1467 Bedford Holdings LLC v Spitzer
2020 NY Slip Op 34094(U)
December 10, 2020
Supreme Court, Kings County
Docket Number: 517788/2019
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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1467 BEDFORD HOLDINGS LLC, GEMCAP EQUITY CORP., & MAZEL EQUITIES GROUP LLC,

Plaintiffs, Decision and order

- against - Index No. 517788/2019

JOEL SPITZER a/k/a ELLIOT SPITZER and COBBLESTONE EQUITY LLC, December 10, 2020

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §6301 seeking a preliminary injunction staying the defendant from loitering on the property and from holding themselves as owners and interfering with the management of the property. The defendant Spitzer has moved seeking to enjoin the plaintiffs from continuing to slander Spitzer and to stay a proceeding in Landlord Tenant court. The motions have been opposed respectively. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On December 5, 2013 the entity 1467 Bedford Holdings LLC was formed and it is owned by three entities, Gemcap Equity Corp., 50% Mazel Equities Group LLC, 25% and Cobblestone Equity LLC, 25%. The purpose of the entity was to acquire, develop and maintain property located at 1467 Bedford Avenue in Kings County. Pursuant to the Operating Agreement the managers of the entity are Judah Zelmanovitz and Sam Wieder (see, Operating Agreement, §5). The plaintiffs allege the defendant Spitzer has been acting as the

manager of the property, has been presenting himself as the manager of the property and has in fact rented units that were already occupied. They further allege he has trespassed and loiters at the property. It is alleged these activities violate the operating agreement and is harming not merely the financial success of the enterprise but the physical well being of the tenants that reside there. The plaintiffs have moved seeking an injunction preventing the defendant from acting as the owner of the property and from having any interaction with any of the tenants. The defendant opposes the motion and has cross-moved seeking an injunction preventing the plaintiffs from continuing to slander him.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d

690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]). Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is grounded in the fact it is alleged the defendant has violated the operating agreement by 'managing the property' where he is not denominated as the designated manager. Thus, Benjamin Schwadel, the current regional property manager for Sharp Management Company, the management company of the entity, submitted an affidavit wherein he states that "on several occasions Elliott Spitzer ("Spitzer") prevented us from accessing vacant apartments - that he kept the keys to and tried to manage or control. Of course, by keeping Sharp Management from efficiently accessing vacant apartments, Spitzer stopped us from properly marketing and renting out the vacant unit(s)" (see, Affirmation of Benjamin Schwadel, ¶4). Moreover, "furthermore, the Building's tenants have constantly complained to us about Spitzer often loitering around the Building, on its roof, and even repeatedly banging on their doors for no justifiable reason" (id at ¶6). Lastly, "most troublingly, [sic] recently the tenants residing at unit 2A in

the Building returned home to find someone else occupying their unit. After the police were called down, the "new tenant" advised us that Spitzer had rented the unit to her - which Spitzer did not deny" (id at ¶7). Mr. Spitzer generally does deny these allegations. In his affidavit he states that "after Sharp Mgmt. took over, I never made any effort to continue "managing" the Building or any of its operations" (Affirmation of Joel Spitzer ¶20). Spitzer further denied he rented an occupied apartment to another tenant noting that the woman who allegedly obtained a rental from Spitzer had a history of occupying apartments rented to others. Thus, concerning the management portion of the preliminary injunction, while Spitzer denies he acted as a manager he concedes that he maintains no authority to so act. Therefore, notwithstanding that issues of fact exist, it is still apparent the moving party has a likelihood of success on the merits (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]). Thus, the moving party is not required to present 'conclusive proof' of its entitlement to an injunction and "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Ying Fung Moy v. Hohi Umeki, 10 AD3d 604, 781 NYS2d 684 [2d Dept., 2004]).

Likewise, there are allegations the defendant trespasses upon property at locations on the property he does not own or

rent. Clearly, if there are legitimate allegations the defendant has committed or continues to commit trespass then such activity may be enjoined. Moreover, the harms alleged here, usurpation of management duties are irreparable. In Fieldstone Capital Inc., v. Loeb Partners Realty, 105 AD3d 559, 963 NYS2d 120 [1st Dept., 2013] the court held that a party is entitled to an injunction where it is shown "that they are suffering irreparable injury to the extent the properties they own continue to be managed by an agent they do not desire" (id).

Concerning the alleged rental of occupied apartment 2A to another person, Bryan Aguilar, the superintendent of the building stated that the 'new tenant' informed him that Spitzer had rented her the apartment while the true tenants of the apartment were away (see, Affirmation of Bryan Aguilar, ¶5). Spitzer vehemently denies this allegation and indeed this allegation is seriously disputed. Further, precise injunctive relief sought over a disputed past act that has no possibility of any future irreparable harm is difficult to assess.

The plaintiff has presented sufficient evidence it has a likelihood of success on the merits and will suffer irreparable harm if the injunction is not granted concerning Spitzer acting as a manager. Therefore, the motion seeking a preliminary injunction prohibiting Spitzer from exercising any management role in any capacity is granted. Likewise, the plaintiff is

enjoined from trespassing upon any portion of the property that is private which the defendant does not rent (see, Arcamone-Makinano v. Britton Property Inc., 83 AD3d 623, 920 NYS2d 362 [2d Dept., 2011]). The motion seeking to enjoin defendant from loitering is denied. Without engaging in any specific activity there can be no injunction preventing the defendant from merely loitering. Further, any injunction connected to the rental of apartment 2A is denied.

Turning to Spitzer's motion, as noted by the parties the landlord tenant action has been discontinued this that portion of the relief sought is now moot. Indeed, the only remaining portion of defendant's injunctive relief concerns enjoining slanderous statements made by the owners of the plaintiff entities. The defendant asserts that the plaintiff's or their agents or employees have uttered slanderous statements against him and seek to enjoin them in the future. While of course slander is a tort and can be damaging and embarrassing it is generally well settled that an injunction prohibiting the spread of slander is improper (see, De Wick v. Dobson, 18 AD 399, 46 NYS 390 [2d Dept., 1897]). More recently courts have consistently upheld this rule. Thus, in Hammer v. Trendl, 2002 WL 32059751 [E.D.N.Y. 2002] the court held, citing earlier authority that "because ordinarily libels may be remedied by damages, equity will not enjoin a libel absent extraordinary circumstances" (id).

Again in Brummer v. Wey, 166 AD3d 475, 89 NYS3d 11 [1st Dept., 2018] the court noted that prior restraints are not permissible to enjoin libel or slander absent a showing such statements pose a "true threat" to the defendant. In this case no such threat has been demonstrated. Consequently, the defendant's motion seeking an injunction enjoining any future slander is denied.

So ordered.

ENTER:

DATED: December 10, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC