

Dylan House, Ltd. v Borges

2016 NY Slip Op 31083(U)

February 1, 2016

Supreme Court, New York County

Docket Number: 163070/15

Judge: Barbara Jaffe

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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

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DYLAN HOUSE, LTD.,

Plaintiff,

-against-

Index No. 163070/15

Motion seq. no. 001

DECISION AND ORDER

MARGARET A. BORGES,

Defendant.

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BARBARA JAFFE, J.

For plaintiff:

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This action arises from a dispute between plaintiff, a cooperative corporation, and defendant over access to her unit to undertake repairs to her terrace which was allegedly then leaking water into the unit below.

On January 6, 2016, with all parties present and represented, I signed plaintiff's amended order to show cause to the sole extent of granting it a temporary restraining order enjoining defendant, the admitted owner of the cooperative apartment unit in issue, from preventing plaintiff access to the unit for the narrow purpose of "patching the drain through which plaintiff alleges the leak flows into the apartment directly below." I directed the parties to return on January 20 to address plaintiff's application for a preliminary injunction. (NYSCEF 42). On January 20, counsel claimed that he had been unaware of the date until the court clerk notified him by telephone. He did not seek an adjournment. (NYSCEF 45).

I. BACKGROUND

The cooperative's amended proprietary lease contains the following relevant provisions:

25. The Lessor and its agents and their authorized workmen shall be permitted to visit, examine or enter the floor and any storage space assigned to Lessee at any reasonable hour of the day upon notice . . . to make or facilitate repairs in any part of the building or to cure any default by the Lessees and to remove such portions of the walls, floors and ceilings of the floor and storage space as may be required for any such purpose

....

27. Any notice by or demand from either party to the other shall be duly given only in writing sent by registered mail; Notices or demands shall be deemed given on the date when mailed.

28. If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor

(NYSCEF 9, 10, 15-16).

By letter addressed to the cooperative board dated December 14, 2014, an architect employed by plaintiff opined that there were "hazardous and substandard" conditions on the terrace of defendant's unit, due in part to cold temperatures and ice accumulation, resulting in water infiltration into the unit below. The architect recommended replacement of the terrace membrane and walking surface. (NYSCEF 34). By letters dated February 17, 2015 and May 22, 2015 to the board, the architect confirmed his previous findings based on additional inspections of defendant's unit and the unit below. (NYSCEF 36-37).

By letter dated October 27, 2015, plaintiff demanded entry into defendant's unit to inspect and repair a drain on the terrace, estimating two days of work, and on November 2, 2015, defense counsel acknowledged receipt of the letter. (NYSCEF 18-19). When personnel

employed by plaintiff arrived on November 4 to make the repairs, defendant denied them entry. (NYSCEF 4-5, 19).

II. DISCUSSION

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.” To obtain a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, the likelihood of success on the merits, a danger of irreparable injury, and that the balance of equities is in its favor. (*Hairman v Jhawarer*, 122 AD3d 570, 571-572 [2d Dept 2014]). “[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment.” (*Zoller v HSBC Mortg. Corp. (USA)*, AD3d , 2016 NY Slip Op 00495, *1 [2d Dept 2016]; *St. Paul Fire and Marine Ins. Co. v York Claims Servs., Inc.*, 308 AD2d 347, 349 [1st Dept 2003]).

While plaintiff demonstrates a likelihood of success on its underlying claims, the relief sought is not meant to preserve the status quo, and it is identical to the ultimate relief sought in the complaint, namely, to permit access to defendant’s unit. Absent extraordinary circumstances, a preliminary injunction is inappropriate. (*See Bd. of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d 822, 824 [2d Dept 2010] [board not entitled to preliminary injunction compelling defendants to restore condominium unit to original condition as it sought identical relief in complaint]; *see also SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005] [order compelling defendant to affirmatively take action did not preserve status quo and thus inappropriate for preliminary injunction]). Moreover, given counsel’s concession on

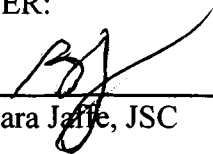
January 20 that the recent repair of the drain stopped the leak, there is no risk of irreparable harm.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's application for a preliminary injunction is denied.

ENTER:



Barbara Jaffe, JSC

DATED: February 1, 2016
New York, New York