Omansky v 160 Chambers St. Owners Inc.
2017 NY Slip Op 31108(U)
May 16, 2017
Supreme Court, New York County
Docket Number: 654367/16
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

LAWRENCE A. OMANSKY, AND
LAWRENCE A. OMANSKY, Shareholder of and Suing in the Right of
160 CHAMBERS STREET OWNERS INC.,

Plaintiffs,

- against -

160 CHAMBERS STREET OWNERS INC., MARYA COHEN, MATTHEW PALEOLOGOS, MICHAEL LATEFI, and NAZLIE LATEFI,

Defendants.

Index No. 654367/16

Mot. seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff, self-represented:
Lawrence A. Omansky, Esq.
51 Warren St., Ste. 1W
New York, NY 10007
212-571-6658

For 160 Chambers:
Andrew Bittens, Esq.
Kucker & Bruh, LLP
747 Third Ave., 12th fl.
New York, NY 10017
212-869-5030

By order to show cause, plaintiff, owner of a co-operative apartment at 160 Chambers Street (building) in Manhattan, and one of four shareholders in defendant 160 Chambers Street Owners Inc. (Chambers), seeks on his own behalf and derivatively for Chambers, orders:

(1) compelling 160 Chambers to (a) sign all documents necessary for his application to install a roof deck on his terrace and to allow the installation of four to six posts at his own expense; (b) replace defective skylights in the front of his unit; and (c) restore or repair portions of his unit that are damaged as a result of leaks;

(2) enjoining and restraining defendants from repairing the rear portion of the roof;

(3) fixing the reasonable value of legal fees incurred by him in bringing the instant

application and ordering defendants to pay such fees; and

(4) imposing sanctions on defendants.

I. PERTINENT BACKGROUND

Plaintiff's proprietary lease, which applies to all of the shareholders, provides, in section 7.A., that where an apartment includes, *inter alia*, a portion of the roof adjoining the penthouse, the lessee

> shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of this Lease . . . The Lessor shall have the right to erect equipment on the roof . . . And shall have the right of access thereto for such installations and for the repair thereof. . . .

Section 7.B. gives plaintiff "exclusive use of the roof," and requires that he keep it "clean and free from snow, ice, leaves and other debris, [and] maintain all screens and drain boxes in good condition, and [ ] repair nonstructural defects and damages caused exclusively by him, his guests, and his family." (NYSCEF 63). Chambers is required to "repair any structural defects or damages caused by acts of God, by acts not attributable to Mr. Omansky's use, and any defects caused by normal wear and tear of such roof." (*Id.*).

The lease additionally provides, in section 18.A., that the lessee takes possession of the apartment and

> its appurtenances and fixtures "as is" as of the commencement of the term hereof [] the Lessee shall keep the interior of the Apartment (including interior walls, floors and ceilings, but excluding windows, window panes, window frames, sashes sills, entrance and terrace doors, frames and saddles) in good repair.

(*Id.*).

In or around May 2007, plaintiff asked that the co-operative board "fulfill its obligations to repair the roof, and replace leaking windows and skylights under Article 1, 2, 7 A & B, and

18," whereupon, after a meeting held on May 22, 2007, the board resolved to replace and/or repair "the entire existing building roofing from front to back of the building." It was also resolved that "should it become clear during the estimate/bidding process that the costs are going to exceed [the maximum provided for], then the Board agrees that a new resolution will need to be passed." (NYSCEF 18, ¶¶ 5, 12). On December 27, 2008, the board resolved that all of the work would be done, as well as the installation of an elevator. (NYSCEF 19).

In 2009, the DOB issued a violation against Chambers for an illegal rooftop deck. (NYSCEF 62). Plaintiff thereupon hired an architect to file plans to legalize it, and by email dated October 27, 2009, defendants granted plaintiff permission to do so on the following conditions: that plaintiff provide the board with a copy of architectural plans and a letter from the architect stating that the plans are adequate for a permit to issue, and if not, that plaintiff would remove the roof deck to remedy the violation by January 2010, that he grant the board access to the roof and to his apartment to repair "the current leak and fungus problems in the building," that he agree to pay any fine for the violation, and that he agree that the roof deck is his sole property and as such, it is his responsibility to pay to remove and replace portions of it if and when problems with it affect the building as a whole, or when any work must be done on the roof. (NYSCEF 20).

Plaintiff alleges that he provided Chambers with a letter from his architect and application to the DOB (NYSCEF 45), which Chambers refused to sign (NYSCEF 16). By resolution dated May 4, 2016, the board again agreed to repair the roof. Between May and June 2016, plaintiff removed the old deck to allow for the repairs. (*Id.*, ¶¶ 5-7).

At a board meeting held on July 27, 2016, plaintiff asked that the board consent to the

roof deck construction. The board refused unless plaintiff agreed to withdraw his appeal in a related action. Plaintiff also sought, by second motion before the board, that the board resolve to repair and replace the skylight and repair the damaged portions of his unit, which the board refused to do on the ground that there was no money to accomplish those tasks. (*Id.*, ¶¶ 7-8).

II. CONTENTIONS

Relying on the aforementioned portions of the proprietary lease, plaintiff argues that defendants breached the proprietary lease and fiduciary duty owed him in refusing to allow him to construct a terrace on the "appurtenant portion of [his] unit," to repair and replace his defective windows, and repair the interior of his apartment that was damaged as a result of the leak. He claims that the individual defendants' conduct toward him is motivated by revenge for his having filed suit against them, and by personal financial gains resulting from not being assessed for the repairs. (*Id.*, ¶ 9).

Plaintiff's bid for sanctions against defendants and their counsel is based on what he asserts are fabrications uttered against him in court. He alleges that counsel falsely asserted that he had not paid his maintenance and an assessment, relying on an order of a different justice of this court dated June 17, 2016 (NYSCEF 23), and maintaining that he had paid $17,500 of a $35,000 assessment. (NYSCEF 16, ¶ 12). He also contends that counsel falsely stated that he owes legal fees notwithstanding that the issue of fees is being heard by a referee. (*Id.*).

Plaintiff complains that I unfairly granted defendants an order requiring that he remove his rooftop deck based on counsel's representation that funds had been obtained and a contractor hired to do the work, and that after six or seven weeks of no progress on the roof repair by defendants, he sought to hold defendants in contempt for their failure to perform, whereupon

defendants immediately called a special meeting and illegally assessed all owners $35,000 for the roof repair and, the day before a hearing, hired a contractor to perform, thereby mooting his motion. A preliminary injunction is needed, he argues, to install posts before the roof repairs are complete and thereby prevent a breach of warranty. (*Id.*, ¶¶ 10, 12).

Apart from certain procedural objections, defendants argue that plaintiff's failure to advance any argument that he satisfies the requirements for seeking injunctive relief is fatal to his motion, and assert that given the availability of money damages to compensate him for the loss of the roof deck, he does not demonstrate a right to injunctive relief. Defendants invoke the business judgment rule as justifying their conduct here and maintain that plaintiff does not show that the board acted outside the scope of its authority or in bad faith, and that his demand that the board sign off on the reinstallation of the roof deck is unsupported. (NYSCEF 60, ¶¶ 7-11).

That the removal of the deck may cure the DOB violation does not mean, defendants contend, that plaintiff is entitled to install a new deck, and observe that he offers no expert evidence to support his claims as to whether such a deck would be legal vis a vis the DOB, or that the requested installation of posts is time-sensitive. Relying on the proprietary lease, they argue that it confers no right on plaintiff to replace the preexisting roof deck; rather, it affords him exclusive use of the area, not an unfettered right to build on it, which is reserved solely to the co-operative. Defendants rely on plaintiff's duty to maintain the roof, as set forth in section 7.B. of the proprietary lease, and observe that plaintiff's failure to comply with that section caused the water to leak into his unit. Defendants offer the affidavit of Paleologos, an expert in the field of general contracting and construction management consulting, who explains that the roof repair work need not stop for the installation of posts, that the skylights are actually vertical windows

that have been sealed with an appropriate sealant, and that the former roof deck, complete with decking, planters, and koi ponds, had a deleterious impact on the roof, and prevented access to the drain, and was installed without proper permits or engineering. (*Id.*, ¶¶ 11-19).

Defendants nonetheless set forth conditions for reinstallation of the roof deck, including that (1) the court determines that plaintiff is entitled to install the deck, and (2) the installation take place after the roof repair is complete, railings have been installed, the roof has been inspected by the contractor and manufacturer, and a manufacturer's warranty has been issued. (NYSCEF 61; NYSCEF 60, ¶ 39). They deny any responsibility under the proprietary lease for repairing the interior of plaintiff's apartment. (NYSCEF 60, ¶¶ 25-26).

For these reasons, defendants argue that plaintiff does not demonstrate a likelihood of success on the merits, and that the balance of the equities favor them given plaintiff's practice of filing meritless motions and actions. Moreover, they observe that plaintiff is in arrears for past due commercial rent, attorney fees, and the full amount of the assessment for the roof repair. For his part, counsel denies any alleged misrepresentations. Defendants ask that I search the record and impose sanctions on plaintiff for harassing, vexing, and abusing them by filing repeated and unfounded actions against them. (*Id.*, ¶¶ 32-38).

III. ANALYSIS

Pursuant to CPLR 6301, the court may grant a party a preliminary injunction "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights." (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 544 [2000]; *Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Ass'n, Inc.*, 21 AD3d 777, 778 [1st Dept 2005]). To obtain a preliminary injunction, the moving

party bears the burden of demonstrating, by nonconclusory statements, the likelihood of success on the merits, a danger of irreparable injury, and that the balance of equities is in its favor. (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]; Vincent C. Alexander, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR 6312, C6312:1 [2010]).

A. Likelihood of success on the merits

Absent any showing that the proprietary lease affords plaintiff an absolute right to reinstall a roof deck, that the deck did not block access to the roof drain and did not play a significant role in producing leaks into plaintiff's apartment, that the board resolved to replace the roof deck as opposed to repairing the roof, that it is necessary to install posts before completing the repair in the event that a deck is approved by the board and DOB, that the board has a duty to repair the interior of plaintiff's apartment as opposed to repair the leaks, and that the skylights have not been repaired, plaintiff has failed to demonstrate that he will likely succeed on the merits of any of his claims. (*See 1234 Broadway LLC*, 86 AD3d at 23 ["[c]onclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction"]). In any event, all of plaintiff's claims may be remedied with monetary damages. (*See Famo, Inc. v Green 521 Fifth Ave. LLC*, 51 AD3d 578 [1st Dept 2008] [damages would compensate plaintiff for losses resulting from landlord's lobby installation]).

B. Danger of irreparable injury

Plaintiff's claim that he will not be able to install a roof deck without installing the posts before the roof is repaired does not constitute irreparable injury absent a showing that he is entitled to install the roof deck or that defendants' expert assessment is wrong. (*See Neos v*

Lacey, 291 AD2d 434, 435 [2d Dept 2002] [plaintiff's bare and conclusory allegations insufficient to show he would suffer irreparable harm if competitor kept selling product]).

C. Balancing of the equities

As plaintiff fails to controvert assertions that the roof repair need not stop to install the posts, he does not show that the balance of equities is in his favor. (*Goldstone v Gracie Terrace Apt. Corp.*, 110 AD3d 101 [1st Dept 2013] [balance of equities not in favor of preliminary injunction prohibiting cooperative from renovating shareholder's apartment where shareholder failed to respond to assertions that her proposed method of repair more expensive than cooperative's]). In any event, as he fails to establish a likelihood of success on the merits or danger of irreparable injury, whether or not the equities balance in his favor is irrelevant. (*See Metro. Steel Indus., Inc. v Perini Corp.*, 50 AD3d 321, 322 [1st Dept 2008] [court need not address irreparable injury where plaintiff failed to establish two other necessary elements]).

D. Sanctions and legal fees

I decline to impose sanctions on any party. Absent any legal basis upon which to award legal fees, plaintiff's request is denied.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for injunctive relief is denied.

ENTER:

Barbara Jaffe, JSC

DATED: May 16, 2017
New York, New York