

25 Indian Rd. Owners Corp. v Baez

2017 NY Slip Op 30158(U)

January 26, 2017

Supreme Court, New York County

Docket Number: 151246/16

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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25 INDIAN ROAD OWNERS CORP.,

Plaintiff,

DECISION/ORDER

Index No. 151246/16

Mot. Seq. No. 001

-against-

RAFAEL A. BAEZ,

Defendant.

-----X
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
MOT. SEQ. NO. 001	
ORDER TO SHOW CAUSE AND ATTY. MINIKES' AFF. IN SUPP.	1,2 (Exs. A-G)
TOPLITSKY AFF. IN SUPPORT	3
MEDINA AFF. IN SUPPORT	4
QUATTLANDER AFF. IN SUPPORT	5
BABAT AFF. IN SUPPORT	6
LOU AFF. IN SUPPORT	7

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

In this action seeking declaratory relief and damages for breach of a lease, plaintiff/lessor 25 Indian Road Owners Corp. moves, by order to show cause, for a preliminary injunction allowing it access to the apartment of pro se defendant/lessee Rafael A. Baez, so that it can, among other things, perform necessary repairs. Defendant has not submitted written opposition to the motion. After oral argument and a review of plaintiff's papers and the relevant statutes and case law, **the motion for a preliminary injunction is granted.**

FACTUAL AND PROCEDURAL BACKGROUND:

On July 28, 2003, plaintiff, owner of a cooperative building located at 25 Indian Road, New York, New York, entered into a proprietary lease with defendant pursuant to which defendant took possession of apartment 3G at the said premises. Ex. A. The lease provided, in relevant part, that:

[Plaintiff] and its agents and their authorized workmen shall be permitted to visit, examine, or enter the apartment * * * at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the building or to cure any default by [defendant] and to remove such portions of the walls, floors and ceilings of the apartment * * * as may be required for any such purpose . . . In order that [plaintiff] shall at all times have access to the apartment * * * for the purposes provided for in this lease, [defendant] shall provide [plaintiff] with a key to each lock providing access to the apartment * * * and if any lock shall be altered or new lock installed, [defendant] shall provide [plaintiff] with a key thereto immediately upon installation.

Ex. A, at par. 25.

On August 6, 11, and 19, 2014, plaintiff notified defendant in writing that the smell of sewage was emanating from his apartment and that plaintiff's plumber needed access to the apartment to address the situation. Ex. B. When defendant refused to allow access to the plumber on August 20, 2014, plaintiff demanded that the plumber be granted access the following day or plaintiff would consider terminating plaintiff's tenancy. Id. It took plaintiff over three weeks to gain access to plaintiff's apartment in order to remedy the leak. Medina Aff., at par. 4.

On July 24, 2015, plaintiff advised defendant in writing that its contractor needed to enter defendant's apartment in order to install de-humidifiers and a fan to dry out the walls and floor so that electrical fires and mold could be avoided. Ex. C. On July 28, 2015, plaintiff again wrote to defendant seeking his cooperation. Id. On July 31, 2015, plaintiff notified defendant that, on August

4, 2015, an engineer retained by the building would be inspecting the structural integrity of the walls and floors in his apartment; that an environmental contractor would be testing for mold in the apartment, and that a third company would be installing de-humidifiers and fans. Id.

By correspondence to defendant dated August 10, 2015, plaintiff noted that, on July 22, 2015, a water leak from defendant's apartment caused damage to apartments in the "G" line below his and that, when the superintendent and the fire department came to the apartment, defendant was sitting in water 2" deep. Ex. C. In the letter, plaintiff further stated that, on July 23, 2015, plaintiff's plumber determined that the leak was caused by a corrosive stored under defendant's sink and that, although defendant allowed the plumber to fix the pipe under his sink, he did not permit access to the engineer, the environmental contractor and the company which was to install de-humidifiers and fans. Id. Plaintiff warned that defendant's refusal to permit such access jeopardized the building and that further lack of cooperation would lead to the termination of his lease. Id.

By correspondence dated February 2, 2016, plaintiff's counsel wrote to defendant to admonish him for threatening the building's superintendent, Sixto Medina, with a knife on January 28, 2016 and for denying access to Medina and the fire department on January 28 and February 2, 2016 in connection with leaks from plaintiff's apartment into apartments 2G and 1G. Ex. D. In that letter, plaintiff demanded that the plumber be granted access on February 4, 2016 at 1 p.m. However, according to the letter, defendant did not grant the plumber access until 2 p.m. on February 4. Ex. E, at p. 4.¹ On February 8, 2015, counsel for plaintiff advised defendant that plaintiff's Board of Directors would be meeting on February 24, 2016 to determine whether to terminate his tenancy. Id.

¹As noted below, however, the plumber, Gregory Quattlander, states in an affidavit that defendant did not allow him into the apartment at all on February 4, 2016. Therefore, defendant either did not fully cooperate with Quattlander or did not cooperate with him at all.

Plaintiff commenced the instant action by filing a summons and verified complaint on February 16, 2016. NYSCEF Doc. No. 1. In its complaint, plaintiff demanded a permanent injunction requiring defendant to permit access to his apartment for the purpose of making repairs and claimed a breach of the lease, negligence, and that defendant was obligated to reimburse it for attorneys' fees. Ex. E.

On February 19, 2016, plaintiff brought the instant order to show cause granting it access to defendant's apartment for the purpose of inspecting the same and making necessary repairs thereto, and directing defendant to provide plaintiff with a key to all locks on his apartment door. On that date, this Court (Jaffe, J.) granted plaintiff a temporary restraining order ("TRO") directing defendant to grant immediate and continuous access to plaintiff and its agents for the purpose of inspecting and repairing leaks emanating from defendant's apartment.

In support of its application, plaintiff submits an attorney affirmation, as well as the affidavits of Jeffrey Toplitsky of Pride Property Management Corp., property manager for the premises; Medina, the building's superintendent; Quattlander, the plumber hired by plaintiff; Anastasiya Babat, a resident of apartment 2G; Leila Marzullo, resident of apartment 1G; and Raymond Lou, an exterminator hired by plaintiff.

In their affidavits, Toplitsky and Medina substantially reiterate the history of defendant's failure to cooperate with plaintiff and its representatives as set forth above. Quattlander states that he saw and repaired leaks which led from defendant's apartment into apartment 2G in July of 2015 and that, on February 4, 2016, defendant refused him access to the apartment, despite a leak emanating from the unit. In her affidavit, Babat states that her parents own apartment 2G and rented it to a family which had to vacate the unit due to leaks from apartment 3G on at least three occasions

from August, 2014 until July, 2015. She maintains that the leaks continue until the present and that her parents' apartment will remain uninhabitable until the leaks are repaired. Marzullo states in her affidavit that she resides in apartment 1G and has had leaks from August of 2014 until the present. Lou, the exterminator hired by plaintiff, states in his affidavit that, in March of 2016, he was briefly permitted into defendant's apartment, at which time he saw that it was cluttered, unsanitary, had a bad odor, and that there were numerous fruit flies and drain flies present. Because these flies generally live where moisture is present, Lou opines that the infestation of apartments 2G and 4G by such insects was caused by the condition of defendant's apartment.

After oral argument of the motion on March 22, 2016, this Court issued an interim order extending the TRO and granting access to an exterminator for the purpose of addressing the insect infestation in the building. NYSCEF Doc. No. 26.² Pursuant to the order, plaintiff was to give defendant 24 hours notice, and 48 hours notice where possible, that it needed access to defendant's apartment, except in the case of an emergency. *Id.* Defendant was also directed to provide plaintiff with keys to all locks on his apartment door. *Id.*

POSITIONS OF THE PARTIES:

Plaintiff maintains that it is entitled to a preliminary injunction because paragraph 25 of the

²Defendant, who, as noted above, is pro se, was represented by counsel at oral argument. The attorney who represented defendant at oral argument moved to be relieved as counsel and his motion was granted by order dated May 2, 2016. NYSCEF Doc. No. 41. Defendant was then represented by a second attorney, who filed an answer on May 6, 2016, thus allowing this Court to consider the injunctive relief sought. NYSCEF Doc. No. 43. On or about November 10, 2016, however, defendant's second attorney also moved to be relieved as counsel, and his motion was granted by order dated December 6, 2016. NYSCEF Doc. Nos. 48-50 and 56.

lease permits it to enter defendant's apartment to inspect and make repairs.³ Plaintiff's counsel specifically asserts that a preliminary injunction is "necessary to stop the continuing leaks from [defendant's a]partment so as to allow [p]laintiff to eliminate [any] health risk and ameliorate the damages caused by the leaks." Minikes Aff., at par. 10.

As noted above, defendant has not submitted any written opposition to plaintiff's application.

At oral argument of the application, defendant's initial attorney consented to inspection and extermination of defendant's apartment but insisted that no force be used in accessing the unit and that defendant be given at least 48 hours notice of such an inspection.

CONCLUSIONS OF LAW:

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing. Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party." *1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011).

Plaintiff has demonstrated a likelihood of success on the merits. Defendant fails to refute that he has repeatedly refused plaintiff and/or its agents access to his apartment, or that he has impeded such access, in order for inspections and repairs to be performed. Since the right of plaintiff to enter defendant's apartment to make repairs is a condition of the lease (Ex. A, at par. 25), and defendant

³Although plaintiff's order to show cause seeks a permanent injunction and a TRO, and its complaint seeks a permanent injunction as well, plaintiff's counsel stated on the record at oral argument on March 22, 2016 that he was seeking a *preliminary* injunction.

has repeatedly failed to satisfy this condition, plaintiff has made a threshold showing of success on the merits. See *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 31 Misc 3d 1220 (A) (Sup Ct New York County 2011).

Plaintiff has also demonstrated a danger of irreparable harm in the event an injunction is not granted. "In this context, 'irreparable injury' means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite*, and if granted, tailored to fit the circumstances so as to preserve the *status quo* to the extent possible. See generally, *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255 (1st Dept 2009)." *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 31 Misc 3d 1220 (A), at ***13. Defendant does not deny that water leaking from his apartment is damaging the building and that water in his apartment has caused an infestation of fruit flies and drain flies. Thus, defendant's further refusal to permit access to plaintiff and its agents to remedy the leaks and exterminate the flies could result in irreparable injury. *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 31 Misc 3d 1220 (A), at ***14.

Finally, plaintiff has demonstrated that the equities weigh in its favor. Although defendant has not even attempted to show how he would be prejudiced if plaintiff or its agents entered his apartment to inspect, repair, or exterminate, plaintiff has shown that its inability to enter his apartment has caused, and will continue to cause, danger and potential safety and health problems in the building. *Id.* Thus, the issuance of a preliminary injunction is warranted under the circumstances of this case.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiffs' application for a preliminary injunction is granted; and it is further,

ORDERED that defendant shall allow plaintiff access to his apartment for the purpose of performing any inspections, repairs, or extermination in accordance with paragraph 25 of defendant's proprietary lease dated July 28, 2003; and it is further,

ORDERED that plaintiff shall provide defendant with written notice, by overnight mail and hand delivery, of the need for such access at least 24 hours in advance, and 48 hours notice where possible, except in the case of an emergency, at which time plaintiff is to be granted immediate access without advanced written notice; and it is further,

ORDERED that any access sought by plaintiff shall be scheduled only on business days (non-holiday Monday-Friday), except in the case of an emergency, and such access shall continue, day to day, only on business days, except in the case of an emergency, until the necessary work to be performed is completed; and it is further,


ORDERED that plaintiff shall serve a copy of this order on defendant, with notice of entry, by overnight mail within 20 days of entry of this order; and it is further,

ORDERED that the parties are to appear for a preliminary conference in this matter on April 4, 2017 at 80 Centre Street, Room 280, New York, New York at 2:30 p.m.; and it is further,

ORDERED that this constitutes the decision and order and decision of the court.

DATED: January 26, 2016

ENTER:



Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**