

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

**PRESENT: Hon. Nancy Bannon
*Justice***

PART 42

**BOARD OF MANAGERS OF 400 CENTRAL
PARK WEST CONDOMINIUM**

INDEX NO. 152705/2016

- v -

MOTION DATE 7/27/2016

**JOSEFINA HENRIQUEZ-BERMAN and
CHARLIE BERMAN**

MOTION SEQ. NO. 001

The following papers were read on this motion for a preliminary injunction.

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) —
Exhibits — Memorandum of Law-----

No(s). 1

Answering Affirmation(s) — Affidavit(s) — Exhibits -----

No(s). _____

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):**

The plaintiff condominium, seeking to recover unpaid common charges and enjoin violations of its by-laws upon theories of breach of contract and nuisance, now moves to preliminarily enjoin the defendants from smoking marijuana in Unit 1S of the condominium and permitting marijuana smoke and excessively loud noises from infiltrating into the common areas and other units of the condominium. The defendants, Josefina Henriquez-Berman and her son, Charlie Berman, who respectively own and occupy that unit, do not oppose the motion.

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in its favor. See CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 (2005); Doe v Axelrod, 73 NY2d 748, 750 (1988). As a general matter, a preliminary injunction may only be issued where the harm alleged may not be adequately compensated by money damages. See Meissner v Yun, 126 AD3d 565, 566 (1st Dept 2015). The decision whether to grant a preliminary injunction rests in the sound discretion of Supreme Court. See Doe v Axelrod, supra at 750. The plaintiff has met this burden.

In support of the motion, the plaintiff has submitted the condominium's by-laws, which, at Article V, section 13(b), provide that "[n]o nuisances shall be allowed on the Property nor shall any use or practice be allowed which is a source of annoyance to its residents or occupants or which interferes with the peaceful possession or proper use of the Property by its residents or occupants." Article V, section 13(c), prohibits an "immoral, improper, offensive, or unlawful use" of the property, and mandates the observation of "all valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction thereof." The plaintiff also submits affidavits of its property manager, business records memorializing complaints of other residents and visitors and observations of building

staff, demonstrating that the defendants smoked marijuana in their unit and/or permitted others to do so, that dozens of complaints were made over a three-year period that the smoke emanating from the defendants' unit infiltrated into those other units and common areas of the condominium, and that the smoke and odor offended and annoyed the other residents and visitors. The same submissions also demonstrated that other residents also complained on several occasions about excessively loud music and excessive "construction noise" emanating from the defendants' unit. According to the plaintiff, defendant Josefina Henriquez-Berman has received cease and desist letters and been fined at least 10 times for these smoke and noise violations, and both defendants, despite being warned of possible legal action, have promised to cease engaging, but have not abated the violations.

By this proof, the plaintiff has demonstrated a likelihood of success on the merits of its causes of action for breach of contract and nuisance. It is well settled that a violation of a condominium's by-laws constitutes a breach of contract. See Big Four LLC v Bond St. Lofts Condominium, 94 AD3d 401 (1st Dept. 2012). The plaintiff demonstrates, for purposes of this motion, that the defendants breached their obligation to comply with Article V, section 13(b) of the by-laws by engaging in a practice that was a source of annoyance to the condominium's residents or occupants and engaging in conduct that interfered with those residents' and occupants' peaceful possession of their units. The same proof also shows a likelihood of success on its claim that the defendants violated the portion of the same by-law which expressly prohibits nuisances, and the separate claim for common-law private nuisance, which requires proof of an intentional, unreasonable, and substantial interference with a neighbors' right to use and enjoy their units and the common areas of the condominium. See Circus Disco v New York State Liquor Auth., 51 NY2d 24 (1980) [noise]; Berenger v 261 W. LLC, 93 AD3d 175 (1st Dept. 2012) [noise and odor]; 61 W. 62 Owners Corp. v CGM Emp LLC, 86 AD3d 403 (1st Dept. 2011) [noise]; see generally Copart Indus., Inc. v Consol. Edison Co. of N.Y., 41 NY2d 564 (1977).

