Lofty Apt. Corp. v R.A.V. Barouck LLC

2012 NY Slip Op 32869(U)

October 26, 2012

Sup Ct, New York County

Docket Number: 114006/2010

Judge: Lucy Billings

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SCANNED ON 12/4/2012

[* 1]

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

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

LOFTY APARTMENT CORP.

- v -

R.A.V. BAROUCK LLC and
R. DAVID BEN BAROUCK CORP.

INDEX NO. 114006/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion to/for a preliminary injunction

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court denies plaintiff's motion for a preliminary injunction, pursuant to the accompanying decision. C.P.L.R. §§ 6301, 6312(a), 7502(c).

FILED

DEC 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/26/12

Lucy Billings

LUCY BILLINGS J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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LOFTY APARTMENT CORP.,

Plaintiff

- against -

R.A.V. BAROUCK LLC and
R. DAVID BEN BAROUCK CORP.,

Defendants

----------x

Index No. 114006/2010

DECISION AND ORDER

FILED
DEC 03 2012
NEW YORK
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff Lofty Apartment Corp. and defendant R.A.V. Barouck LLC each own part of a cooperative building at 428 Columbus Avenue, New York County. Plaintiff, the "Apartment Building Owner," owns the residential cooperative, above the ground floor. Aff. of Lawrence Chaifetz Ex. 1, at 1; Aff. of Anthony L. Tersigni Ex. C (Aff. of Richard N. Gray), at 5 (Ex. 3, at 1) (Reciprocal Agreement at 1). R.A.V. Barouck LLC, the "Store Bulding Owner," owns the commercial cooperative on the ground level, id., which defendant LLC rented to defendant R. David Ben Barouck Corp., currently in receivership. Plaintiff seeks to enjoin defendant LLC, plaintiff's co-owner, to permit plaintiff to install a new drainage system that would include repairing or restoring pipes in that defendant's portion of the basement. Defendant LLC insists that plaintiff run the new piping through the parts of the building that plaintiff owns. Plaintiff claims damages due to deterioration of the pipes, water infiltration,

and deterioration of the structural integrity in plaintiff's premises.

Plaintiff has moved for a preliminary injunction to permit installation of the new drainage system and separately to consolidate with this action a New York County Civil Court action, Columbus Miles Corp. v. Lofty Apartment Corp., R.A.V. Barouck, LLC, and R. David Ben Barouck Corp., Index. No. 32450/2009 (Civ. Ct. N.Y Co.), in which the three parties here are all defendants. C.P.L.R. §§ 602, 6301, 6311(1), 6312(a). Since defendant tenant, R. David Ben Barouck Corp., in receivership, relinquished possession of the commercial premises, plaintiff, in a stipulation executed February 25, 2011, discontinued the amended complaint's first claim, for injunctive relief, and withdrew the motion for a preliminary injunction against defendant tenant.

Defendant LLC has moved separately to dismiss the amended complaint or to stay the action based on an arbitration agreement. C.P.L.R. §§ 2201, 3211(a)(1), (5), and (7), 7503(a). Plaintiff acknowledges the arbitration agreement, but seeks the injunctive relief in aid of arbitration, claiming that without an injunction any award plaintiff obtains through arbitration will be ineffectual. C.P.L.R. § 7502(c); Interoil LNG Holdings, Inc. v. Merrill Lynch PNG LNG Corp., 60 A.D.3d 403, 404 (1st Dep't 2009); Witham v. Finance Invs., Inc., 52 A.D.3d 403 (1st Dep't 2008). See Founders Ins. Co. Ltd. v. Everest Natl. Ins. Co., 41 A.D.3d 350, 351 (1st Dep't 2007); K.F.W. Realty v. Kaufman, 16

A.D.3d 688, 689 (2d Dep't 2005). Nevertheless, the injunction plaintiff seeks accomplishes more than preserving the status quo pending the arbitration's outcome. Other than the damages plaintiff seeks, the injunction in aid of arbitration would afford plaintiff the ultimate relief sought: all the injunctive relief and the principal component of the total relief plaintiff seeks. Lehey v. Goldburt, 90 A.D.3d 410, 411 (1st Dep't 2011); 360 W. 11th LLC v. ACG Credit Co. II, LLC, 46 A.D.3d 367 (1st Dep't 2007); Sithe Energies, Inc. v. 335 Madison Ave., LLC, 45 A.D.3d 469, 470 (1st Dep't 2007). See Jones v. Park Front Apts., LLC, 73 A.D.3d 612, 613 (1st Dep't 2010); Pamela Equities Corp. v. 270 Park Ave. Cafe Corp., 62 A.D.3d 620, 621 (1st Dep't 2009).

