

<b>Samario, LLC v Eli</b>
2013 NY Slip Op 32320(U)
September 17, 2013
Sup CT, New York County
Docket Number: 103196/2012
Judge: Lucy Billings
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: LEWIS BILLINGS  
Justice

PART 46

SAMARIO, LLC

INDEX NO. 103196/2012

-v-

MOTION DATE \_\_\_\_\_

CATHY ELI, et al.

MOTION SEQ. NO. 002

The following papers, numbered 1 to 6, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2, 4, 6

Replying Affidavits \_\_\_\_\_ | No(s). 3, 5

Upon the foregoing papers, it is ordered ~~that this motion is~~ *and adjudged that:*

*The court grants plaintiff's motion for partial summary judgment to the extent set forth in the accompanying decision. C.P.L.R. § 3212(b) and (e).*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/17/13

Lewis Billings, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----X

SAMARIO, LLC,

Index No. 103196/2012

Plaintiff

- against -

DECISION AND ORDER

CATHI ELI, TOM J. ELI, MIKE V. ELI,  
ANTHONY ELI, VERONICA KASLOV, JENNIFER  
ELI, JOHN DOE, and JANE DOE,

Defendants

-----X

LUCY BILLINGS, J.S.C.:

The court grants plaintiff's motion for partial summary judgment on its first and second claims for injunctive relief to the following extent, based largely on the parties' stipulations on the record July 2, 2013. C.P.L.R. § 3212(b) and (e). Defendant adult tenants Cathy Eli and Tom J. Eli have agreed to undertake the required alterations of apartment UEG, 31 St. Mark's Place, New York County, to remove a partition wall and sleeping loft. Based on the opinion of defendants' architect, defendant shall complete the required alterations in compliance with all applicable statutes and regulations, including any required permits and approvals by the New York City Department of Buildings and removal of the debris from the work, within five months after service of this order with notice of entry.

Within three business days after a written request by defendants, plaintiff shall sign and return to defendants any document necessary for any permit for the work. Within five

calendar days after defendants receive any permit, they shall forward a copy of the permit to plaintiff's attorney. Plaintiff may inspect the apartment as provided in the parties' lease or upon defendants' consent.

Defendants' architects, contractors, and their subcontractors shall carry insurance naming plaintiff an additional insured and covering any property damage, personal injury, or death arising from the work. Defendants shall indemnify plaintiff for any such damage, injury, or death.

The court denies plaintiff's request to enjoin defendants to ensure that no mechanics' lien arising from the alterations work is placed on the apartment or 31 St. Mark's Place. Plaintiff asks defendants to accomplish an impossibility. See N.Y. Lien Law § 34; West-Fair Elec. Contrs. v. Aetna Cas. & Sur. Co., 87 N.Y.2d 148, 156-57 (1995). The insurance coverage required above and defendant's indemnification obligation will compensate any loss to plaintiff occasioned by a mechanics' lien arising from the work.

Plaintiff also seeks a "time is of the essence" provision applicable to the deadline of five months, prohibiting any future motion by defendants for an extension of time, for any reason. Aff. of Ivy Alexander in Further Opp'n ¶ 6 (June 27, 2013). See Aff. of Ranakdevi Londoner in Further Supp. ¶ 8 (June 25, 2013). The parties may contract for such a provision, in their lease or in a another agreement, but absent those contractual terms, such a provision is not legally required, see, e.g., Urban Archeology

Ltd. v. Dencorp Invs., Inc., 12 A.D.3d 96, 103-104 (1st Dep't 2004); Burgess Steel Prods. Corp. v. Modern Telecom, 205 A.D.2d 344, 346 (1st Dep't 1994), especially when plaintiff has not established that defendants are required to perform the alterations, but, at best, has shown only that defendants are required to allow the alterations.

Finally, the court denies plaintiff's request for declaratory relief that defendants' noncompliance with this order will constitute an incurable nuisance, which would automatically violate the lease and provide grounds to evict or eject defendants, again even if defendants were not required to perform the alterations, but only required to allow them. This relief exceeds the claims in the complaint and the relief sought by the motion for partial summary judgment. If defendants disobey this order, however, plaintiff may seek remedies for their contempt and any further relief originally sought in the complaint. N.Y. Jud. Law §§ 753(A)(1), 756, 773.

The relief granted now resolves all plaintiff's claims for equitable relief. Plaintiff's only remaining claims in this action are for attorneys' fees and expenses and for damages due to defendants' actions. Such actions allegedly include causing the City of New York to issue notices of violations or impose liens against plaintiff, the apartment, or 31 St. Mark's Place; causing tenants, occupants, or their invitees at 31 St. Mark's Place to sue plaintiff; and causing plaintiff to lose rental income from 31 St. Mark's Place. Thus far plaintiff has not

established that defendants' actions have caused any such consequences.

This decision constitutes the court's order and judgment on plaintiff's first and second claims. C.P.L.R. § 3212(b) and (e). The court will mail copies to the parties.

DATED: September 17, 2013

*Lucy Billings*  
\_\_\_\_\_  
LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.

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