Connery v Sultan
2006 NY Slip Op 30735(U)
February 2, 2006
Supreme Court, New York County
Docket Number: 401336/05
Judge: Marcy S. Friedman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

STEPHANE COSMAN CONNERY and
MICHELINE CONNERY,

Plaintiffs,

- against -

BURTON S. SULTAN,

Defendant.

Index No.: 401336/05

DECISION/ORDER

This is a dispute between the owners of a two-unit condominium townhouse, located at 173-175 East 71st Street in Manhattan, over the management of the building. Plaintiffs Stephane Connery and his mother, Micheline Connery, the owner and occupant, respectively, of the unit located on the top floors (Unit 2), sue defendant Burton Sultan, the owner of the unit on the lower floors (Unit 1) for, among other relief, an injunction restraining defendant from interfering with common area repairs, and appointment of a receiver to manage the property.

Pursuant to the by-laws of the condominium, the parties arbitrated a prior dispute over the scope of required common area repairs and the owners' respective shares of the costs for the repairs. The arbitrator's award, issued on August 1, 2002, determined that it was in the best interests of the condominium to perform repairs to the roof, masonry, and facade; designated the contractors to perform the repairs; and directed the Connerys to pay 35% of the costs to be incurred, and Mr. Sultan to pay 65% of the total costs up to a maximum of $127,660.00. The award also awarded damages to Mr. Sultan for loss of quiet enjoyment and damage to Unit 1 as a

result of work performed on Unit 2, but denied damages for alleged fraud by the Connerys. The award was confirmed by order of this court dated February 25, 2003 in a prior proceeding entitled Connery v Sultan (New York County, Index No. 100709/02). By subsequent order in that proceeding, dated January 30, 2004, this court granted a motion to compel Mr. Sultan to execute a permit application required in order for the work that was ordered by the arbitration award to be performed, without prejudice to a motion for contempt in the event of his failure to do so. No further motions were brought in that proceeding.

Instead, both parties have instituted multiple, often duplicative, actions against each other arising out of their dispute over repairs to the building. In 2004, Stephane Connery and Micheline Connery instituted the instant action in Nassau County. This action seeks performance of the repairs that were directed by the arbitrator, and also seeks appointment of a receiver based on the inability of plaintiffs and Mr. Sultan to reach agreement on the repair and management of the building. By order of the Supreme Court, Nassau County, dated February 25, 2005, defendant Sultan's motion to dismiss this action and, alternatively, to change venue to New York County was granted only to the extent of transferring the action to this County. During the period that it took to transfer the file in this action from Nassau, plaintiffs commenced a separate action in New York County (Index No. 107384/05) for the same or substantially the same relief. Plaintiffs acknowledge that they filed three additional actions in Nassau County, but do not provide details.

In the name of the condominium, Mr. Sultan commenced a non-payment eviction proceeding against the Connerys (173 E. 71st St. Condominium v Cosman-Connery, Civil Court, Housing Part, Index No. 080479/04), which has since been dismissed. Mr. Sultan and members

of his family also filed two actions in New York County against the Connerys and others (Index No. 113715/04) for damages for intentional interference with the Sultans' quiet enjoyment of Unit 1 and other alleged wrongs in connection with the Connerys' use and renovation of Unit 2.

CPLR 6401(a) authorizes the appointment of a temporary receiver, upon motion of a person having "an apparent interest" in the property which is the subject of an action in this Court "where there is danger that the property will be * * * lost, materially injured or destroyed." It is well settled that "[t]he drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties....There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established." (Matter of Armienti v Brooks, 309 AD2d 659, 661 [1st Dept 2003][internal citations and quotation marks omitted].)

Here, plaintiffs demonstrate by clear and convincing evidence that the appointment of a receiver is necessary. It is undisputed that the roof and facade repairs ordered by the arbitrator's award in August 2002 have not yet been made. The evidence submitted on this motion demonstrates that the repairs are necessary to eliminate serious continuing leaks into Unit 2. Mr. Sultan does not dispute plaintiffs' claim that he has refused to authorize repairs by the contractor designated in the arbitrator's award because that contractor has raised his bid in the more than two years that have passed since the award was issued. Nor does Mr. Sultan seriously dispute that severe leaks exist in plaintiffs' apartment. Rather, Mr. Sultan attempts to re-litigate the cause of the leaks (i.e., the issue of whether they were caused by wear and tear or by renovations performed by the Connerys), notwithstanding that the arbitrator has already determined that his unit is 65% responsible for the cost of the repairs; that this award has been confirmed by the

court; and that the time to appeal the confirmation of the award has passed. It is also undisputed that the parties are unable to reach agreement to have the work performed by a contractor, other than the contractor designated by the arbitrator, who would be willing to perform the work at a lower bid. Both plaintiffs and defendant claim to have suggested a different contractor at a lower bid. However, as the papers on this motion indicate, neither party is willing to accept the other's contractor. As of June 2005, a new dispute has arisen as to whether asbestos abatement is needed on the roof, with plaintiffs requesting that defendant sign asbestos abatement forms, and defendant claiming that he has not been given adequate evidence that asbestos exists on the roof.

In addition, under section 2.01 (A) of the by-laws of the condominium, the owners of Unit 1 and 2 each have one representative who is entitled to cast one vote at any meeting of the condominium Board. Section 2.08 (A) of the by-laws provides that all determinations of the Board shall be made at a meeting of the Board at which a quorum is present, and that "the unanimous vote of the members present shall constitute the decision of the Board." A deadlock exists which prevents the two unit owners from reaching any decision. It is undisputed that in 2004, the Connerys called a meeting of the condominium for May 27, which Mr. Sultan declined to attend. Mr. Sultan then issued his own notice of an annual meeting for June 7, 2004, and plaintiffs objected to the time and place of the meeting. While plaintiffs have subsequently withdrawn their objection to a meeting, the parties will be unable to elect officers because they will not vote for each other's representatives. Nor can they reach agreement on any decisions relating to the repairs ordered by the arbitrator, as a unanimous decision is required by the by-laws and, to date, Mr. Sultan has not voluntarily – that is, without a court order – taken even the most unexceptional, ministerial steps, such as the execution of a permit application, necessary to

effectuate such repairs.

The court finds that the continuing inability of the parties to reach the agreements needed to implement the repairs ordered by the arbitrator demonstrates a danger of material injury to the property within the meaning of CPLR 6401(a). The unresolvable dissension between the unit owners over issues relating to the repair and management of the property warrants appointment of a temporary receiver. (See Wollman v Littman, 35 AD2d 935 [1st Dept 1970]; Matter of Jack Martin Auto Sales Inc., ___ Misc 2d ___, 63 NYS2d 686 [Sup Ct, New York County 1946].)

Contrary to defendant's contention, plaintiffs' sole remedy is not to continue, pursuant to the by-laws, to arbitrate disputes over the action the condominium should take. Defendant cites no authority that a receiver should not be appointed where, as here, there is a danger of material injury to the property and a deadlock in the management of the condominium. The court has considered Mr. Sultan's remaining bases for objection to the appointment of a receiver, and finds them to be without merit.

The receiver's function should be limited, until further order of the court, to the performance of the repairs ordered by the arbitrator; any other repairs that are necessary to preserve the property or required in the ordinary course of maintenance; and the orderly functioning of the regular course of business of the condominium. (See Wollman, 35 AD2d at 935.)

It is noted that, after the submission of the instant motion, the parties submitted unauthorized sur and sur-sur replies, as well as numerous unauthorized letters to the court. Such papers have not been considered by the court. The court will not entertain or respond to letter applications for substantive or procedural relief. As defendant is now pro se, he is further

advised that all future motion papers must be double, not single, spaced, and must comply with the page-limits set forth in the Court Rules: 25 pages for affidavits. (Rules of the Justices of the Supreme Court, Civil Branch, New York County, Rule 14, http:www.courts.state.ny.us/supctmanh/>, last updated June 16, 2005.)

This constitutes the decision of the court.

Settle order appointing a temporary receiver.

It is hereby ORDERED that the parties shall appear for a discovery conference in Part 57 of this Court, Room 328, 80 Centre Street, New York, New York, on February 23, 2006 at 11:30 a.m. The parties shall bring to such conference all prior discovery orders in this and any related cases.

Dated: New York, New York
February 2, 2006

MARCY FRIEDMAN, J.S.C.