II. THE ARBITRATION AGREEMENT

The undisputed Reciprocal Agreement, Article XII, § 12.1, between plaintiff and its co-owner provides:

> If a dispute shall arise between any of the Owners, such dispute is to be settled by arbitration, and any such Owner may serve upon the other Owner a written notice demanding that the dispute be arbitrated pursuant to this Article XII.

Reciprocal Agreement at 24. Plaintiff seeks defendant R.A.V. Barouck LLC's specific performance of the easement in the Reciprocal Agreement, Article I, § 1.1(C), given by the Store Building Owner, R.A.V. Barouck LLC, to plaintiff:

> For entry upon, and for ingress and egress through, the Store . . . to the extent reasonably necessary in the performance of the maintenance of any facility.

Id. at 3. Defendant contends that plaintiff's proposal is to perform more than "maintenance of any facility" and instead to

construct improvements, a purpose beyond the easement's intent and scope. Id.

Two other provisions of the Reciprocal Agreement dictate the allocation of expenses to maintain the premises. Article XXI, § 21.1(h) allocates expenses for maintenance of "structural members, walls, ceilings, footings and foundations . . . to that parcel with legal title thereof." Id. at 37. Article XXI, § 21.2 allocates maintenance expenses "caused in operation of one parcel" to "the Owner of such parcel." Id. Plaintiff insists that the necessary repair and restoration of pipes in defendant LLC's portion of the basement constitutes maintenance of structural elements in its parcel, a common cost to be shared by defendant LLC. It responds that any new drainage system would be "to handle runoff" from above the ground level, in plaintiff's parcel, and to replace the "illegal" drainage system plaintiff previously installed, shifting the entire expense to plaintiff. Reply Aff. of Anthony Tersigni ¶ 11.

First, the dispute between the co-owners does not pertain simply to the allocation of maintenance expenses. The dispute, first and foremost, concerns the nature and location of the necessary or desirable maintenance, improvements, or construction. No contractual, statutory, or regulatory provision excludes this part of the dispute from the arbitration provision's broad scope.

Second, since the co-owners disagree as to which provision of the Reciprocal Agreement applies to the allocation of expenses

for the disputed nature and location of necessary or desirable maintenance, improvements, or construction, the arbitration provision's broad scope equally encompasses this part of the dispute. In fact, a more specific arbitration provision, Article XXI, § 21.3, dictates arbitration in precisely these circumstances:

> If at any time the Owners cannot agree on the proper allocation of maintenance or items of shared maintenance in view of then existing circumstances, then this dispute will be submitted to arbitration as provided for in Article XII (Arbitration) hereof.

Id. Confronted with these undisputed arbitration provisions, plaintiff concedes that, if its claims are reduced to damages against its co-owner R.A.V. Barouck LLC, those claims must proceed via arbitration.

III. INJUNCTIVE RELIEF IN THE CONTEXT OF ARBITRATION

In opposition to R.A.V. Barouck LLC's motion to dismiss all claims against this defendant in favor of proceeding via arbitration to resolve them, plaintiff expresses two principal concerns. First, its attorney attests that he has "been advised" by an undisclosed source that the LLC's architect and engineer plans to repair the basement foundation in the building and that "plaintiff is quite concerned" about the building's structural integrity being maintained. Aff. of Lawrence Chaifetz in Opp'n ¶ 11. Since these allegations of defendant LLC's plan and of a client's concern are not pleaded in the amended complaint and are supported only by inadmissible hearsay evidence, the court may not consider them in opposition to defendant's motion to dismiss

claims based on the arbitration agreement, C.P.L.R. § 3211(a)(1) and (7), see Leon v. Martinez, 84 N.Y.2d 83, 88 (1994); Quiroz v. Tsoulos, 303 A.D.2d 331 (1st Dep't 2003); Crepin v. Fogarty, 59 A.D.3d 837, 838 (2d Dep't 2009); Lessoff v. 26 Ct. St. Assoc., LLC, 58 A.D.3d 610, 611 (2d Dep't 2009), or in support of preliminary injunctive relief to aid in arbitration. C.P.L.R. § 6312(a); GFI Sec., LLC v. Tradition Asiel Sec., Inc., 61 A.D.3d 586 (1st Dep't 2009); De Werthein v. Gotlib, 188 A.D.2d 108, 113 (1st Dep't 1993); Winter v. Brown, 49 A.D.3d 526, 529 (2d Dep't 2008). See Monserrate v. Upper Ct. St. Book Store, 49 N.Y.2d 306, 310 (1980).

