Red Apple Child Dev. Ctr. v Board of Mgrs. of Honto 88 Condominiums
2018 NY Slip Op 33346(U)
December 17, 2018
Supreme Court, New York County
Docket Number: 160185/2014
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

---X

RED APPLE CHILD DEVELOPMENT CENTER,

Plaintiff,

- v -

BOARD OF MANAGERS OF HONTO 88 CONDOMINIUMS, CANDY XIA, NEW GOLDEN AGE REALTY, INC, JOHN DOE,

Defendants.

---X

INDEX NO. 160185/2014

MOTION DATE

MOTION SEQ. NO. 006

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 130, 131, 132, 133, 134, 135, 136, 137, 138, 145, 146, 147, 148, 149, 150, 151, 167

were read on this motion for contempt.

Plaintiff moves pursuant to Judicial Law § 753(A)(3) and CPLR 5104 for an order holding defendant Board of Managers of Honto 88 Condominiums (Condominiums) in civil contempt and, pursuant to Judicial Law § 773 for an order imposing damages for its contempt. It claims that Condominiums failed to comply with my decision and order dated August 25, 2017, whereby its motion for a preliminary injunction was granted, enjoining defendants "from failing to maintain, in first-class condition, order, repair, and maintenance, the cooling system and tower and areas in the steam room in the condominium." (NYSCEF 93).

On April 10, 2018, plaintiff's expert engineer inspected the cooling tower. By affidavit dated May 22, 2018, he states that the remedial measures he had previously identified as "necessary to correct the problems afflicting the cooling tower system" had not been implemented, and that it would take approximately 45 days to do so at an estimated cost of $175,000 with annual costs of $7,000 to "chemically treat, test, and clean the tower" as legally required. The remedial measures include:

1) installation of a new cooling tower to replace the existing one that is severely corroded; 2) installation of new condenser water distribution piping to replace pipes that are internally corroded and occluded; 3) installation of new condenser water pumps because the existing pumps have been internally damaged by scale; and 4) implementation of the cooling tower maintenance program required by Chapter 8 of Title 24 of the Rules of the City of New York, also known as Local Law #77/2015 including chemical treatment of the condenser water with inhibitors to prevent corrosion and to control microbial infestation.

The expert alleges that plaintiff will be unable to use the water-cooling units to air-condition the classrooms and office areas during the summer, and that in his opinion, based on his inspection, Condominiums "continues not to maintain the cooling tower in a state of first class condition order and repair." (NYSCEF 132).

Plaintiff thus asks that Condominiums be compelled to comply with the August 25 order by imposing a reasonable monetary sanction for its continued non-compliance and that it be daily imposed pending compliance, or alternatively, an order directing Condominiums to pay it damages in the amount of $182,000 for the approximate cost of remediating the cooling tower. To the extent that Condominiums has repaired or maintained the common elements in compliance with the order, plaintiff seeks a hearing to determine such compliance. It also asks for reasonable attorney fees and costs for the instant motion practice and access for it and its expert to access the common elements in order to determine compliance. (NYSCEF 93).

In opposition, Condominium's managing agent denies that the August 25 order was willfully violated. Rather, she asserts, from 2011 to 2018, various service and repair companies had advised that the systems were in good working order. Thus, repairs were made when needed (NYSCEF 147). However, based on the recent opinions of contractors that the cooling tower can no longer be maintained or repaired, written proposals for the installation of a new cooling system have been solicited (NYSCEF 148). (NYSCEF 146).

Condominiums also argues that absent an affidavit from one with personal knowledge of the facts, plaintiff fails to demonstrate prejudice to its rights, and otherwise relies on the maintenance and repair invoices as evidence that the cooling system was functional and on the proposals as evidence that it is actively seeking to replace the cooling tower. (NYSCEF 145).

At oral argument on the motion, plaintiff's counsel alleged that the cooling tower was nonfunctional since 2014, and that Condominiums was aware of its condition since at least March 2017 when plaintiff's expert opined that it was nonfunctional. He also stated that there was no longer any issue with the steam room. Moreover, he maintained without dispute that the invoices offered by Condominiums as evidence that the cooling tower had consistently been maintained and/or repaired since June 2015 relate solely to the steam room and not to the cooling tower. Thus, he argued that Condominiums willfully and intentionally disobeyed the August 25 order. (NYSCEF 167).

A court may

> punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: * * * 3. A party to the action or special proceeding * * * for any other disobedience to a lawful mandate of the court.

(Jud Law § 753[A][3]; *McCormick v Axelrod*, 59 NY2d 574, 582–83, amended, 60 NY2d 652 [1983]). The penalty imposed for civil contempt is "to compensate the injured private party for the loss of or interference with that right resulting from the contempt. (*Id.*).

While Condominiums solicited proposals for replacing the cooling tower, it did so long after plaintiff demonstrated by expert evidence that the cooling tower was nonfunctional. While Condominiums was free to reject the opinion of plaintiff's expert, having offered no evidence,

expert or otherwise to the contrary, it is reasonable to infer that it has been dilatory in remediating the condition. The invoices it provides prove nothing pertinent.

As it is reasonable to infer from the circumstances that plaintiff is prejudiced by Condominium's failure to provide a new cooling tower, the absence of a supporting affidavit beyond that of the expert is of no legal significance here. Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order holding defendant Board of Managers of Honto 88 Condominiums in contempt is granted to the extent that it is directed, within 60 days of the date of this order, to

1) install a new cooling tower to replace the existing one;

2) install new condenser water distribution piping to replace pipes that are internally corroded and occluded;

3) install new condenser water pumps; and

4) implement the cooling tower maintenance program required by Chapter 8 of Title 24 of the Rules of the City of New York, also known as Local Law #77/2015 including chemical treatment of the condenser water with inhibitors to prevent corrosion and to control microbial infestation.

If defendant Board of Managers of Honto 88 Condominiums fails to comply timely, sanctions will be imposed upon plaintiff's submission of an affidavit of non-compliance.

12/17/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE