Fairmont Tenants Corp. v Braff
2017 NY Slip Op 32119(U)
October 10, 2017
Supreme Court, New York County
Docket Number: 152489/2015
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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Fairmont Tenants Corp.,

Plaintiff,

Index Number: 152489/2015

-against-

Michael Braff and Gladys Wanich,

Defendants.
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Melissa Crane, J.:

Defendant Michael Braff (Braff) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and granting summary judgment on defendants' first counterclaim for a declaratory judgment. Plaintiff moves, pursuant to CPLR 3212, for summary judgment on its claim for a declaratory judgment and for an injunction. The court consolidates these motions for disposition.

Underlying Allegations

Plaintiff is a cooperative corporation that owns the building (the Building) located at 401 East 86th Street, New York, New York. The Building converted to cooperative ownership pursuant to an offering plan (the Offering Plan), that sets forth, among other things, the financial details including identifying the apartments in the Building and the shares allocated to them. Defendants are the owners of the shares

allocated to apartments 2F and 2G (the Apartment) in the Building, pursuant to a proprietary lease (the Proprietary Lease) and they have resided in the Apartment since purchasing it in January 1989 (complaint, ¶¶ 1-6; admitted in answer).

The dispute between the parties concerns the right to use and occupy the setback portion of the roof (the Roof) adjacent to the Apartment. The Roof is approximately 20 feet long by 10 feet wide and has a gravel surface (Braff affidavit dated January 13, 2017 [Braff Affidavit], ¶¶ 2-3). Defendants have used the Roof since purchasing the Apartment in 1989 (*id.*, ¶ 17; Braff EBT at 27). The access to the Roof is through one of the windows of the Apartment (*id.* at 13; Braff Affidavit, ¶ 5). Defendants never discussed use of the Roof with plaintiff's Board and never had written permission to use the Roof (Braff EBT at 17, 48).

Plaintiff first raised the issue of defendants' use of the roof on or about December 19, 2007, when plaintiff's then managing agent sent defendants a letter (the Plaintiff's December 2007 Letter), advising them that plaintiff considered their use of the Roof to be "an unauthorized use of [plaintiff's] space" and advised them to remove personal items, including furniture, from the Roof (*id.* at 27-29). Defendants disputed plaintiff's claim that their use of the Roof was unauthorized and asserted in a letter dated December 27, 2007

(Defendants' December 2007 Letter) that the "use is in fact authorized by our proprietary lease" (*id.* at 29-30). Subsequent correspondence between plaintiff and defendants reiterated their respective positions. Plaintiff has had workers perform construction on the Roof to repair exterior bricks. The contractors accessed the Roof through an exterior ladder (Winston EBT at 30-33; Braff EBT at 60).

Defendants assert that the Proprietary Lease grants them the right to use the Roof. Plaintiff contends that the Offering Plan and the Proprietary Lease establish that the Roof is not part of the Apartment and, therefore, defendants may not use it as a balcony or terrace.

The Offering Plan sets forth the terms of the Building's conversion to cooperative ownership. It details the apartments in the Building, with number of bedrooms and bathrooms, and identifies the number of shares allocated to each apartment in the Building. It also identifies with a capital "T" those apartments with an accessible terrace (Offering Plan, Section B; Polinsky affidavit, ¶¶ 3-6).

The Proprietary Lease includes the following provisions:

> 7. Penthouse, Terraces and Balconies. If the apartment includes a terrace, balcony or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of this lease and

to the use of the terrace, balcony or roof by the Lessor to the extent herein permitted. The Lessee's use thereof shall be subject to such regulations as may, from time to time, be prescribed by the Directors. The Lessor shall have the right to erect equipment on the roof, including radio and television aerials and antennas, for its use and the use of the lessees in the buildings and shall have the right of access thereto for such installations and for the repair thereof. The Lessee shall keep the terrace, balcony or portion of the roof appurtenant to his apartment clean and free from snow, ice, leaves and other debris and shall maintain all screens and drain boxes in good condition. No planting, fences, structures or lattices shall be erected or installed on the terraces, balconies, or roof of the buildings without prior written approval of the Lessor. No cooking shall be permitted on any terraces, balconies or the roof of the building, nor shall the walls thereof be painted by the Lessee without the prior approval of the Lessor. Any planting or other structures erected by the Lessee or his predecessor in interest may be removed by the Lessor at the expense of the Lessee for the purpose of repairs, upkeep or maintenance of the building.

* * *

26. Waivers. The Failure of the Lessor to insist, in any one or more instances, upon a strict performance of any of the provisions of this lease, or to exercise any right or option herein contained, or to serve any notice, or to institute any action or proceeding, shall not be construed as a waiver, or a relinquishment for the future, of any such provisions, options or rights, but such provision, option or right shall continue and remain in full force and effect. The receipt by the Lessor of rent, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach, and no waiver by the Lessor shall be deemed to have been made unless in a writing expressly approved by the Directors."

The Offering Plan indicates that the apartments in the "F" line of the Building on each ascending floor, commencing with 2F which has 314 shares allocated to it, have an additional 3 shares allocated to them, until apartment 18F, which has 359 shares allocated to it, with the sole exception being apartment 10F (a 2.5 room apartment). Apartment 19F, that the Offering Plan identifies as having a terrace, has an additional 53 shares allocated to it. The Offering Plan identifies those apartments with terraces and that the terraces "are access[ible] through a door from the apartment" (Ibrahim affidavit, ¶ 2).

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material

issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Injunction Standard

"A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *see also Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Contract Interpretation

Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Put another way, "[c]ourts will give effect to the [C]ontract's language and the

parties must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] internal quotation and citations omitted; *see also McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

In a case involving whether "the roof area in question is not part of the demised [A]partment, . . . [the controlling documents are] the [O]ffering [P]lan, building plans and the [P]roprietary [L]ease" (*1050 Fifth Ave. v May*, 247 AD2d 243, 243 [1st Dept 1998]; *see also Rotblut v 150 E. 77th St. Corp.*, 79 AD3d 532, 532 [1st Dept 2010]; *Prospect Owners Corp. v Sandemeyer*, 62 AD3d 601, 602 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010]; *Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 78-79 [1st Dept 2008]).

Waiver

"A waiver is the voluntary abandonment or relinquishment of a known right. . . . [I]t may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise" (*Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]; *Extell Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 70 [1st Dept 2003], *lv*

dismissed 2 NY3d 794 [2004]; *see also Jossel v Filicori*, 235 AD2d 205, 206 [1st Dept 1997]; *Katz v 215 W. 91st St. Corp.*, 215 AD2d 265, 267 [1st Dept 1995]).

Adverse Possession

"In order to prevail on a claim of title by adverse possession, the adverse possessor must demonstrate, by clear and convincing evidence, that the character of the possession is 'hostile, and under a claim of right, actual, open and notorious, exclusive and continuous' for the statutory period of 10 years" (*Keena v Hudmor Corp.*, 37 AD3d 172, 173 [1st Dept 2007], *quoting Brand v Prince*, 35 NY2d 634, 636 [1974]; *see also 1380 Madison Ave., L.L.C. v 17 E. Owners Corp.*, 12 AD3d 156, 156 [1st Dept 2004]). "New York law has long disfavored the acquisition of title by adverse possession" (*Joseph v Whitcombe*, 279 AD2d 122, 126 [1st Dept 2001]).

Discussion

The material facts in this matter are essentially undisputed and resolution of the matter involves the interpretation of the documents governing the parties' relationship-the Offering Plan and the Proprietary Lease (*see Sassi-Lehner*, 55 AD3d at 78-79; *see also Ainetchi v 500 West End LLC*, 92 AD3d 584, 584-585 [1st Dept 2012]). The Offering Plan identifies apartments with terraces with a capital "T" and the Apartment lacks this designation. The plain reading of the

Proprietary Lease is, therefore, that because the Apartment does not "include a terrace, balcony or a portion of the roof adjoining a penthouse" (Proprietary Lease, ¶ 7), defendants do not have the exclusive right to use, occupy or enjoy the Roof (*see 1050 Fifth Ave.*, 247 AD2d at 243). While defendants assert that the Roof is accessible (because access to it is solely through a window and all apartments in the Building with terraces have a door to the terrace) "the only reasonable conclusion is that the parties did not intend the [Roof] to be included in the leased premises" (*Prospect Owners.*, 62 AD3d at 603). The roof is a 200 square foot area and the share allocation from the Offering Plan reflects the allocation of the space for the respective apartments in the Building. The significant increase in share allocation for the apartment in the "F" line with a terrace establishes that there is additional space. The greater share allocation reflects this circumstance (Polinsky affidavit, ¶¶ 6-7). The Roof is not an appurtenance, "since its use is neither essential nor reasonably necessary to defendants' full beneficial use and enjoyment of the [A]partment" (*Prospect Owners*, 62 AD3d at 603).

The no waiver provision of the Proprietary Lease bars defendants' claim of waiver. It is undisputed that Plaintiff did not give explicit written permission to use the Roof (*see Jossel*, 235 AD2d at 206; *Katz*, 215 AD2d at 267). Similarly, the

defendants' adverse possession claim is not sustainable. The first time there was a hostile claim was in Defendants' December 2007 Letter, but plaintiff had workmen on the Roof in 2015. Accordingly, defendants' use of the Roof was not "exclusive . . . for the statutory period of 10 years" (*Keena*, 37 AD3d at 173).

Consequently, the Court grants plaintiff's motion for summary judgment and denies defendants' motion for summary judgment.

It is, therefore,

ORDERED that the Court grants plaintiff's motion for summary judgment; and it is further

ORDERED that the Court denies defendant Michael Braff's motion for summary judgment; and it is further

ADJUDGED and DECLARED that plaintiff has right, title and interest to the setback portion of the roof adjacent to apartments 2F and 2G of the building located at 401 East 86th Street, New York, New York and defendants do not have a leasehold interest under their proprietary lease to occupy, use or enjoy said setback portion of the roof; and it is further

ORDERED that defendants and any guests or invitees of defendants are enjoined from occupying or using the setback portion of the roof adjacent to apartments 2F and 2G of the building located at 401 East 86th Street, New York, New York.

Dated: 10/10, 2017

ENTER:

HON. MELISSA CRANE
J.S.C.