The holding of Ewen v Maccherone, 32 Misc 3d 12 (App Term, 1st Dept. 2011), does not require a different result. There, the court found that cigarette smoke emanating from an apartment does not alone support a private nuisance claim by one tenant against another where smoking is not expressly prohibited in the by-laws. However, in so holding, the court noted that such a claim may lie where the condominium's by-laws impose some duty on the tenants or condominium board and the board is made a party to the action. Here, the by-laws impose such a duty by prohibiting any nuisances or practices which annoy another resident or interfere with peaceful possession or use of the property, and authorize the condominium board, a party, to enforce the by-laws, as per this action. Unlike here, there is no indication in Ewen of a similar by-law as exists here, that the smoke infiltration persisted for years and affected so many, or that noise was also an issue. See also Upper E. Lease Assoc., LLC v Cannon, 30 Misc 3d 1213(A) (Dist Ct, Nassau County 2011) [second-hand cigarette smoke emanating from adjoining unit, unaddressed by landlord, constitutes lease violation warranting rent abatement].

The injunctive remedy sought here is proper. It has been held that exposure to second-hand smoke from a neighboring apartment does not give rise to cause of action to recover money damages. See Feinstein v Rickman, 136 AD3d 863 (2nd Dept. 2016). However, a court may issue a preliminary injunction prohibiting a unit owner from violating the by-laws. See Board of Mgrs. of Bond Parc

Condominium v Broxmeyer, 62 AD3d 925 (2nd Dept. 2009). Since any injury caused by the smoke conditions arising from the defendants' conduct here is not compensable by money damages, the plaintiff has demonstrated that irreparable injury, requiring injunctive relief, would result should the smoke condition be permitted to persist. While money damages may be available to compensate a person for a nuisance created by loud noises, an injunction may issue where, as here, such damages are inadequate to abate the nuisance. See 61 W. 62 Owners Corp. v CGM Emp LLC, *supra*.

Finally, the balance of equities clearly favors the plaintiff. The detriment to the defendants that would be engendered by granting the injunction and directing them to cease permitting marijuana smoke and excessively loud noises from infiltrating into the common areas and other units of the condominium is far outweighed by the detriment that would inure to the plaintiff and the defendants' neighbors by virtue of exposure to the smoke and excessive noise were the motion denied.

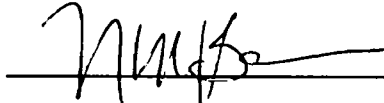
Since the court is affording the plaintiff injunctive relief based on the defendants' violation of the by-laws and creation of a private nuisance, there is no need to premise the injunction on the alternative ground urged by the plaintiff, namely, that the possession and use of marijuana is illegal. See Penal Law §§ 221.05-221.30. A court of equity will not undertake the enforcement of the criminal law, and an injunction prohibiting that which is already prohibited by law may be deemed redundant unless equitable relief on that basis is necessary to give adequate protection to the interest claimed to be invaded. Nonetheless, the mere fact that certain conduct violates the Penal Law does not divest a court of equity of the jurisdiction it otherwise has to enjoin harmful behavior. See People v Romero, 91 NY2d 750 (1998); Lanvin Parfums v Le Dans, 9 NY2d 516 (1961); People ex rel. Bennett v Laman, 277 NY 368 (1938). As such, the court may grant the preliminary injunction regardless of whether the defendants' possession and use of marijuana constituted a failure to observe any law, ordinance or regulation, or an unlawful use of the property. See Lanvin Parfums v Le Dans, *supra*.

Accordingly, it is

ORDERED that plaintiff's motion is granted, without opposition, to the extent that the defendants are hereby enjoined, pending the disposition of this action, from permitting smoke and excessively loud noises from infiltrating from Unit 1S of 400 Central Park West, New York, New York, into common areas or other units of the condominium.

This constitutes the Decision and Order of the court.

Dated: January 6, 2017


_____, JSC
HON. NANCY M. BANNON

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER