

ANOTHER SOUND VICTORY!

Judge affirms right of two student musicians to practice music in their apartment, despite owner's complaint



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WHEN I'M ASKED what's the most common problem I've helped musicians with over the years, the answer is loud and clear: the right to practice music in an apartment. Luckily, it is also the question that has the most stable body of law. In New York State, a professional musician has the unfettered right to practice in her or his apartment during reasonable times. It has been noted in judicial decisions that hearing people practice music is simply one of the many inconveniences people living in populous areas must tolerate. Unfortunately, musicians are subjected to noise complaints with great frequency, despite this well-established precept.

I've written about this issue many times here. Almost a year ago, in my December 2015 column, I outlined the details of a nuisance suit that a condo owner had lodged against two young piano students enrolled at Mannes. The suit, premised upon the defendants'

alleged violation of the New York City noise code, sought money damages and also a permanent injunction barring the children from practicing in their apartment. An injunction is an extraordinary remedy to ask for. It is used when monetary damages are insufficient to compensate or abate a claimed loss.

In order to prove the existence of a common law nuisance, a litigant must adequately demonstrate that the noise disturbance **unreasonably, intentionally and substantially** interferes with the person's right to enjoy and use the land in question. The plaintiff was required to demonstrate to the court that he had no adequate remedy other than an injunction. He also had to show that the "balance of equities" (fairness) tipped in his favor. Finally, an injunction is only granted if the plaintiffs can demonstrate that they have a likelihood of prevailing in their suit.

On Sept. 20, 2016, New York Supreme Court Justice Gerald Lebovits issued a decision in which he **denied** the plaintiff's request for a permanent injunction. *Ezrapour v. Schaffer*, Index No. 15157/15, Supreme Court, New York County.

First, Justice Lebovits held that there was absolutely no proof submitted by the plaintiff that he would be irreparably harmed if the children continued to play. While the plaintiff contended that he would become mentally and physically ill if the court denied his motion, no specific evidence supported that contention. His failure to demonstrate that money damages could not adequately compensate him if his claims were sustained also prompted the denial of the injunction.

The court also found grounds to deny the motion on the basis that the equities of the case were decidedly balanced in the defendants' favor. The court noted that in order for the children to remain in the Mannes program, they



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A recent judge's decision affirms the right to practice in your apartment.

were required to practice at least two hours a day. If they were barred from practicing, it would severely hamper their chances of becoming professional musicians. Clearly, the children would suffer greater harm if the permanent injunction were granted than plaintiff would if it were not granted.

Finally, the court addressed the merits of plaintiff's nuisance case. First, the plaintiff had submitted no evidence that the children were not complying with the condo rules with respect to practice of musical instruments. They clearly practiced within the time frames established by those rules. Furthermore, the acoustical report presented by the plaintiff did not demonstrate that defendants had violated the noise code when they practiced. Significant in that regard was the fact that no noise complaint or code violation was lodged with the city. Finally, the court relied upon the fact that the defendants had taken measures to dampen the noise levels in their apartment and had followed the requirements suggested by their own acoustical experts. For these reasons the court concluded that the plaintiff

had not sufficiently established a private nuisance claim.

While the request for an injunction has been denied, the plaintiff's demand for monetary relief still remains intact and the suit will continue until the defendants move for dismissal of that portion of the suit. After Justice Lebovits' decision, it seems a strong likelihood that the suit will be dismissed in short order.

As I've previously written, suits such as this one usually fail as the law favors professional musicians' ability to practice in their own apartments during reasonable times. In this case, it should be noted that Justice Lebovits is an avid drummer, a fact revealed in a June 2010 article in the New York Post entitled "Here Drum the Judge." During oral argument, Justice Lebovits referred to his side career as a musician when he remarked to the plaintiffs' counsel that he wondered how the plaintiff would feel if the children started playing the drums. Yes, it always helps to have a sympathetic judge in cases like these.

(Here's a link to the Post article on the judge. Dig the pic! www.nypost.com/2010/06/09/here-drum-the-judge.)