

Green Bldrs. NYC1 LLC v Frierson

2019 NY Slip Op 33542(U)

November 22, 2019

Supreme Court, Kings County

Docket Number: 503586/2019

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of November, 2019.

P R E S E N T:

HON. CARL J. LANDICINO, JSC

-----X
GREEN BUILDERS NYC1 LLC,

Index No.: 503586/2019

Plaintiff,

- against -

DECISION AND ORDER

WILLIE MAE FRIERSON, "JOHN DOE",
"JANE DOE",

MOTION SEQ. #1

Defendant(s).

-----X
WILLIE MAE FRIERSON,

Third Party Plaintiff,

-against-

SHERMAN GRAHAM, "JOHN DOE", "JANE DOE",
and "XYZ" CORPORATION,

Third Party Defendants.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2
Opposing Affidavits (Affirmations).....	3
Supplemental Affidavits (Affirmations).....	4
Memorandum of Law	5

After oral argument and upon a review of the papers, the Court finds as follows:

Plaintiff Green Builders NYC1 LLC ("Plaintiff") seeks, by Order to Show Cause (motion sequence #1) an Order, pursuant to CPLR 6301:

- a. Restraining and enjoining the Defendants from access to 1241 Dean Street, Brooklyn, NY 11216; and
- b. Granting such other and further relief as this Court deems just and proper.

Defendant Willie Mae Frierson (“the Defendant”) opposes the motion. Plaintiff alleges that the New York City Department of Housing Preservation and Development (“HPD”) has issued an Order to Repair/Vacate (HPD Order) (Plaintiff’s Motion, Exhibit “A”) dated December 31, 2009, relating to 1241 Dean Street, Brooklyn, New York 11216 (the “Subject Premises” or “Premises”). Plaintiff alleges that in violation of this HPD Order the Defendant has refused to vacate the Premises and continues to occupy the first floor by breaking locks to gain access thereto. Plaintiff contends that pursuant to the HPD Order it was required to vacate the Premises and seal it. Procedurally, the Order to Show Cause provided an interim stay that directed that, pending a hearing on the instant motion, the Plaintiff was entitled to immediately secure the Premises, including changing the locks of the entrance doors to the Premises (Honorable Mark I. Partnow, J.S.C., February 25, 2019).

Defendant, in opposition, contends that the HPD Order only relates to the 3rd story of the Premises (Apt. 3) and the Basement. The Defendant further argues that the subject HPD Order is not admissible because it is not authenticated. The Defendant also contends that in any event the purported Order is not material to the subject application. However, the Defendant represents and concedes that due to procedural filings and other setbacks in the case, that:

“Frierson opposes plaintiff’s CPLR 6301 motion for a restraining order that extends beyond a determination of this motion; but Frierson would agree that the entire premises remains completely secure and inaccessible to the parties as well as the public pending the outcome of this action or any other action concerning 1241 Dean Street, Brooklyn, New York.”

Accordingly, the motion (motion sequence #1) for a Preliminary Injunction is granted and the Subject Premises is to remain sealed pursuant to the HPD Order, as reflected by the

Temporary Restraining Order contained in the Order to Show Cause dated February 25, 2019 (Hon. Mark I. Partnow, JSC), or further order of this Court.

In granting the plaintiff's motion for a preliminary injunction, the Court must also address the issue of an undertaking. *See Butt v. Malik*, 106 A.D.3d 849, 850, 965 N.Y.S.2d 540, 541 [2nd Dept, 2013]; CPLR 6312. The Court permitted the parties to submit supplemental affirmations on the issue of an undertaking. "The plain language of CPLR 6312(b) directs the court to fix the undertaking in an amount that will compensate the defendant for damages incurred "by reason of the injunction", in the event it is determined that the plaintiff was not entitled to the injunction." *Clover St. Assocs. v. Nilsson*, 244 A.D.2d 312, 313, 665 N.Y.S.2d 537 [2nd Dept, 1997].

The Court finds that the Plaintiff has not provided sufficient grounds for the posting of a nominal bond. In their Supplemental Affirmation in Support of Plaintiff's Preliminary Injunction, the Plaintiff contends that a nominal undertaking be ordered by the Court in satisfaction of CPLR Rule 6312(b) given that the instant application is only seeking to enforce an existing governmental order. The Plaintiff questions that "[s]ince there is already a Full Vacate Order in place by the HPD, what waste or damages, if any, could befall on Defendant?" In opposition, the Defendant argues that an undertaking for a preliminary injunction in this matter should be based upon a valuation of the Subject Premises at \$2,595,000.00. In matters where a nominal undertaking was ordered, the applicants low income, or not for profit status, and not merely the presence of a public interest, was a significant factor in the request for a nominal undertaking. *See Noble Drew Ali Plaza Tenants Ass'n v. Noble Drew Ali Plaza Hous. Corp.*, 29 A.D.3d 549, 550, 815 N.Y.S.2d 116, 117 [2nd Dept, 2006]; *Daytop Vill., Inc. v. Consol. Edison Co. of New York*, 61 A.D.2d 933, 934, 403 N.Y.S.2d 222, 224 [1st Dept, 1978].

In the instant proceeding, the Plaintiff does not take the position that a nominal bond should be issued based on a lack of income. As a result, the motion by the Plaintiff is granted and the application for a nominal bond is denied. The Plaintiff shall post a bond in the sum of \$100,000.00 within 30 days of entry of this Decision and Order pursuant to CPLR §6312. The Court finds that this amount reasonably reflects the value of the Defendant's use if she had been permitted access. This sum acknowledges that there is an HPD Order stopping work and that there are issues relating to habitability. The Defendant has not made an adequate showing of waste or loss of profit or rents pursuant to CPLR 6312(b)(2).

Based on the foregoing, it is hereby ORDERED as follows:

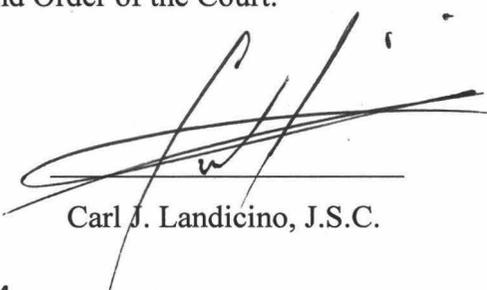
The motion by the Plaintiff (motion sequence #1) for a preliminary injunction is granted pursuant to CPLR 6301; and it is further

ORDERED that The Plaintiff shall post a bond in the sum of \$100,000.00 within 30 days of entry of this Decision and Order, and file proof of same with the Court on notice to the Defendant within 10 days thereafter, pursuant to CPLR §6312; and it is further

ORDERED, that Plaintiff shall be entitled to immediately secure 1241 Dean Street, Brooklyn NY 11216 in accord with the vacate order, issued on December 30, 2009 by New York City Department of Housing Preservation and Development (HPD) under Violation #8211117, in order to prevent access, including changing the locks at the entrance doors to 1241 Dean Street, Brooklyn, N.Y. 11216 and that this Preliminary Injunction shall continue pending further order of the Court.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

FILED
NOV 27 2019
KINGS COUNTY CLERK'S OFFICE