

620 W. 152nd St. Assoc., LLC v Soldevilla
2021 NY Slip Op 31475(U)
April 29, 2021
Supreme Court, New York County
Docket Number: 150564/2020
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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620 WEST 152ND STREET ASSOCIATES, LLC

Plaintiff,

- v -

THOMAS SOLDEVILLA,

Defendant.

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INDEX NO. 150564/2020

MOTION DATE 04/29/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number 22, 23, 24, 25, 26, 27, 28, and 29 (Motion 002)

CONTEMPT

In this action, the plaintiff landlord moves pursuant to Judiciary Law §§ 753 and 773 to hold the defendant tenant in civil contempt of court for violating a preliminary injunction order dated March 24, 2020, and thereupon imposing a fine. That order prohibited the tenant or any occupant residing in his apartment from allowing cigarette smoke from migrating into common areas of the plaintiff's apartment building and from smoking in common areas of the building, The tenant personally appeared in the action and opposed the motion. The motion is denied.

The plaintiff commenced this action on January 16, 2020, seeking a judgment declaring that a person occupying the tenant's apartment was in violation of Admin. Code of City of N.Y. (Ad Code) § 17-503, which prohibits cigarette smoking in all enclosed areas within public places. The plaintiff alleged that the tenant's occupant violated the Ad Code by smoking in or permitting smoke to permeate a common area of the building, which is defined as a public place under Ad Code § 17-505(b). It also seeks a judgment declaring that this conduct constitutes a breach of the lease. In its complaint, the plaintiff also seeks a permanent injunction prohibiting such behavior, and asserts causes of action to recover for damages for nuisance and breach of

contract. The plaintiff neither named nor joined the occupant as a party defendant. By order dated March 24, 2020, the court granted the plaintiff's motion preliminarily to enjoin the tenant from permitting or suffering the occupant of his apartment, designated as Apartment #6 at 620 West 152nd Street, New York, New York, from smoking in the common areas of that building or causing tobacco smoke to infiltrate into or permeate common areas of the building or units of the building other than Apartment #6.

Based on at least one tenant's complaint, the plaintiff made the instant motion to hold the tenant in contempt for violating the terms of the preliminary injunction. The motion was first made returnable on February 25, 2021, but was adjourned until March 3, 2021 upon the request of the tenant, who temporarily resides in Peru, for the purpose of conducting a virtual hearing on the contempt motion. On March 3, 2021, however, the tenant did not appear at the remote conference. The court thus ruled from the bench that, upon the tenant's default, the tenant was in contempt, and scheduled a hearing for April 29, 2021 to determine the extent of the sanction or penalty. The tenant, along with the superintendent of the plaintiff's building, testified at the hearing, and the superintendent also submitted an affidavit setting forth his direct testimony, as requested by the court.

To prevail on an application to punish a party for civil contempt, a party must establish that the party to be held in contempt violated a clear and unequivocal court order, known to the parties (see Judiciary Law § 753[A][3]; see also *McCormick v Axelrod*, 59 NY2d 574 [1983], amended 60 NY2d 652 [1983]). The applicant must also establish that the party to be held in contempt engaged in conduct that was calculated to and actually did defeat, impair, impede, and prejudice the rights of the applicant (see *450 West 14th St. Corp. v 40-56 Tenth Avenue, LLC*, 15 AD3d 166 [1st Dept 2005]; *Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V.*, 304 AD2d 482 [1st Dept 2003]). "[W]ilfulness is not an element of civil contempt" (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 35 [2015]). A civil contempt must be proven by clear and convincing evidence (see *Classe v Silverberg*, 168 AD3d 603, 604 [1st Dept 2019]). The superintendent's testimony

consisted only of hearsay declarations of tenants who had recently complained to him that the occupant of the tenant's apartment continued to cause cigarette smoke to infiltrate into common areas of the building subsequent the issuance of the preliminary injunction. Those declarations were not admissible under any recognized exception to the hearsay rule. The superintendent himself had no personal knowledge of whether the occupant continued to smoke in the apartment or common areas, and testified that the last time that he personally smelled cigarette smoke emanating from the subject apartment was three years ago.

Hence the plaintiff failed to satisfy its burden on this motion.

In addition, at the April 29, 2021 hearing, the plaintiff conceded that the tenant was not himself smoking or causing cigarette smoke to migrate from the apartment into common areas. It further conceded that, in light of the moratorium on residential evictions arising from the pandemic, there was no legal proceeding pursuant to which the tenant could seek to remove his occupant from the apartment, and otherwise nothing he could do to prevent his occupant from smoking other than requesting him to refrain from doing so. In light of these concessions, and upon the tenant's statement that he had attempted to comply with all prior directives to appear remotely, the court vacated the tenant's default in failing to appear on March 3, 2021, as well as its concomitant ruling holding the tenant in contempt, and permitted him to oppose the motion and testify on his own behalf.

Accordingly, it is,

ORDERED that the plaintiff's motion to hold the defendant in civil contempt, and thereupon to impose a fine upon him, is denied; and it is further,

ORDERED that the plaintiff's pro se appearance at the April 29, 2021 hearing is deemed to be an appearance in the action, his testimony is deemed to constitute an answer to the complaint, and, upon the parties' stipulation at the hearing, the appearance and answer shall be deemed timely interposed; and it is further,

ORDERED that the parties shall appear for a remote preliminary conference via the Microsoft Teams computer application on June 10, 2021, at 10:30 a.m., the court shall provide the parties with an email link to access that conference, and, on or before May 11, 2021, the plaintiff shall email a copy of this order with notice of entry to the defendant at tomassoldevillag313@gmail.com.

This constitutes the Decision and Order of the Court.

4/29/2021
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	