Hemmings v Ivy League Apt Corp.
2013 NY Slip Op 33459(U)
December 24, 2013
Supreme Court, New York County
Docket Number: 100357/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN
Justice

PART 11

PAUL HEMMINGS

- v -

IVY LEAGUE APT CORP

INDEX NO. 100357/12

MOTION DATE

MOTION SEQ. NO. 4

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

FILED

JAN 03 2014

NEW YORK
COUNTY CLERKS OFFICE

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

Dated: December 24, 2013

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

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PAUL HEMMINGS, VIVIAN LLORDA, ROGER MURPHY, RONALD SMITH AND MAYADA EL-ZOGHBI, EACH ON THEIR OWN BEHALF AS SHAREHOLDERS OF IVY LEAGUE APT CORP. AND DERIVATIVELY ON BEHALF OF THE IVY LEAGUE APT CORP.,

Plaintiffs,

Index No. 100357/12

-against-

IVY LEAGUE APT CORP., 675 REALTY LLC, EDEL FAMILY MANAGEMENT CORP., MICHAEL EDELSTEIN, FLORENCE EDELSTEIN, RONALD EDELSTEIN, DANIEL EDELSTEIN, SHANEE RUBIN, ERIN MESSNER, AND LUZ FELICIANO,

Defendants.

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JOAN A. MADDEN, J.:

Defendants 675 Realty LLC (the Sponsor), Edel Family Management Corp. (the Managing Agent), Michael Edelstein, Florence Edelstein, Ronald Edelstein, and Daniel Edelstein (collectively defendants) move, by order to show cause, for renewal and reargument of the court's decision and order dated June 19, 2013 ("the original decision"), which denied defendants' motion to enjoin plaintiffs/counterclaim defendants Paul Hemmings (Hemmings), Vivian Llorda (Llorda), Roger Murphy (Murphy), and cross-defendant Ivy League Apt. Corp. (Ivy League or the Coop) (collectively plaintiffs) from marketing for sale, selling, leasing to any third party, terminating the commercial lease on or otherwise disposing of or encumbering the professional apartment located in the Coop and known as 675 Academy Street, Apartment AA, in New York City (the professional apartment). Plaintiffs oppose the motion, which is denied.

In 1986, the Sponsor converted a 60-unit apartment building located at 675 Academy Ave. in New York City to cooperative ownership, which includes the professional apartment. According to the Offering Plan, the professional apartment was to be leased by the Coop to the Sponsor for a term of 25 years, to expire in September 2011. Although no shares were immediately allocated to the professional apartment, 176 shares were designated for it. The Offering Plan further provides:

> "That in the event that the professional unit is altered for residential use and the Certificate of Occupancy amended to reflect such residential use, or in the event a ruling shall be made by the Internal Revenue Service or by a court of competent jurisdiction that the existence of the professional unit in the building will not result in a disqualification of the Apartment Corporation as a "cooperative" under § 216 (1) (B) of the Internal Revenue Code, the lessee (i.e. "the Sponsor") may surrender the lease for the professional apartment, at which time the Apartment Corporation shall issue to the lessee the 176 shares of the Apartment Corporation allocated to Apartment AA together with the appropriate proprietary lease"

In 2009, the Sponsor informed the Coop that it intended to convert the professional apartment to a residential unit. Thereafter, throughout 2009, 2010 and the first half of 2011, the Sponsor took various steps to convert the apartment and began renovations. In the summer of 2011, the Coop raised some concerns about the windows and the dimensions of the new unit. These concerns were addressed at a board meeting held on August 29, 2011.

At that meeting, the Coop's board of directors approved four resolutions related to the professional apartment: 1) approval of the installation of new windows; 2) approval of the dimensions of the apartment for conversion to residential use pursuant to plans which had been approved by the Buildings Department; 3) a mandate that all work for conversion of the

professional unit to residential use would be substantially completed by the later of 180 days from August 29, 2011, or the date provided for, if any, in the Offering Plan, and that upon substantial completion of all such work the Sponsor would have 120 days to obtain any building department approvals for the work, and an additional 120 days after receiving such approvals to amend the certificate of occupancy to reflect the conversion of the apartment to residential use and; 4) an agreement that, upon completion of all work and the amendment of the certificate of occupancy in accordance with the time provisions in Resolution 3, the board would issue the 176 shares and the proprietary lease to the Sponsor.

Plaintiffs commenced this lawsuit in January 2012, alleging, among other things, that defendants breached their obligations in the Offering Plan, and that the Sponsor and the Edelstein family breached their fiduciary duties. Plaintiffs sought injunctive relief prohibiting the Coop from transferring the shares allocated for the professional apartment to the Sponsor. In support of their motion for a preliminary injunction, plaintiffs submitted the affidavit of plaintiff Vivian Llordra, the one board member who voted against the resolutions. In her affidavit, Ms. Llordra states, *inter alia*, that the board was "unduly influenced by the Sponsor." She also stated that two board members were absent for most of the meeting, and that two others did not understand English, and these two board members usually required a translator but were not provided one at the meeting.

Defendants opposed the motion, arguing, *inter alia*, that Ms. Llordra's version of the events is not supported by the minutes of the meeting, and submitted the affidavit of counsel for the Sponsor, who drafted the board minutes.

Thereafter, the Sponsor continued its work on the professional apartment and, on June 6, 2012, the Department of Buildings signed off on the construction and issued a temporary

Certificate of Occupancy for the unit.[1]

However, on July 24, 2012, the Coop held its annual shareholders meeting and elected a new board of directors which included plaintiffs Hemmings, Llodra, Murphy and nonparty Angela Imbriano, a shareholder who was on record as opposing the Sponsor's conversion efforts. On July 26, 2012, the new board held its first meeting and, at that meeting, it voted to rescind resolutions three and four which had been passed by the prior board of directors. By letter dated August 8, 2012, the Sponsor was advised of the board's action. On September 4, 2012, the Coop served a notice of termination on the Sponsor, notifying it that the Coop was terminating the 25-year commercial lease.

After the new board of directors rescinded resolutions three and four, plaintiffs withdrew their pending motion for a preliminary injunction to prevent the Sponsor from gaining access to the 176 shares associated with the professional apartment. Thereafter, on September 7, 2012, defendants served their second amended answer, counterclaims and cross claims. The counterclaims and cross claims seek, *inter alia*, specific performance of the contract between the Sponsor and the Coop, as set forth in the Offering Plan and the August 29, 2011 resolutions, an order requiring the Coop to issue the shares allocated to the professional apartment to the Sponsor, and an order requiring the Coop to issue a proprietary lease for the professional apartment to the Sponsor. The counterclaims and cross claims also seek injunctive relief and damages.

Defendants moved for a preliminary injunction to prevent the Coop from terminating the commercial lease or otherwise encumbering or disposing of the professional apartment and to

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[1] There is no dispute that the Sponsor is in compliance with the August 29, 2011 resolutions, including the extended deadlines contained in resolution three.

prevent the plaintiffs from issuing a proprietary lease for the apartment to a third party. Plaintiffs opposed the motion.

In the original decision the court found that defendants had not established their right to a preliminary injunction. The court noted that defendants' ability to establish likelihood of success on the merits depended on the legality of the four resolutions passed by the board on directors on August 29, 2011, prior to the expiration of the 25-year lease, and found that the record raised issues as to whether the resolutions were the product of undue influence and overreaching by the Sponsor and and as to whether the resolutions served the legitimate ends of the Coop. In particular, the court found that the statements in the affidavit of Vivian Llordra appeared to raise questions to whether the resolutions were the product of undue influence or overreaching and that it was "particularly troubled by Ms. Llordra's statements, that translators were not provided for two board members who did not speak English well, even though they usually require assistance of translators during board meetings, and that two other directors were absent for much of the meeting."

The court further found that defendants had not established that they would be irreparably harmed in the absence of injunctive of relief. The court explained that:

> An interest in a cooperative apartment may be characterized as personalty or realty depending on the purpose of the characterization (*see Matter of State Tax Commn. v. Shor,* 43 NY2d 151, 154 *[1977]; Sansol Indus. v 345 E. 56th St. Owners*, 159 Misc 2d 822, 824 [Sup Ct, NY County 1993]). In this connection, in determining whether the loss of an interest in a cooperative apartment will result in irreparable harm, the courts examine whether the unit is "unique" (*Lombard v. Station Square Inn Apartments Corp.,* 94 AD3d 717, 721 [2d Dept 2012]; *Hirschmann v Hassapoyannes*, 11 Misc 3d 265, 272 [Sup Ct, NY County 2005] [in determining irreparable injury the court found that the apartment was unique due to its proximity to a hospital where defendant is receiving care]). As noted by plaintiffs, this

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> determination turns on whether the party seeking injunctive relief resides in the apartment or if its interest in the apartment is commercial (*see e.g. After Six Inc. v. 201 East 66th Street Associates,* 87 AD2d 153 [1st Dept], *appeal dismissed* 57 NY2d 835 [1982][irreparable harm not shown where apartment was used on interim basis by employees of party seeking injunctive relief]; *Lombard v. Station Square Inn Apartments Corp.,* 94 AD3d at 721 [finding that irreparable harm was absent where movant did not reside in the subject apartment and only potential loss was his investment as opposed to its home]).
>
> Here, as defendants' interest in the professional apartment is commercial, it cannot be said that it will be irreparable harmed in the absence of injunctive relief. Moreover, contrary to defendants' argument, it cannot be said that the professional apartment is unique based on certain features that make its economic value uncertain. In addition, that defendants have requested specific performance of the resolutions does not warrant a finding that they will be irreparable harmed when, as here, money damages would provide an adequate remedy in the event defendants prevail. *After Six Inc. v. 201 East 66th Street Associates,* 87 AD2d at 156 (holding that plaintiffs were not entitled to a preliminary injunction where they sought specific performance of a subscription agreement to purchase shares of stock in cooperative where, inter alia, plaintiff had failed to show irreparable harm based on their commercial interest in apartment at issue). Moreover, that the Coop may not have the funds to reimburse the Sponsor for certain of its expenditures it made in connection with renovating the apartment is insufficient alone to warrant of finding irreparable harm.

