New York Law Journal

The Sound and the Fury: Noise in Rentals, Coops and Condos

Wednesday, June 8, 2016

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As New York City experiences ever denser housing, the problems of noise resound ever more clearly. The noise has gotten louder for many reasons. First more families have chosen to reside in this city and one of the loudest and unrepresented group of violators has been screaming children. Second, newly constructed buildings are built with more glass and less insulation and other materials that would block the noise making—thus, noise travels farther and louder. Third, to use every inch of the home, owners are altering their units to remove the guts of the residence which makes noise protections disappear. Fourth, many noise problems can be treated with wall-to-wall insulated carpeting in all places except for the bathrooms and kitchen. However, many residents refuse to carpet their homes and many rental, co-op and condominium leases and bylaws do not effectively require such means of carpeting in their leases, or bylaws or house rules.[1]

As a result, noise complaints have become popular and common, and, as such, noise litigation has spiked. Like the flash of a neon light,[2] this article attempts to explain both the noise laws and remedies in New York.

Because rental buildings and co-ops are a form of rental housing, noise issues speak to the warranty of habitability, generally, but not exclusively, and are enforceable in the Housing Court. Condominiums, in which each unit is a separate piece of real estate and there is no landlord-tenant relationship, find noise controversies heard only in the Supreme Court, generally by way of injunctive action, although such actions are available in co-ops as well.

Three sets of law govern noise in all dwellings in New York City: Municipal ordinances regarding noise, municipals ordinances regarding construction, and the common law of nuisance. Because of the essential landlord-tenant nature of co-op dwelling, the warranty of habitability governs there as well.

The Noise Control Code

Sound is something that is scientifically absolute and measurable. Noise can be defined like a weed, "an unwelcome intrusion." However, The Noise Control Code[3] does not deal with the subjective factors that make a particular sound unpleasant to one person and pleasant to another (such as the sound of a passing train) but rather measures sound levels in scientifically absolute terms: frequencies and decibels.[4] Its main objective is to limit excessive and unreasonable sounds that would be a menace to the health, comfort, and welfare of city dwellers, regardless of the type of building they live in.[5] Bowing to the subjective nature of noise, The Noise Code varies its limitations of unreasonable sounds, depending on the hour of the day. It also limits the days and times construction can take place, the level of sounds air conditioners and circulations devices may cause, and the permissible times that animals may cause noise.[6]

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Architectural Isolation

The most common noise problem in residential housing is neighbor-to-neighbor noise, especially upstairs/downstairs neighbors where the floor that is supposed to isolate noise from traveling to the apartment below actually acts like a sound box and amplifies the sound. NYC Building Code §27-769 requires the "acoustical isolation of dwelling units." While modern concrete slab floor buildings readily pass these requirements, the thousands of wooden floored buildings in the city often fail, as do many walls, regardless of the composition of the flooring, and the abatement measures the law requires are expensive. Naturally, co-ops and condominiums seek to pass these costs to the individual unit owners, but by law, both the board and the unit owners are responsible for the units' compliance with law.[7]

Nuisance

While case law establishes that municipal violations are not a prerequisite to establishing private nuisance,[8] Noise Code violations are generally prima facie nuisances. Experience teaches that while police are trained to detect that a barking dog or a television violates noise laws, it is generally a matter of pure luck when a building inspector detects that a unit violates the acoustical isolation requirements. However, several acoustical engineers in the city specialize in making just such determinations and are available as expert witnesses, although it may require a court order to get the access for them to perform their necessary tests.

Courts are generally hostile to noise claims. For example:

It has long been well established that 'apartment-house living in a metropolitan area is attended with certain well-known inconveniences and discomforts' and one cannot expect a noise-free environment. 'The peace and quiet of a rural estate or the sylvan silence of a mountain lodge cannot be expected in a multiple dwelling.'"[9]

And, the Court of Appeals has stated that, "not every intrusion will constitute a nuisance. 'Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other…. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life.'"[10]

Private Nuisance

To establish noise as a prima facie private nuisance, a plaintiff must show an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, and (4) caused by another's conduct in acting or failure to act.[11] "Intent" means that the actor was acting for the purposes of causing the interference, or knows that the interference was resulting or substantially certain to result from his or her conduct.[12] The objectionable conduct must also be characterized by a pattern of continuity or recurrence in order to constitute

a nuisance.[13] The First Department has also sustained dismissals of the Housing Part where the record lacked proof that there was "excessive or unreasonable noise."[14]

A frequent remedy for private nuisance is an award of compensatory damages. However, for most unit owners, this is cold comfort. Most unit owners do not want to be paid for the noise they have suffered so much as they want an injunction against the continuing of the noise—whether that be by cessation of noisy conduct (something very hard to enforce) or by construction of noise suppressing walls, ceilings, and floors (something very expensive). Typical governing documents require 80 percent carpeting for this very reason, but if the fundamental construction is flawed, other more aggressive improvements will be necessary, like, for example, floating floors under the carpeting.[15]

In *Brown v. Blennerhasset Corp.,* [16] the occupants complained of the neighboring unit producing noise including heavy footsteps, snoring, and a dishwasher. The First Department, Appellate Division held that such noises were not unreasonable as they were incidental to normal occupancy. However, because the plaintiff's expert stated that the noise could not be abated via carpeting or padding because the penetration of noise was attributable to the construction of the building, the court granted leave to amend the complaint so as to allege breach of the warranty of habitability against the co-op corporation. If there were proof of violation of §27-769, the court should have awarded an injunction mandating the amendment of the building so as to isolate the noise.

Recently in *150 West 21st LLC v. Doe*,[17] the First Department, Appellate Term found there are was no "actionable nuisance." Here, the landlord brought the action against tenants that allegedly made a "handful of of complaints over the course of more than one year" to the upstairs neighbor. The court found that this "did not constitute a recurring or continuing pattern of objectionable conduct that threatens the comfort and safety of others in the building," and that the landlord failed to submit evidence to support the allegations.

In the case of rentals, the First Department has held that where a landlord had surrendered control of the unit to another tenant who was causing the nuisance, a cause of action for nuisance could not be sustained against the landlord because the landlord did not create the nuisance.[18] However, that speaks to the generation of the noise, not architectural failure to sufficiently prevent its transmission.

While condominium boards are not subject to the implied warranty of habitability, condominiums boards are required, pursuant to RPL 339(v)(1)(i), to include by-law provisions "that are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners."[19] Unit owners can therefore obtain relief from noise interference through private nuisance claims and injunctive relief.

Warranty of Habitability

Unlike condominiums, co-ops and rental units are bound by the statutory warranty of habitability.[20] They are required to ensure that there is no unreasonable interference with shareholders' and tenants' ability to use their premises for residential purposes.

In *Kaniklidis v. 35 Lincoln Place Housing Corp.*,[21] the plaintiff-shareholders of a co-op complained over the course of several years of noise from heavy walking, banging, and a washer-dryer coming from the apartment above. The plaintiffs brought suit, alleging that the co-op "breached the warranty of habitability, the proprietary lease, and the covenant of quiet enjoyment, which constituted a private nuisance."[22] However, the Second Department Appellate Division held that showing numerous complaints alone is not enough and that "plaintiffs failed to show that the noises they complained of were so excessive that they were deprived of the essential functions that a residence is supposed to provide."

Similarly, in *Armstrong v. Archives LLC*,[23] the First Department Appellate Division, found that the trial court erred in granting summary judgment for the tenant because there were material issues of fact as to "whether the alleged noise emanating from the neighboring apartment was 'so excessive that [plaintiff was] deprived of the essential functions that a residence is supposed to provide.'"

In contrast, the plaintiffs in *Nostrand Gardens Co-Op v. Howard*[24] were successful in establishing their claim that the landlord breached the warranty of habitability and obtaining an abatement of rent. The plaintiffs provided evidence showing the nature, scope, and duration of the of the breach and that the noise emanating from the apartment neighboring the tenant was excessive and occurred during unreasonable hours.

Where liability is found for breach of warranty of habitability, the "measure of damages is the difference between the fair market value of the premises if they had been as warranted and the value of the premises during the period of the breach."[25] In co-ops, these numbers tend to be vastly lower than in conventional landlord-tenant housing.

Condos: Nuts and Bolts

Utilizing expert testimony and conducting sound tests is helpful in establishing liability. In the case of *Hohenberg v. 77 W. 55th St. Associates*,[26] the plaintiffs resided in the unit as tenants until the building was converted into a condominium. As such, the board of managers became responsible for common areas of the building. The plaintiffs showed that they made numerous complaints to the board and that they expended a considerable amount of money to change the layout of the apartment to ameliorate the penetrating noise and vibration. The court found that the board failed to take actions to correct the interference complained of and awarded damages to the plaintiffs. Similarly, in *JP Morgan Chase Bank v. Whitmore*,[27] the owner of a condo unit produced expert testimony. The Second Department Appellate Division accepted the unit owner's expert testimony and awarded damages in her favor.

