Binder v Board of Mgrs. of Arris Lofts
2013 NY Slip Op 33701(U)
January 25, 2013
Sup Ct, Queens County
Docket Number: 702421/2012
Judge: Roger N. Rosengarten

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: ROGER N. ROSENGARTEN, JUSTICE. PART IAS 23

LON BINDER and JESSICA BINDER,

Plaintiffs,

-against-

THE BOARD OF MANAGERS OF ARRIS LOFTS, et al.,

Defendants.

Index No. 702421/2012

Motion Date: 12/6/12

CMP Cal. No. 8

Motion Seq. # 1

The following papers numbered 1 to 10 read on this motion for a preliminary injunction:

Order to Show Cause – Affidavits in Support (2) – Exhibits – Memo of Law.....1-5
Affidavit in Opposition – Exhibits – Memo of Law.....6-8
Reply Affidavit – Exhibit.....9-10

Upon the foregoing papers it is ordered that this motion is decided as follows:

Plaintiffs filed this action seeking declaratory and injunctive relief establishing their right to maintain and continue to use the kitchen range and vented exhaust system they installed in the kitchen of their condominium unit at Arris Lofts ("Arris"). Now before the Court is Plaintiffs' motion, by order to show cause, for a preliminary injunction preventing Defendants from sealing the vent.

The facts of this case, with exceptions noted below, appear to be largely undisputed. Plaintiffs, husband and wife, own and live in a residential condominium unit of Arris, which they purchased in January 2010. Mrs. Binder is a trained chef and operates a successful business and internet blog out of the kitchen of her home, which involves developing and photographing Chinese recipes and hosting cooking events. Her style of cooking produces large amounts of smoke and grease and requires an externally-ventilated exhaust hood over the kitchen range. It is Plaintiffs' contention that when viewing the condominium and considering their purchase, they explained their home business and the need for such an exhaust system to a representative of Arris's sponsor, Defendant Tag Court Square, LLC ("the Sponsor") which then controlled Defendant Board of Managers of Arris Lofts ("the Board"). Plaintiffs contend that they were assured that the needed renovations would be permitted – and that the representative in fact advised them of the specifications and suppliers of the necessary equipment – and that they purchased their unit in reliance on those assurances. It is not clear from the record presented, which does not include Defendants' Answer, whether Defendants admit or deny these allegations

concerning pre-purchase communications and promises. It is undisputed, however, that in July 2010, about six months after closing on the unit, Plaintiffs submitted their renovation plans, which Plaintiffs allege were based on the recommendations of the Sponsor's representative, to the Board for approval and that the Board denied approval for the exhaust system around September or October of that year. Plaintiffs then sought to compel an arbitration of that denial, but the Board successfully petitioned this Court for a finding that there had been no agreement to arbitrate. (Opp. Exh. E.) Plaintiffs nevertheless proceeded with their renovations, which were completed in June 2011 and included a 10-inch diameter hole through the 8-inch thick south-facing concrete exterior Arris wall for the exhaust system vent. Plaintiffs contend that the managing agent then inspected their condominium and their $1,500 alteration security deposit was refunded to them; it is again unclear if Defendants admit or deny this allegation. In February 2012, the managing agent again inspected their unit. Plaintiffs then received a letter dated October 4, 2012 advising them that "the Board intends to immediately commence work to repair and restore" the concrete exterior wall, and demanding access for further inspection the same month. (Mot. Exh. 1.) Plaintiffs commenced this action in response.

The well-known elements for preliminary injunctive relief require Plaintiffs to show "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor." *Kelley v Garuda*, 36 AD3d 593, 596 [2nd Dept 2007] (*quoting Aetna Ins. Co. v Capasso*, 75 N.Y.2d 860, 862 [1990]). The showing must be by clear and convincing evidence and the risk of irreparable harm must be "imminent, not remote or speculative." *Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738, 739 [2nd Dept 2010] (*quoting Golden v Steam Heat*, 216 A.D.2d 440, 442 [2nd Dept 1995]). "The purpose of a preliminary injunction is to maintain the status quo pending determination of the action." *Kelley, supra* (*quoting Coinmach Corp. v Alley Pond Owners Corp.*, 25 A.D.3d 642, 643 [2nd Dept 2006]). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court." *Family-Friendly Media, Inc., supra*. Although the case at bar presents a close question, the Court finds preliminary injunctive relief is warranted.

Likelihood of success

The first required element – Plaintiffs' likelihood of success on the merits of their claims based on promissory estoppel – is highly disputed by the parties. Defendants point out that Plaintiffs do not offer any written evidence of the assurances they allege they received prior to their purchase and contend that reliance on any oral assurances would not be reasonable given conflicting prohibitions in the Arris by-laws, which Plaintiffs accepted with their purchase. Defendants also argue that Mrs. Binder's description of her business constitutes a commercial use of the residential unit in violation of both the Arris by-laws and zoning laws, as well as indicating fire and health code violations, thus diminishing Plaintiffs' likelihood of success.

The Court is not persuaded by these arguments. The only evidence regarding the pre-sale communications between Plaintiffs and the Sponsor's representative are the affidavits of each Plaintiff in support of the motion, which identify that representative as Bill Bretschger, director of construction for the Sponsor. Defendant offer no affidavit from, or any information as to, Mr. Bretschger, and the affidavit in opposition offered by James Xanthos, an employee of Arris's managing agent, is notably silent as to Plaintiffs' allegations, including that Mr. Bretschger provided specific advise as to the exhaust system equipment and suppliers Plaintiffs should use. The Court therefore credits the claims in Plaintiffs' affidavits as to oral assurances from Mr.

Bretschger and finds, since they stand conspicuously unrebutted, that the affidavits meet the clear and convincing standard of proof for purposes of this motion. Defendants' argument that Plaintiffs' reliance on the oral representations would be unreasonable because of conflicting provisions of the by-laws is unavailing because the cited provisions do not appear to conflict with the alleged promises, but merely require the Board application and approval procedure that Plaintiffs followed. Given Plaintiffs' additional allegation that the Board was controlled by the Sponsor represented by Bretschger – as to which Defendants are again conspicuously silent – the Court finds a sufficient showing of likely success on a reasonable reliance claim. As for the argument that Plaintiffs will not prevail because their use of their unit may be in violation of zoning, health and fire codes, its appears these are eleventh hour arguments raised for the first time in opposition to the motion. Despite the unrebutted allegation of knowing Plaintiffs' intended use of their unit, the Board denied the renovation, Plaintiffs allege, based on concerns over vitiating the warranty of a possibly affected insulation system. Zoning, fire and health code concerns appear not to have been raised then and are not indicated in the October 4th letter that instigated this action, which cited only the unauthorized nature of the alteration. As a result, neither side briefs those issues in detail or with sufficient authority to permit a determination as to their merits. In any event, the Court notes that preliminary injunctive relief is sought only as against Defendants and will not in any way affect Plaintiffs' obligations as to any municipal or state laws or the enforcement thereof by the responsible authorities.

Risk of irreparable harm

This factor is not as difficult to assess. Defendants contend that Mrs. Binder could conduct her business by renting an alternative, commercial kitchen location and that any wrongful damages to Plaintiffs would be compensable as a monetary award for lost profits and the cost of such alternative accommodations. The Court finds the argument unpersuasive. As Mrs. Binder describes her operations, she is now able to work from home, while caring for Plaintiffs' young child; there is no basis in the record to conclude she could continue her operation in a commercial setting away from home. Additionally, the potential loss at issue does not appear to be of a purely demonstrable and compensable sort, but rather would constitute speculative losses of networking, brand maintenance and growth opportunities that are not likely subject to proof. The Court also rejects the additional claim, offered as the opinion of counsel in his memo of law in opposition, that Mrs. Binder's output of new recipes on her website has fallen too low to find a risk of irreparable harm. Given that the Board's letter expressed the intent to commence work on sealing the exhaust system "immediately," the requirement of imminence is also shown. The Court thus finds Plaintiffs have demonstrated a sufficient risk of irreparable harm if injunctive relief is not granted, and further finds there is little or no risk of irreparable harm to Defendants from such relief. In that regard, the Court notes that it is undisputed that Plaintiffs have used their exhaust system for about one and a half years. Plaintiffs also claim that another, similar system is installed in the same exterior wall, which Defendants state they have not previously discovered and are now investigating. Thus, it appears unlikely that continued use by Plaintiffs until the action is resolved will cause irreparable harm to Defendants, and the Court again notes the injunction has no effect as to the applicability and enforcement of any zoning or public safety laws.

Balance of equities

As Defendants point out, Plaintiffs are quite candid in acknowledging that they installed

the exhaust system after the Board denied their application to approve the project and successfully resisted arbitration on the matter. Defendants argue that equitable relief should therefore be foreclosed by the unclean hands doctrine. Although the prudent course for Plaintiffs would have been to seek declaratory relief, or rescission of their purchase contract plus any recoverable consequent losses, at that time, the Court finds their conduct is not shown to have been so egregious as to foreclose equitable relief. In this regard, the Court again notes that while Plaintiffs are candid in outlining the timeline of the renovations and use of their condominium unit, Defendants submissions are conspicuously silent in addressing the allegations of broken pre-sale assurances that go to the heart of Plaintiffs' promissory estoppel claim. As a result of that silence, Plaintiffs' allegation in that regard stand unrebutted for the purposes of this motion. Additionally, the Court notes that while Defendants argue that equity does not favor Plaintiffs based on unclean hands, another equitable doctrine may favor Plaintiffs' position: Defendants also do not dispute or address the allegation that they inspected the renovations and refunded a security deposit to Plaintiffs very soon after completion. If that allegation is true, it may form the basis of a laches argument against the Board's attempts to now seal the exhaust system. Based on these circumstances, and given that the Court has found the risk of irreparable harm is faced by Plaintiffs and not by Defendants, the Court finds the balancing of equities favors granting preliminary injunctive relief in order to preserve the status quo.

Based on the foregoing, the motion is granted to the extent that Defendant the Board of Managers of Arris Lofts, and their agents and assigns, are hereby preliminarily enjoined from taking any action to seal or disable the kitchen exhaust system installed in Plaintiff's condominium unit (unit 310) at Arris Lofts, pending further order of the Court or resolution of the parties' dispute.

Dated JAN 25TH 2013

ROGER N. ROSENGARTEN, J.S.C.