Avenue and is directly above the 4/5/6 subway line (Schmidt Aff at ¶¶ 13-14, NYSCEF Doc No 65). The apartment is located directly above a ground floor commercial space leased to defendant Joe & The Juice since February 2018 (NYSCEF Doc No 3 at ¶ 2; NYSCEF Doc No 65 at ¶ 6). Joe & The Juice is

a coffee shop / juice bar, which utilizes blenders and coffee grinders as necessary components of their business (NYSCEF Doc No 3 at ¶¶ 3-5).

Since October 2018, plaintiff asserts that her apartment has been "plagued with excessive, disruptive noise from" Joe & The Juice consisting of "incredibly loud bass music, excessive banging, and extremely loud whining machine noises . . . *nearly every single morning*" from approximately 7:00 a.m. until after 9:00 p.m. (NYSCEF Doc No 3 at ¶ 5 [emphasis in original]). Plaintiff alleges the noise prevents her from being able to sleep or rest, make telephone calls, and causes her headaches, undue stress, and anxiety (*id.*). Plaintiff sought to address the issue by speaking with the store's employees, requesting remedial efforts by the board of the corporation, and hiring an acoustical consulting service company, Acoustilog Inc. (Acoustilog), to perform sound testing and acoustical recordings from April 1, 2022 through April 11, 2022 (Fierstein Aff, at ¶¶ 11-15, NYSCEF Doc No 13).

Acoustilog's findings, submitted by affidavit of Alan Fierstein, Acoustilog's president, confirmed that the excessive noise plaintiff alleged hearing came from the store below and was "likely caused by a lack of sufficient soundproofing in the [b]uilding's commercial space" (NYSCEF Doc No 3 at ¶ 38). It additionally found that the noise is sporadic and unpredictable which can cause a "startle effect" that is more than just a matter of annoyance (*id.* at ¶ 39). Since the Acoustilog report came out, Joe & The Juice claims it has taken measures to reduce the noise coming from its store (*see* NYSCEF Doc No 65 at ¶ 29). Nevertheless, the noise continues to emanate from Joe & The Juice and Acoustilog outlines a series of additional steps that should be considered by defendants to ensure the issue is resolved (Fierstein Reply Aff at ¶ 58, NYSCEF Doc No 87).

Plaintiff argues that all of the elements for a preliminary injunction are met: (1) she has demonstrated a likelihood of success on the merits for all three causes of action (nuisance, breach of contract, and breach of the warranty of habitability); (2) she will suffer irreparable harm if the preliminary injunction is not granted; and (3) the balance of equities tips in her favor. Defendants argue that plaintiff does not have standing to demand the relief sought because there is no private right to adjudicate Noise Code violations and she cannot demonstrate the necessary elements for the issuance of a preliminary injunction.

DISCUSSION

It is well-established that a preliminary injunction will only be issued if plaintiff demonstrates, with convincing evidentiary support, a likelihood of success on the merits, irreparable injury absent granting of a preliminary injunction, and that a balancing of equities favors its position (CPLR § 6301; *Nobu Next Door, LLC v. Fina Arts Housing, Inc*., 4 N.Y.3d 839, 840 [2005]; *LAIG v. Medanito S.A*., 130 A.D.3d 466 [1st Dept 2015]). Here, plaintiff has met all of these elements.

Likelihood of Success on the Merits

To establish a likelihood of success on the merits, "a prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioners' claims should be left to a full hearing on the merits" (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016] [internal quotations omitted]). "A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive (*id.*; *see also* CPLR 6312 § [c] [an issue of fact "shall not in itself be grounds for denial of the motion"]). Here, plaintiff brings three claims: private nuisance, as against defendants, and breach of contract and breach of the warranty of habitability, as against the building.

To prevail on her nuisance claim, plaintiff must prove that defendants are substantially and unreasonably interfering with plaintiff's use and enjoyment of her home (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 123 [2003]). "Noise of such character as to produce actual physical discomfort and annoyance to a person of ordinary sensibilities is a nuisance, even though it is caused by conducting a trade or business in a city" (*Dillon v Cortland Baking Co.*, 224 AD 303, 305 [3d Dept 1928]). Plaintiff has demonstrated that the noise emanating from Joe & The Juice is unreasonably loud and substantially interferes with her use and enjoyment of her apartment. The affidavits submitted by plaintiff and her son detail years-long disturbances of loud music, banging, and mechanical noises that have harmed her life in a variety of essential ways (*i.e.*, sleep issues, stress and anxiety, and social interruptions). Additionally, the two reports submitted by Acoustilog demonstrate that Joe & The Juice is violating New York City's Noise Code. Fierstein states that

> "[t]he recording picked up *hundreds* of banging and machine sounds, as well as other incidents of disturbing noise over the course of the 10 days . . . [T]hese banging and machine sounds are caused by employees and machinery (such as coffee grinders, blenders, and smoothie machines) in the [s]tore. Not only does the character of the sounds clearly show that the noise disturbance came from the first floor, but as further confirmation, the accelerometer data from the vibration on the [a]partment's floor clearly correlates with the bangs and machine noise"

(NYSCEF Doc No 13 at ¶ 15) He elaborates that

> "[t]he impulsive sounds and the continuous machine sounds are easy to distinguish from traffic and miscellaneous sounds, both visually and aurally. These noises are substantially louder than the background level, or 'ambient,' which is shown just before and after the noisy events. The impulsive sounds are typically at least 16-17 dBA . . . higher than the background level, 'or ambient, which is shown just before and after the noisy events, while the continuous machine sounds are at least 12-13 decibels higher than ambient noise"

(*id.* at ¶ 18). The findings of 16-17 dBA impulsive sounds violate Noise Code 24-218 [b] [3] because they are greater than the 15-dBA increase threshold for impulsive noise and "the continuous machine sounds were recorded at as high as 24 dB above the ambient level at various frequencies, which violates Noise Code 24-218 [b] [2], since it is greater than the 10-decibel increase threshold for daytime noise" (*id.* at ¶¶ 21, 23). Noise issues persisted when Fierstein conducted additional acoustic tests on August 30, 2022 (*see generally* NYSCEF Doc No 87).

Defendants' assertion that the relief sought by plaintiff is inappropriate because there is no private right to enforce the Nuisance Code is unavailing because plaintiff is only seeking to use the Nuisance Code violations to support her common law nuisance claim. Defendants also argue that there are multiple issues of fact regarding the Acoustilog report such as the methodology being skewed and the findings being out of date, yet the reporting occurred twice, with the first report taking place over a period of ten days, and the second occurring as recently as August 2022. Additionally, the affidavit of plaintiff's expert wherein he establishes the noise complained of was significantly above the legal limit under the Noise Code is unrebutted by competent proof.

Since plaintiff has demonstrated a likelihood of success on the merits of her nuisance claim, it is not necessary to consider the remaining claims on this motion (*see Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285, 295 [Sup Ct, NY County 2004]).

Irreparable Injury

An irreparable injury for purposes of granting a preliminary injunction is an "injury for which money damages are insufficient" (*Bashian & Farber, LLP v Syms*, 147 AD3d 714, 717 [2d Dept 2017]; *see also U.S. Re Cos. v Scheerer*, 41 AD3d 152, 155 [1st Dept 2007]). Plaintiff's affidavit details the harm the noise has caused her (NYSCEF Doc No 3 at ¶ 5 [the noise

"prevents [plaintiff] from being able to sleep or rest, or to make or stay on telephone calls, and causes [her] headaches, undue stress, and anxiety. In short, it makes it almost impossible for [plaintiff] to live in [her] home."]). Therefore, plaintiff has established irreparable harm for which money damages are insufficient if the preliminary injunction is not granted.

Balance of Equities

Courts must weigh the irreparable harm that would be suffered by the movant in the absence of an injunction against the burden or harm to the opposing party through the imposition of an injunction (*McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165 [2d Dept 1996]). Here, defendants' burden of stopping or lowering the store's music, instructing employees not to bang equipment or slam doors, and finding some temporary sound-proofing solutions until a more long-term solution can be agreed upon does not outweigh the harm caused to plaintiff by the continued disturbances to her quality of life at home.

Additionally, defendants cannot claim prejudice or inequity from being required to comply with their contractual or statutory obligations (*see Stellar Sutton LLC v Dushey*, 82 AD3d 485, 487 [1st Dept 2011] [equities favored injunction under which non-moving party "would be required merely to abide by the terms of its purchase of the building"]; *see also Doe v Dinkins*, 192 AD2d 270, 276 [1st Dept 1993] [equities favored injunction requiring defendant to comply with legal obligations]).

Lastly, the case proffered by defendants, *McGuire v Bloomingdale*, 8 Misc 478 [NY Com Pl 1894], is easily distinguishable from the present matter considering the plaintiff in *McGuire* was seeking to enjoin defendants from running essential machines and equipment for their business. Here, plaintiff is not asking for Joe & The Juice to completely stop operating their business, she is only asking for defendants to take additional measures to lower or eliminate the

noise disturbances. None of Fierstein's remedial suggestions include closing shop. Therefore, the third element is satisfied. Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction enjoining and restraining defendants from creating or allowing noise from defendant Joe & The Juice New York, LLC into plaintiff's apartment in excess of what is allowed under the New York City Noise Code is granted; and it is further

ORDERED that pursuant to CPLR § 6312 (b) the preliminary injunction is conditioned on plaintiff posting a bond in the amount of $5,000.

2/7/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**