Second, petitioner insists that R.A.V. Barouck LLC be directed to turn over the plans for repair of the basement foundation and to refrain from such repair until plaintiff approves the plans. Yet plaintiff does not seek this relief in the amended complaint or motion for a preliminary injunction either.

As for the injunctive relief plaintiff does seek, to permit its refurbishing of the drainage system and component pipes, its engineer attests that this approach, rather than defendant LLC's plans, is necessary immediately to prevent further water damage to the basement foundation and main supporting beam and then to remediate the damaged conditions permanently. Plaintiff urges that, if these conditions are not addressed through its approach, the deterioration may cause catastrophic consequences to the building, rendering the resolution of a dispute over allocation

of the expenses moot.

Deterioration of the building's piping and structure has persisted for years. Plaintiff has not shown that the safety of building occupants is at imminent risk, that any deteriorated or destroyed building components would be irreplaceable, or that the potential damages, however, extensive, would be difficult to quantify, such that the harm would be irreparable. GFI Sec., LLC v. Tradition Asiel Sec., Inc., 61 A.D.3d 586; Founders Ins. Co. Ltd. v. Everest Natl. Ins. Co., 41 A.D.3d at 351; Winter v. Brown, 49 A.D.3d at 529; K.F.W. Realty v. Kaufman, 16 A.D.3d at 689. See Interoil LNG Holdings, Inc. v. Merrill Lynch PNG LNG Corp., 60 A.D.3d at 404; Gundermann & Gundermann Ins. v. Brassill, 46 A.D.3d 615, 617 (1st Dep't 2007).

More significantly, the arbitration provision's broad scope is not limited to monetary disputes. "If a dispute," of any kind, "shall arise between any of the Owners, such dispute is to be settled by arbitration." Reciprocal Agreement art. XII, § 12.1, at 24. See Brown & Williamson Tobacco Corp. v. Chesley, 7 A.D.3d 368, 373 (1st Dep't 2004); Riverside Capital Advisors, Inc. v. Winchester Global Trust Co. Ltd., 21 A.D.3d 887, 889 (2d Dep't 2004). This provision encompasses, equally with any monetary dispute, the dispute over R.A.V. Barouck LLC's plans to repair the basement foundation versus plaintiff's proposed refurbishing of the drainage system and component pipes. Any limitation on the arbitrator's power to determine this kind of dispute:

> must be set forth as part of the arbitration clause itself, for to infer a limitation from the substantive provisions of an agreement containing an arbitration clause . . ., is to involve the courts in the merits of the dispute--interpretation of the contract's provisions--in violation of the legislative mandate.

Matter of Silverman, 61 N.Y.2d 299, 307 (1984); Brown & Williamson Tobacco Corp. v. Chesley, 7 A.D.3d at 373 (citations omitted). See C.P.L.R. § 7511(b)(1); Matter of Silverman, 61 N.Y.2d at 302; Brown & Williamson Tobacco Corp. v. Chesley, 7 A.D.3d at 372; Riverside Capital Advisors, Inc. v. Winchester Global Trust Co. Ltd., 21 A.D.3d at 889.

Nothing in the Reciprocal Agreement or elsewhere in the record indicates that this part of the dispute would not be addressed efficiently through arbitration and, if necessary, before any monetary disputes. As long as this part of the dispute is arbitrable as the arbitration's provision's plain terms dictate, at least until the arbitrator determines otherwise, how the merits of this dispute are to be resolved is for the arbitrator. Cheng v. Oxford Health Plans, Inc., 15 A.D.3d 207, 208 (1st Dep't 2005); Brown & Williamson Tobacco Corp. v. Chesley, 7 A.D.3d at 372; Shah v. Monpat Constr., Inc., 65 A.D.3d 541, 544 (2d Dep't 2009).

Finally, plaintiff also fails to show that it has served "upon the other Owner a written notice demanding that the dispute be arbitrated pursuant to this Article XII." Reciprocol Agreement art. XII, § 12.1, at 24. If plaintiff itself has not sought any relief in the arbitral forum by serving a demand, then plaintiff further fails to demonstrate potential entitlement to

an award that will be rendered ineffectual absent injunctive relief and, thus, entitlement to that injunctive relief in aid of arbitration. C.P.L.R. § 7502(c); Matter of Cullman Ventures, 252 A.D.2d 222, 230 (1st Dep't 1998); Kal Data v. AMC Computer Corp., 268 A.D.2d 589 (2d Dep't 2000).

IV. CONCLUSION

On the other hand, the record also does not reveal that defendant R.A.V. Barouck LLC has served a written demand for arbitration on its co-owner. This omission, nevertheless, does not prevent dismissal of plaintiff co-owner's action against R.A.V. Barouck LLC. By simply providing that, "If a dispute shall arise between any of the Owners, such dispute is to be settled by arbitration," the arbitration agreement bars this action between the two co-owners to settle their disputes. Reciprocol Agreement art. XII, § 12.1, at 24. To settle a dispute, "any such Owner may serve" an arbitration demand, but it is not mandatory. Id. (emphasis added). Therefore, and for all the reasons discussed above, the court grants defendant R.A.V. Barouck LLC's motion to dismiss the action against this defendant and denies plaintiff's motion for a preliminary injunction. C.P.L.R. §§ 3211(a)(1), (5), and (7), 6301, 6312(a), 7502(c), 7503(a).

The Reciprocal Agreement is between plaintiff and R.A.V. Barouck LLC. Plaintiff and defendant R. David Ben Barouck Corp. never agreed to arbitrate any disputes. Shah v. Monpat Constr., Inc., 65 A.D.3d at 545. Therefore, pursuant to the stipulation

between plaintiff and the receiver for R. David Ben Barouck Corp. executed February 25, 2011, this defendant shall answer the complaint within 45 days after entry of this order.

Since R. David Ben Barouck Corp. has not yet articulated any defenses or counterclaims in this action, nor does the record here contain this defendant's answer with any cross-claims against Lofty Apartment Corp. in the Civil Court action, the record is inadequate to determine the extent to which the claims between the two remaining parties here overlap with cross-claims there. The Civil Court action is at a more advanced stage than this action and also involves two parties that are not in this action, R.A.V. Barouck LLC and a fourth party suing R.A.V. Barouck LLC, plus the two remaining parties here. Ahmed v. C.D. Kobsons, Inc., 73 A.D.3d 440, 441 (1st Dep't 2010); Cronin v. Sordoni Skanska Constr. Corp., 36 A.D.3d 448, 449 (1st Dep't 2007); Goldman v. Rosen, 15 A.D.3d 321 (1st Dep't 2005); Abrams v. Port Auth. Trans-Hudson Corp., 1 A.D.3d 118, 119 (1st Dep't 2003). Consolidation likely would embroil this action in more claims that do not overlap, than claims that do overlap with the remaining claims here, and would delay resolution of both actions. Ahmed v. C.D. Kobsons, Inc., 73 A.D.3d at 441; Cronin v. Sordoni Skanska Constr. Corp., 36 A.D.3d at 449; Barnes v. Cathers & Dembrosky, 5 A.D.3d 122 (1st Dep't 2004); Abrams v. Port Auth. Trans-Hudson Corp., 1 A.D.3d at 119. Therefore the court denies plaitiff's motion for consolidation, without prejudice to a future motion for consolidation upon a showing of

the extent of common questions in the actions to be consolidated and a showing that consolidation will not unduly delay either action. C.P.L.R. § 602; Ahmed v. C.D. Kobsons, Inc., 73 A.D.3d at 441; Cronin v. Sordoni Skanska Constr. Corp., 36 A.D.3d at 449; Abrams v. Port Auth. Trans-Hudson Corp., 1 A.D.3d at 119. See Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d 337, 339-40 (1st Dep't 2006); Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d 332, 335 (1st Dep't 2005); Matter of Progressive Ins. Co., 10 A.D.3d 518, 519 Dep't 2004); Teitelbaum v. PTR Co., 6 A.D.3d 254, 255 (1st Dep't 2004).

DATED: October 26, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS

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