It is important to note that motions to compel sound testing should include facts that indicate that such testing is "material and necessary."[28] In the case of *Constantiner v. Sovereign Apartments, Inc.*, the plaintiffs moved for the court to compel defendants to allow a bed and area rug to be temporarily removed to allow for sound testing. The First Department Appellate Division affirmed the denial of the motion on the grounds that removal of the bed required disassembly. The court found that the plaintiffs failed to establish that removal of the bed and rug was "material and necessary, as it would not provide evidence of any noise condition as they actually exist."[29]

Conclusion

Courts have been hostile to noise complaints. While there are several possible theories with which to frame various claims for relief, only the most extreme cases are going to see any relief actually granted. Plaintiffs are going to have to be prepared for expensive litigation, using expensive and highly specialized expert witnesses. However, if the plaintiffs overcome these hurdles, the defendants can find the litigation extremely expensive and the physical mitigation of the problem even more so.

ENDNOTES:

1. To see a properly drafted, effective and tested carpeting provision drafted by the authors for BlumbergExcelsior, Inc, go to https://www.blumberglegalforms.com/Forms/59.pdf, paragraph 20(p). or http://alblawfirm.com/forms/.

2. The Sounds of Silence, Simon & Garfunkel, Columbia Records, 1964, Recorded at Columbia Studios in New York City, written in Queens, New York.

3. NYC Administrative Code §24-201. There are pitches that are two low for humans to perceive them (low frequencies) and two high for humans to perceive them (high

frequencies). Thus, no matter how loud they are, they are not "noise."
4. NYC Administrative Code §24-218.
5. The "Noise Control Code" is also known as "The Noise Code." See http://www.nyc.gov/html/ dep/pdf/noise_code_guide.pdf.
6. NYC Administrative Code §24-222, §24-227, §24-235.
7. NYC Administrate Code §27-232 defines an "Owner" to include "any other person having legal ownership or control of the premises."
8. *61 W. 62 Owners Corp. v. CGM EMP*, 77 A.D.3d 330 (1st Dept. 2010).
9. *Mariani v. Rogers*, 25 Misc.3d 1206(A), 901 N.Y.S.2d 907 (City Ct., 2009).
10. *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 315 (Ct. of App., 1970) (quoting *Campbell v. Seaman*, 63 N.Y. 568, 569 (Ct. of App., 1876).
11. *Berenger v. 261 W. LLC*, 93 A.D.3d 175 (1st Dept. 2012) (quoting *Copart Indus. v. Consolidated Edison Co. of N.Y.,* 41 NY2d 564 (Ct. of App. 1977)).
12. Id.
13. *Tsangarinos v. Attaway*, 43 Misc.3d 142(A) (1st Dept. 2014).
14. *Frankel v. 71st St. Lexington Corp.*, 46 Misc.3d 149(A) (1st Dept. 2015).
15. Floating floors absorb sound, shock, and vibration by having a sandwich of flooring, absorbers like springs or rubber, and another layer of floor.
16. *Brown v. Blennerhasset Corp.*, 113 A.D.3d 454 (1st Dept. 2014).
17. *150 W. 21st LLC v. Doe*, 50 Misc.3d 140(A) (1st Dept. 2016).
18. *Bernard v. 345 E. 73rd Owners Corp.*, 181 A.D.2d (1st Dept. 1992).
19. RPL 339(v)(1)(i).
20. RPL §235-b.
21. *Kaniklidis v. 235 Lincoln Place Housing Corp.*, 305 A.D.2d 546 (2d Dept. 2003).
22. Id.
23. *Armstrong v. Archives*, 46 AD.3d 465 (1st Dept. 2007).
24. *Nostrand Gardens Co-Op v. Howard*, 221 A.D.2d 637 (2d Dept. 1995).
25. Id. (citing *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316).
26. *Hohenberg v. 77 W. 55th St. Associates*, 118 A.D.2d 418 (1st Dept. 1986).
27. *JP Morgan Chase Bank v. Whitmore*, 41 A.D.3d 433 (2d Dept. 2007).
28. *Constantiner v. Sovereign Apartments, Inc.*, 126 A.D.3d 532 (1st Dept. 2015).
29. Id.