

**Avenue A Assoc. LP v Board of Mgrs. of the Hearth
House Condominium**

2020 NY Slip Op 30121(U)

January 13, 2020

Supreme Court, New York County

Docket Number: 159073/2019

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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AVENUE A ASSOCIATES LP,
Plaintiff,

INDEX NO. 159073/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

BOARD OF MANAGERS OF THE HEARTH HOUSE
CONDOMINIUM, HEARTH HOUSE OWNERS CORP.,
BOARD OF DIRECTORS OF THE HEARTH HOUSE
OWNERS CORP., LOREE LASH-VALENCIA, ARIANE
MARDER, STEPHANIE NELSON, VIRGIL WONG, RUTIE
PATELA, NATE NEWMAN, SHANNAN CLICK

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9,
10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 36, 37, 38, 39, 40, 41, 42, 43,
44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

The Hearth House Condominium, which is located at 50 Avenue A, New York, New
York, consists of a commercial unit, owned by plaintiff Avenue A Associates LP, and a
residential unit, owned by Hearth House Owners Corporation. Pursuant to a long-term
commercial lease dated September 14, 2018, plaintiff Avenue A Associates leased the
commercial premises to non-party Milk Money Kitchens, which is in the business of renting out
commercial grade kitchens and equipment. In order to operate its business, Milk Money
Kitchens must install a vent exhaust on the building's exterior walls.

After it became clear that the building's management would not permit access to install
the vent on the building's exterior walls, plaintiff commenced this action against the
condominium's board of managers and the owner and residents of the residential unit seeking
both equitable and monetary relief. Upon commencing this action, plaintiff immediately moved,

by order to show cause, for a preliminary injunction under CPLR 6301 enjoining defendants from interfering with plaintiff's alleged rights to install the vent stack and directing defendants to provide access to plaintiff and its tenant to any part of the building so that the work can be completed. By order dated October 7, 2019, this court denied plaintiff's request for a temporary restraining order, which sought the same relief as the underlying motion. Defendants oppose the motion and cross-move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, arguing that, according to the clear language of the condominium's declaration, plaintiff and its tenant do not have a right to install the vent stack.

It is well-established that a preliminary injunction will only be issued if plaintiff demonstrates, with convincing evidentiary support, a likelihood of success on the merits, irreparable injury absent granting of a preliminary injunction, and that a balancing of equities favors its position. CPLR 6301; *Nobu Next Door, LLC v. Fina Arts Housing, Inc.*, 4 N.Y.3d 839, 840 (2005); *LAIG v. Medanito S.A.*, 130 A.D.3d 466 (1st Dep't 2015). Here, plaintiff has not met any of these elements.

First, plaintiff has not shown that the condominium's declaration permits it or its tenant to perform this work. Plaintiff argues that Article 11 of the condominium's declaration, which is entitled "Easements", allows it to install the vent on the building's exterior wall. In particular, plaintiff relies on paragraph 11.1 of the declaration, which provides in relevant part, that both the plaintiff, as the commercial unit owner, and the defendant co-op, "shall have an easement in common with each other to inspect, maintain, repair, alter and replace all Common Elements or Commercial Limited Common Elements (if any) where on the Property they may be located." Affidavit of Michael F. Rakosi sworn to on September 18, 2019, Exh. A (condominium declaration and by-laws), ¶ 11.1. Plaintiff also relies on paragraph 11.4, which provides that both

the commercial and residential unit owners “shall have easements over the Common Elements and the Commercial Limited Common Elements (if any), reasonably necessary to allow function of said Units for purposes set forth herein.” *Id.*, ¶ 11.4. According to plaintiff, these provisions give it and its tenant an absolute right to install the vent stack along the exterior wall of the building above the first floor.

However, contrary to plaintiff’s contention, the area where plaintiff’s tenant seeks to install the vent stack is not a “Common Element” of the building as defined by the declaration but is rather part of the “Residential Unit.” The Common Elements of the building are defined in Article 6 of the declaration, which provides that the Common Elements consist of common areas that are (1) “below the second floor” of the building and are (2) “not incorporated in either the Residential or Commercial Unit(s).” Article 5, in turn, defines the Residential Unit, which is measured, above the second floor, “from the exterior face of each exterior wall to the opposite exterior wall” and includes, above the second floor, “all exterior walls which exclusively support or benefit the Residential Unit.” *Id.*, ¶ 5.2. Thus, the exterior walls of the building above the second floor are part of the Residential Unit and not part of the Common Elements of the building. This is further supported by the declaration’s definition of the Commercial Unit, which “consists of the commercial space on the first floor . . . [including] windows, doors and other installations in the exterior walls of the Building which are primarily used for the benefit of the Commercial Unit.” *Id.*, ¶ 5.1. These provisions establish that the exterior walls located above the Commercial Unit are primarily used for the benefit of the Residential Unit, not the Commercial Unit.

In addition to the easement under Article 11, plaintiff also relies on Article 8 of the declaration to support its argument that it, or its tenant, has a right to install the vent stack

without obtaining the permission of the board or the Residential Unit. Article 8 provides that each Unit owner shall have the right, with respect to their Unit, “to install any ducts, stacks, chutes, or chases reasonably required in connection with the renovation of either Unit, provided that the nature and location of such installation thereof does not interfere materially with the use of the other Unit” *Id.*, ¶ 8.1. Although this section states that the consent of the other Unit is not required to perform this work, the section only applies to the work performed in each respective Unit. *Id.*, ¶ 8.1 (“both Unit owners shall have the right with respect to their Unit”). Thus, although plaintiff and its tenant arguably have the right to install the vent stack on the exterior wall of the first floor where the Commercial Unit is located, such rights do not apply to the portion of the exterior wall on the second floor and above, which, as discussed above, is part of the Residential Unit. Accordingly, plaintiff has failed to show that it is likely to succeed on the merits of its claims as the declaration does not give it the right to install the vent stack on the exterior wall of the Residential Unit.

With respect to the element of irreparable harm, plaintiff spends a considerable part of its papers discussing how important the vent stack is to the business of its commercial tenant, Milk Money Kitchens, and that it would devastate the tenant’s business if it is not permitted to install the vent stack as planned. However, plaintiff is the unit owner, not the tenant or business owner, who is not a party to this action. The loss incurred by plaintiff if the vent stack is not installed will be lost rent under the commercial lease, which consists of monetary damages and is not considered irreparable harm. *U.S. Re Companies, Inc. v. Scheerer*, 41 A.D.3d 152, 155 (1st Dep’t 2007).

Likewise, plaintiff has failed to show that a balancing of the equities favors its position. Although the denial of the motion may detrimental to the business of its commercial tenant, the

harm incurred by plaintiff, as the unit owner, primarily consists of lost rental income, which was caused by plaintiff's own decision to lease the space to this tenant. On the other hand, installation of the vent stack in order to ventilate nine commercial kitchens, will significantly impact the residents of the Residential Unit as it appears that the vent stack will be installed on the exterior wall by the windows of the apartments of the Residential Unit, with the exhaust portion terminating near the terrace of a fourth floor apartment in this 6-story building. *See* Affidavit of Farid Ismayilov sworn to on December 31, 2019, ¶ 8; Affidavit of Youngsam Yu sworn to on January 7, 2020, ¶ 11. Finally, the circumstances presented here are not of such an extraordinary nature so as to warrant mandatory injunctive relief, which, in effect, would grant the plaintiff the ultimate relief requested. *Rosa Hair Stylists, Inc. v. Jaber Food Corp.*, 218 A.D.2d 793, 794 (2d Dep't 1995). Accordingly, plaintiff's motion for a preliminary injunction must be denied.

Turning to the cross-motion, defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. On a motion to dismiss pursuant to CPLR 3211(a)(1) and (7), the court is required to accept all of the allegations in the complaint as true, and to draw all inferences from those allegations in the light most favorable to plaintiff, unless the documentary evidence conclusively disproves an alleged fact. *Devash LLC v. German American Capital Corp.*, 104 A.D.3d 71 (1st Dep't 2013) (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994)). Documentary evidence includes documents such as judicial records, deeds, contracts or other papers, such as the declaration at issue here, which meet the requirements of being essentially unambiguous, authentic and undeniable. *VXI Lux Holdco SARL v. SIC Holdings, LLC*, 171 A.D.3d 189, 193 (1st Dep't 2019).

In its first cause of action, plaintiff seeks a permanent injunction for the relief outlined in its motion. "The standard for obtaining a permanent injunction is essentially the same as for a

preliminary injunction with the exception that the plaintiff must actually succeed on the merits of the case, rather than merely demonstrate that success is likely in a future proceeding.” *Weizmann Institute of Science v. Neschis*, 229 F.Supp.2d 234, 258 (S.D.N.Y. 2002) (internal citations and quotations omitted). As discussed above, the condominium’s declaration does not entitle plaintiff, or its tenant, to install the vent stack along the exterior wall of the Residential Unit, as it seeks to do, and thus the documentary evidence conclusively shows that plaintiff is not entitled to this relief. Further, as discussed above, plaintiff cannot show irreparable injury in order to be entitled to the equitable relief that it seeks as its injury consists of lost rental income, which is compensable in monetary damages.

Plaintiff’s second cause of action for a declaratory judgment declaring the parties’ rights and obligations under the condominium’s by-laws must be dismissed as it is duplicative of the breach of contract cause of action. *See Wildenstein v. 5H & Co.*, 97 A.D.3d 488, 491 (1st Dep’t 2012). Plaintiff’s third cause of action for breach of contract must also be dismissed, because, as discussed above, the condominium’s declaration does not entitle plaintiff, or its tenant to install the vent stack and thus defendants did not breach the declaration or the by-laws by preventing plaintiff and its tenant from performing this work. Plaintiff’s fourth cause of action for tortious interference with contract must also be dismissed as plaintiff has failed to plead that its contract with the commercial tenant has been breached, an essential element of this cause of action. *NBT Bancorp Inc. v. Fleet/Norstar Financial Group*, 87 N.Y.2d 614 (1996). Finally, plaintiff’s fifth and sixth causes of action, which are based on the alleged breach of fiduciary duty by the board, must be dismissed as the board did not act wrongfully in denying plaintiff and its tenant permission to install the vent stack.

Accordingly, it is

ORDERED that the motion for a preliminary injunction is denied; and it is further

ORDERED that the defendants' cross-motion to dismiss the complaint is granted and the complaint is dismissed against all of the defendants, with costs and disbursements awarded to defendants, and the Clerk shall enter judgment accordingly.

11/13/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: