

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE
Justice

PART 12

-----X
DR. JUDITH HELLMAN,
Plaintiff,

INDEX NO. 151429/18

MOTION DATE _____

MOTION SEQ. NO. 1

- v -

THE ST. TROPEZ CONDOMINIUM, *et al.*,
Defendants.

DECISION AND ORDER

-----X
By order to show cause, plaintiff moves pursuant to CPLR 6301 and 6313 for an order preliminarily enjoining and restraining defendants and their agents, employees, and/or anyone acting in concert with them from violating and/or causing a violation of the New York City Noise Control Code within unit 18A in the building, plaintiff's apartment, located at 340 East 64th Street in Manhattan, New York, by causing and/or permitting the transmission of noise and vibrations from the building's elevator machine room into the unit. Defendants oppose.

In her complaint, plaintiff seeks the same relief in the form of a permanent injunction, and advances claims for nuisance, breach of contract, negligence/gross negligence, and bad faith/breach of fiduciary duty, for which she seeks money damages of no less than \$2.75 million. (NYSCEF 1). She relies on her experts' findings that a noise control code violation exists in the building. (NYSCEF 10, 13, 15).

Defendants object to the motion on the grounds that plaintiff seeks the ultimate relief sought in her action, that there is no irreparable harm, that plaintiff may be compensated through money damages she seeks on her other claims, and that the equities do not weigh in her favor. (NYSCEF 69). They submit the affidavits of the condominium's senior property manager, the board's president, and the elevator consulting company hired by defendants, by which they attest that they have addressed all of plaintiff's complaints, that the elevator modernization project that the condominium undertook in 2016 was expected to address the noise issues, that during the project when issues were found that created or aggravated noise, defendants instructed the elevator contractor to fix the issues, which it did, and that all measures which were recommended to deal with the noise were implemented. They also observe that plaintiff has not taken advantage of measures recommended by her own experts to deal with the alleged noise,

and that the noises that remain are such that would be expected in an apartment next to an elevator. (NYSCEF 35, 59, 62).

To be entitled to a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent the injunction, and that the equities weigh in its favor. (CPLR 6301). As plaintiff requests an order directing defendants to take actions to minimize or remove the alleged excessive noise emanating into her unit, she essentially seeks a preliminary mandatory injunction compelling them to act rather than to maintain the status quo, which is a drastic measure to be granted where required by compelling circumstances, or when essential to maintain the status quo pending trial, or if the final judgment may not afford complete relief. (67A NY Jur 2d, Injunctions § 57 [2018]).

Here, even if there is an existing noise violation, plaintiff has not established that extraordinary or compelling circumstances exist which warrant disturbing the status quo and granting plaintiff the ultimate relief sought before the action is resolved. (See *St. Paul Fire and Marine Ins. Co. v York Claims Svce., Inc.*, 308 AD2d 347 [1st Dept 2003]; see also *Zoller v HSBC Mortg. Corp. (USA)*, 135 AD3d 932 [2d Dept 2016] [request for mandatory injunction requiring defendant to remediate conditions on neighboring property properly denied absent showing of extraordinary circumstances]).

Moreover, defendants deny plaintiff's allegations, and unresolved issues remain as to whether a noise violation currently exists, whether defendants took steps to resolve the situation or should have done so, whether any steps taken were reasonable, and what, if any, future steps are needed. (See e.g. *Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793 [2d Dept 1995] [plaintiff failed to satisfy heavy burden of proving clear right to mandatory injunctive relief which would in effect grant ultimate relief; many unresolved issues existed and it could thus not be determined whether there was likelihood of success on merits]).

Plaintiff also fails to establish that she will suffer irreparable injury if the injunction is not granted, or that monetary damages will not sufficiently compensate her for her injuries. (See *Rowland v Dushin*, 82 AD3d 738 [2d Dept 2011] [request for preliminary injunction properly denied, as plaintiff did not establish any imminent and non-speculative harm that would occur in absence of injunction or demonstrate potential injuries not compensable by money damages]).

Accordingly, it is hereby

ORDERED, that plaintiff's application for preliminary injunction is denied.

9/27/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE