Board of Mgrs. of Clinton W. Condominium v Desmond
2018 NY Slip Op 30907(U)
May 11, 2018
Supreme Court, New York County
Docket Number: 159751/2017
Judge: William Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.W. FRANC PERRY, J.S.C. PART 23

THE BOARD OF MANAGERS OF CLINTON WEST CONDOMINIUM, suing on behalf of unit owners,
Plaintiffs

INDEX NO. 159751/2017

MOT. DATE April 19, 2018

- v -

EDWARD DESMOND
Defendant

MOT. SEQ. NO. 001 and 002

The following papers were read on this motion for Preliminary Injunction and Motion to Dismiss

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through H — ECFS DOC No(s). 1
Answering Affidavits — Exhibits — ECFS DOC No(s). 2
Replying Affidavits — ECFS DOC No(s). 3

In this declaratory proceeding, plaintiffs, The Board of Managers of Clinton West Condominium, suing on behalf of unit owners, (hereinafter "plaintiffs" and/or "CWC"), move by Order to Show Cause, motion sequence no. 001, seeking a preliminary injunction requiring defendant Edward Desmond, (hereinafter "defendant"), to permit plaintiffs access to his unit to remove a flag and flagpole, which plaintiffs contend defendant has improperly installed to the exterior of the building in violation of the Condominium's declaration, by-laws and the rules. *Pro se* defendant opposes plaintiffs' motion and contends that he is in compliance with the by-laws and that New York Real Property Law Section 339-j, (hereinafter, "RPL 339-j"), allows him to fly the American flag which measures 2 ½' by 4 ½'. In motion sequence no. 002, defendant moves to dismiss plaintiffs' declaratory judgment action, relying on RPL 339-j. Plaintiffs oppose the motion to dismiss. The motions are consolidated for disposition.

FACTUAL BACKGROUND and CONTENTIONS

The facts of this matter are largely undisputed. Defendant, is a unit owner and resides at CWC in a two-bedroom, two-bath apartment. (Koplovitz Aff., Ex. A, ¶3; Ermler Aff., ¶37). Pursuant to paragraph 14 of the declaration, upon purchasing the unit, defendant agreed to comply with and abide by the by-laws and rules and regulations. (Ermler Aff., Ex. B, ¶14).

Schedule C to the declaration, paragraph 6(A)(3), provide in pertinent part that the General Common Elements are the "Exterior walls of the Building to the unexposed face of the drywall enclosing a Unit, excluding such drywall and excluding the windows and doors to a Unit, but including those portions of the exterior walls and any insulation including mechanical pipes; those portions of the walls and partitions dividing the Units from lobbies, corridors, elevator shaft and stairs located beyond the drywall enclosing the Unit.". (Ermler Aff., Ex. B, ¶6(A)(3)).

Pursuant to Schedule C to the declaration, "Common Elements" means the "entire Property, including all parts of the Building and improvements thereon other than the Units. Common Elements are comprised of General Common Elements and Limited Common Elements". "Unit" is defined as any space in the Building designated as a Unit in this declaration, consisting generally of a specific apartment in the Building. (Ermler Aff., Ex. B, Schedule C to the Declaration).

Section 6.14 of the by-laws, provides in pertinent part that "A Unit Owner shall not place or cause to be placed in a lobby, public halls, stairways or other common facilities, any furniture, packages or objects of any kind." Section 6.15 of the by-laws provides that defendant is required to grant CWC access to the Unit in order to correct any condition in the Unit and also which threaten another apartment or the common elements. Pursuant to Section 6.16 of the by-laws, CWC is permitted to enact rules and regulations governing the use of apartments and the common elements at the building. (Ermler Aff., Ex. B, By-Laws, §§§6.14; 6.15; 6.16).

Section 9.1 of the by-laws provides defendant a five (5) day period in which to cure a default; if defendant fails to cure his default within the cure period, CWC is permitted the right to abate or enjoin defendant's violation. Section 9.2 of the by-laws provides that CWC has the right to "enjoin, abate, or remedy the continuance or repetition of any . . . violation or breach by appropriate proceedings brought either at law or in equity." (Ermler Aff., Ex. B, By-Laws, §§9.1; 9.2).

Schedule A, rules and regulations, paragraph 4 provides, "no exterior of any Unit or the windows or doors thereof or any other portions of the Common Elements shall be painted or decorated by any owner in any manner without the prior written consent of the Board of Managers. Paragraph 5 similarly prohibits defendant from placing any "furniture, equipment, or other personal articles" in the General Common Elements. Paragraph 11 provides, "No clothes, sheets, blankets, laundry, or other articles of any kind shall be hung on or out of a Unit or its appurtenant Limited Common Elements." (Ermler Aff., Ex. B, Schedule A, Rules and Regulations, ¶4; ¶5; ¶11).

According to Schedule A, rules and regulations, paragraph 16, CWC's agents have the right to enter defendant's Unit at any reasonable hour of the day for any purpose permitted under the declaration, by-laws, and the rules and regulations. Paragraph 24 provides that all damage to the Building caused by defendant his family member, guests, agents, servants, employees, etc. shall be repaired at defendant's expense. Finally, paragraph 26 provides that defendant is not permitted to use or occupy the Unit in a manner which interferes with other occupants, nor is he permitted to create any nuisance in the Common Elements. (Ermler Aff., Ex. B, Schedule A, Rules and Regulations, ¶16; ¶24; ¶26).

In opposition to plaintiffs' motion and in support of his motion to dismiss, defendant relies on New York Real Property Law Section 339-j. RPL 339-j of the Condominium Act grants boards express authority to seek "injunctive relief" against "each unit owner" who does not "comply strictly" with the "by-laws, rules, regulations, resolutions and decisions adopted pursuant thereto." See generally *Board of Managers of Plymouth Village Condominium v. Mahaney,* 272 A.D.2d 283, 707 N.Y.S.2d 353 (2d Dept. 2000). The last sentence of this section, on which defendant relies, was added as an amendment to the RPL in 1999. As plaintiffs correctly note, since its enactment, not a single case in New York has discussed or interpreted that part of the section.

The section reads in whole:

> Each unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief or both maintainable by the board of managers on behalf of the unit owners or, in a proper case, by an aggrieved unit owner. In any case of flagrant or repeated violation by a unit owner, he may be required by the board of managers to give sufficient surety or sureties for his future compliance with the by-laws, rules,

> regulations, resolutions and decisions. Notwithstanding the foregoing provisions of this section, no action or proceeding for any relief may be maintained due to the display of a flag of the United States measuring not more than four feet by six feet.

Plaintiffs contend that the above quoted section does not preclude a condominium from bringing an action to require that a flag be removed from the building's common areas, but rather restricts a condominium's board from enacting or enforcing a by-law or rule which would restrict a unit owner from displaying a flag within the confines of that unit owner's own unit. Plaintiffs argue that the language of RPL 339-j only prohibits the board from preventing a unit owner's display of the American flag; it does not grant the unit owner a license to trespass on the community's common areas. Plaintiffs maintain that defendant is free to display his flag within the confines of his unit and CWC has not prohibited that right in any respect.

Additionally, CWC contends that the flag and flagpole brackets have not only damaged plaintiffs' property, but they also hang over the common areas and pose a threat to the general public as well as other unit owners. (Ermler Aff., Ex. A). Prior to commencing this action, plaintiffs attempted, on five separate occasions, to resolve this issue with defendant, to no avail. (Ermler Aff., Exs. C-H). The record indicates that on at least two occasions, plaintiffs had made an appointment with defendant to enter his apartment to remove the flagpole from the exterior of the building, however defendant would not allow plaintiffs access to his unit when they arrived. (Ermler Aff., Ex. G).

Defendant argues that this is "the American Flag, the symbol of our Country. It is not a decoration. It is not a plant, planter or shoe sitting on my window sill." Specifically, defendant contends that, "Good men and women have died for this flag. So I am proud to fight this fight, and shame on those who bring this action against me. I know that I am right. I know that my parents would be proud of me. My father and his younger brother fought in the Korean War, his 5 older brothers fought in WWII and both my Grandfathers fought in WWI. I was not called to serve, the Vietnam War had just ended a few years earlier. But patriotism and love for this great country was instilled in me at an early age, so I fly the flag in honor of the men and their sacrifice which afforded me the opportunity to live in this great country." (Defendant's Answer; NYSCEF Doc. No. 20, p.4).

STANDARD OF REVIEW and ANALYSIS

A party seeking injunctive relief must demonstrate three factors for such relief as set forth under CPLR § 6301. (see, *Doe v Axelrod*, 73 NY2d 748, 750, 532 N.E.2d 1272, 1273, 536 N.Y.S.2d 44, 45 [1988]; *Jiggetts v Perales*, 202 AD2d 341, 342, 609 N.Y.S.2d 222, 223 [1st Dept. 1994]). Specifically, plaintiffs bear the burden of demonstrating a probability of success on the merits, irreparable injury in the absence of a preliminary injunction, and a balance of the equities in their favor. CPLR §6301; *Housing Works, Inc. v City of New York*, 255 AD2d 209, 213, 680 NYS2d 487, 491 (1st Dept. 1998).

An application for preliminary injunctive relief is addressed to the sound discretion of the Court. *Rakosi v Sidney Rubell Co., LLC*, 155 A.D.3d 564 (1st Dept. 2017). Such relief is a drastic remedy that should not be granted unless a clear legal right to it is established under law. *County of Orange v. Lockey*, 111 A.D.2d 896, 897 (2d Dep't 1985); see also *Graham v. Wisenburn*, 39 A.D.2d 334, 335 (3d Dep't 1972) (preliminary injunction may not be granted unless a party has stated a prima facie cause of action which would justify a permanent injunction); *Rodgers v. Rodgers*, 30 A.D.2d 548, 549 (2d Dept. 1968), *app. denied*, 22 N.Y.2d 643 (1968); *Scotto v Mei*, 219 AD2d 181, 182 (1st Dept. 1996) (proof establishing "elements must be by affidavit and other competent proof, with evidentiary detail" [citation omitted]).

Plaintiffs' claims for preliminary injunctive relief are based on defendant's continued violations of various sections of the Condominium's by-laws, declaration and rules, which defendant agreed to abide by when he purchased his unit. CWC has shown a clear right to relief which is "plain from the undisputed facts." *Sumiko Enterprises, Inc. v. Town Realty Co, LLC.* 259 AD 2d 483 (2nd Dept. 1999); *Caruso v. Board of Managers of Murray Hill Terrace Condominium,* 146 Misc. 2d 405, 550 NYS 2d 548 (N.Y. Sup Ct. 1990). Additionally, plaintiffs have demonstrated that in the absence of a preliminary injunction, permitting access to plaintiffs' agents to remove the personal property that defendant has placed on the exterior of the building without permission, CWC continues to be irreparably harmed. *Bd. Of Managers of S. Star v Grishanova*, 38 Misc 3d 1231(A) (N.Y. Sup Ct 2013); See also *Moody v. Filippowski*, 146 A.D.2d 675, 537 N.Y.S.2d 185 (2d Dept. 1989) (a plaintiff who would be deprived of the full use and enjoyment of property unless the defendants were enjoined "from continuing the aforesaid violation", constitutes irreparable injury).

Finally, plaintiffs have demonstrated a balance of the equities in their favor, as the record indicates that the flagpole is flying over an interior courtyard where many residents, guests and occupants utilize that space on a regular basis, and defendant suffers no prejudice from being required to display his flag from within his unit in accordance with the by-laws and rules. (Ermler Aff., ¶6).

In opposing plaintiffs' request for relief, defendant argues that his right to fly the American flag on a flagpole attached to the exterior of the condominium building is protected by the provisions of RPL 339-j, notwithstanding the declaration, by-laws and rules duly promulgated by plaintiffs, which rules defendant agreed to abide by when he purchased the unit. (Ermler Aff., Ex. A; and Ex. B, ¶14).

CWC maintains that the provision cited by defendant, does not preclude a condominium from bringing an action to require that a flag and flagpole be removed from the Associations' Common Elements. CWC reasons that the section of the Condominium Act cited by defendant is not absolute, as it only restricts a condominium board's ability to enact or enforce a by-law or rule which would restrict a unit owner from displaying a flag within the confines of that unit owner's own unit; it does not remove the board's express authority to enforce compliance with the by-laws and rules.

Careful review of the operative language indicates that the section speaks in terms of a prohibition against a condominium unit owner's "*display* of a flag measuring not more than four feet by six feet." RPL 339-j (emphasis added). CWC has no objection to defendant displaying the American flag within the confines of his unit and/or in compliance with the by-laws and rules. The objection is defendant's continued violation of the above cited by-laws and rules, and the further objections related to damage to the building's exterior, and the potential risk of harm posed by the flagpole hanging over the common area where other unit owners gather.[1] Notably, CWC concedes that defendant is free to display his flag within the confines of his unit, even agreeing that defendant can display the flag on the inside of his window; the record demonstrates that CWC's board has not encroached that right in any respect.

Defendant avers, without any proof, that there is no danger to the public because the flagpole is securely fastened to the building and survived Hurricane Sandy without incident. He also claims that the brackets are not secured to the "exterior" of the building, but rather within the frame of the window which, defendant claims, is not part of the Common Elements. Review of the photograph attached to CWC's papers as Exhibit A, and a reading of the relevant sections of the declaration, by-laws and rules,

[1] CWC alleges that the installation of the flagpole has pierced the waterproof membrane and exposed the building facade to water infiltration. CWC also alleges that the entire community will be harmed without the issuance of preliminary injunctive relief because the entire community's safety and well-being is placed into harm's way by virtue of the danger created by defendant's refusal to remove the flag and flagpole. (Ermler Aff., ¶11).

demonstrate that defendant's assertions offer no defense to the clear and continuing violations proven by CWC.

Plaintiffs have demonstrated a likelihood of success on the merits as the declaration, by-laws and rules confirm CWC's authority to circumscribe what residents may and may not do with respect to the Common Elements and the exterior of the building. Pursuant to by-laws section 6.14, no unit owner is permitted to place in any common areas of the building any object of any kind; pursuant to section 6.16 of the by-laws, CWC is permitted to enact rules and regulations governing the use of apartments and the common elements at the building; pursuant to section 9.2 of the by-laws, CWC has the right to enjoin or remedy the continued violation or breach by any unit owner, through appropriate proceedings brought either at law or in equity. Pursuant to paragraph 4 of the rules and regulations, defendant is not permitted to decorate any exterior portion of any window without prior written consent of CWC; pursuant to paragraph 5 of the rules and regulations, defendant is not permitted to place any personal item in the General Common Elements; and pursuant to paragraph 26 of the rules and regulations, defendant is not permitted to use or occupy the unit in a manner which interferes with other occupants, nor is he permitted to create any nuisance in the Common Elements. (Ermler Aff., Ex. B).

Courts have consistently acknowledged that condominium homeowners' rights concerning exterior alterations are circumscribed by the declaration, by-laws and guidelines. See, e.g., *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 539-540, 553 N.E.2d 1317, 554 N.Y.S.2d 807 [1990]. As explained by the Court of Appeals, these reduced rights are a necessary evil, that require cooperation among the property owners for the good of the complex recognizing that "board decisions concerning what residents may or may not do with their living space may be highly charged and emotional. A . . . condominium is by nature a myriad of often competing views regarding personal living space, and decisions taken to benefit the collective interest may be unpalatable to one resident or another". (*Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 539-540, 553 N.E.2d 1317, 554 N.Y.S.2d 807 [1990].)

In *Levandusky,* the Court observed that, "Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less." (*Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 537, 553 N.E.2d 1317, 554 N.Y.S.2d 807 [1990], quoting *Sterling Vil. Condominium, Inc. v. Breitenbach*, 251 So. 2d 685, 688 [Fla 1971].)

Here, defendant's interpretation of the last sentence of RPL 339-j, requires a construction that would render the first sentence of the section meaningless. Defendant contends that because the flag and flagpole he has installed on the exterior of the building measures not more than four feet by six feet, he is entitled to keep the flagpole where it is and is further entitled to have this action dismissed. Defendant's interpretation of RPL 339-j, however, fails a basic principle of statutory construction: to construe laws in a way that avoids "unreasonable or absurd consequences." *Roberts v. Tishman Speyer Props.*, L.P., 62 A.D.3d 71, 81 (1st Dept. 2009) (In interpreting a statute, it is fundamental that a court ascertain and give effect to the intention of the legislature. The clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. Moreover, new language cannot be imported into a statute to give it a meaning not otherwise found therein, and a court, in discerning the meaning of statutory language, must avoid objectionable, unreasonable or absurd consequences).

The Condominium Act provides in unmistakable terms that: "Each unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be ground for an action . . . or injunctive relief". Thus, adopting

defendant's construction of the section, giving him an absolute right to fly the flag on the exterior of the building, hanging over the common area, would lead to the "unreasonable or absurd consequence" that RPL 339-j allows a unit owner to ignore compliance with the by-laws and rules which said owner agreed to abide by when the unit was purchased.[2]

When presented with an issue of statutory interpretation, the court's primary consideration is to ascertain and give effect to the intention of the Legislature. Although statutes will ordinarily be accorded their plain meaning, it is well settled that courts should construe them to avoid objectionable, unreasonable or absurd consequences. McKinney's Cons Laws of NY, Book 1, Statutes §§ 141, 143. The court declines to accept defendant's interpretation of RPL 339-j as it would lead to the unreasonable result of voiding plaintiffs' declarations, by-laws and rules and regulations, which clearly prohibit a unit owner from placing or hanging any personal item on or out of a unit. (Emler Aff., Ex. B).

Employing the rules of statutory construction and common-sense, this court finds that the Condominium Act prohibits the board from preventing a unit owner's display of the American flag. It does not prohibit the board from enacting rules and regulations relative to the location and installation of any personal item which may interfere with other occupants or create a nuisance in the Common Elements. Indeed, plaintiffs' objection does not concern defendant's *display* of the flag, but rather the location and installation of the flag and flagpole on the exterior of the building. Defendant is free to display his flag from within the confines of his unit and as the record demonstrates, CWC has not interfered with that right in any manner.

Accordingly, plaintiffs' motion seeking a preliminary injunction is granted, and defendant's motion to dismiss is denied in all respects.

CONCLUSION

Based on the foregoing, plaintiffs are entitled to a preliminary injunction ordering defendant Edward Desmond to allow plaintiff or its agents access to the unit to cure defendant's default in failing and/or refusing to remove a flag and a flagpole at the exterior portion of plaintiffs' building, which defendant has installed without authority or consent from plaintiffs.

Plaintiffs have demonstrated a likelihood of success on the merits by establishing that defendant has violated the declaration, by-laws and rules, and continues to do so despite plaintiffs' multiple efforts to resolve the violation and cure the default. Irreparable injury has been demonstrated in that money damages cannot compensate defendant's trespass and the risk of harm to other unit owners and passersby in the courtyard. Finally, the equities clearly favor plaintiffs in that defendant suffers no prejudice from displaying his flag from within his unit in accordance with the by-laws and rules. Accordingly, it is

ORDERED, that Plaintiffs' Order to Show Cause, Sequence No. 001, seeking a preliminary injunction is granted; and it is further

ORDERED that defendant, and all other persons acting under the supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from prohibiting plaintiffs and/or plaintiffs' agents access to defendant's unit for the express purpose of removing the flag and flagpole, defendant has installed to the exterior of the building; and it is further

[2] As noted by plaintiffs, federal law and other state's laws support this court's statutory interpretation. The Freedom To Fly the American Flag Act, a federal statute passed in 2005, only allows a unit owner to display a flag, of any size, on the unit owner's own property. The Congressional record indicates that in discussing the Act, it was observed that; "this is a common-sense accommodation of the rights of the associations to maintain the value of their properties and the rights of Americans to fly the flag." 152 Cong. Rec H 4574.

ORDERED, that Defendant's Motion to Dismiss, Sequence No. 002, is denied; and it is further

ORDERED, that the parties and their counsel are directed to appear for a preliminary conference, on July 17, 2018 in Room 307, 80 Centre Street, New York, New York, at 9:30 a.m.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: May 11, 2018
New York, New York

HON.W. FRANC PERRY, 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**