Defendants now move for renewal with respect to the court's finding that they had not demonstrated that likelihood of success on the merits. In support of renewal defendants submit the affidavits of Luz Feliciano and Norma Delgado, two former Board members who deny Ms. Llordra statements in her affidavit that they did not speak English well and in the case of Ms. Delgado that she was absent for most of the August 29, 2011 meeting.

Defendants also seek reargument of the court's original decision, arguing that the court overlooked and/or misapprehended the law in finding that they had not established irreparable

harm. In support of its position defendants raise a new argument that there is irreparable harm where an investor who has discretionary managerial authority over an investment vehicle loses the authority based on a co-investor's contractual breach.

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court's attention"(*Tishman Constr. Corp. of New York v. City of New York*, 280 AD2d 374, 376 [1st Dept 2001][citations omitted]).

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided"(*William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 [1992]).

Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunction relief, and (3) a balancing of the equities in the movant's favor. CPLR 6301;(*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]). If any one of these three requirements is not satisfied, the motion must be denied (*Faberge Intern., Inc. v. Di Pino*, 109 AD2d 235 [1st Dep't 1985]). Moreover, "[p]roof establishing these [requirements] must be by affidavit and other competent proof with evidentiary detail" (*Scott v. Mei*, 219 AD2d 181, 182 [1st Dep't 1996]).

Here, even if court were to find that defendants were entitled to renewal based on the

affidavits submitted by defendants and that such facts were sufficient to support a finding of likelihood of success on the merits, defendants would still not be entitled to a preliminary injunction as their motion to reargue is insufficient to establish irreparable harm. Specifically, as the court found since defendants' interest in "the professional apartment is commercial, it cannot be said that it will be irreparable harmed in the absence of injunctive relief." The court's conclusion is supported by the cases cited in the original decision and defendants have failed to cite any controlling law to the contrary.

As for defendants' argument that it will suffer irreparable harm based on their loss of discretionary rights over the management and control of the professional apartment, it appears that this argument was not raised in the prior motion, and reargument should be denied on this ground alone. In any event, this argument is unavailing. The cases relied on by defendants are not dispositive here as they involve circumstances in which the party seeking injunctive relief demonstrated that it would suffer irreparable harm based on the loss of the ongoing management and control of a business interest, whereas this dispute concerns the ownership rights to a single apartment, the loss of which can be compensated for with money damages.

Thus, for example, in *Wisdom Import Sales Company v. Labatt Brewing Company, Ltd.*, 339 F.3d 101 (2d Cir 2003), the court held that a minority shareholder was entitled to injunctive relief where a majority shareholder sought to violate the minority's veto power over fundamental matters affecting the company. The court found irreparable harm explaining that "the continued viability of [plaintiff's] minority veto is critical to defining its precise management role [and that] [plaintiff] expressly negotiated for and received the right to veto certain transactions with which it disagreed before those transactions commenced, a right irretrievably lost upon breach, and may

not be compensable by non-speculative damages.[2]" Id., at 114. Similarly, in *Oracle Real Estate Holdings Co. 1 v. Adrian Holdings Co. 1, LLC*, 582 F Supp.2d 616, 621 (SD NY 2008), the court granted a preliminary injunction where the issue was loss of control of a company, finding irreparable harm, noting that "[plaintiff] seeks to enforce (1) a bargained-for right to corporate control (2) that is difficult or almost impossible to value, which (3) could be meaningless or substantially diminished in value by the end of the litigation in the absence of injunctive relief." *see also, Bank of America, N.A. v. U.S. Bank National Association*, 2010 WL 4243437, at *10-11 (Sup Ct NY Co. 2007)(finding irreparable harm where in the absence of injunctive relief, plaintiffs would lose their bargained-for right to control the management of property which consisted of approximately 11,000 units, 25,000 residents and 550 employees).

In contrast to the cases relied on by defendants, as found in the original decision, it cannot be said that the loss of defendants' rights to the professional apartment, which it owned for commercial purposes, would result in irreparable harm. *See e.g., After Six Inc. v. 201 East 66th Street Associates,* 87 AD2d at 156. Accordingly, defendants' motion to reargue is denied.

Accordingly, it is

ORDERED that the motion to reargue is denied; and it is further

ORDERED that the motion to renew is denied as moot in light of the denial of the motion to reargue.

FILED
JAN 03 2014
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Dated: December 24, 2013

J.S.C.

[2] In reaching this conclusion, the court expressly limited its holding writing that "[t]his is not to say that all bargained-for contractual provisions provide a basis for injunctive relief upon breach or threatened breach; such a broad holding would eviscerate the essential distinction between compensable and non-compensible harm. We hold only that the denial of bargained-for minority rights standing alone, may constitute irreparable harm for the purpose of obtaining an injunction." *Wisdom Import Sales Company v. Labatt Brewing Company, Ltd.*, 339 F.3d at 114.