

**Kurland v 161 W. 16th St. Owners Corp.**

2021 NY Slip Op 32319(U)

November 15, 2021

Supreme Court, New York County

Docket Number: Index No. 160440/2019

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF NEW YORK**

**PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29**

-----X  
YETTA G. KURLAND,

**INDEX NO.: 160440/2019**

Plaintiff(s),

**MOTION DATE: 6/3/21**

-against-

**MOTION SEQ. NO(s): 1, 3**

161 WEST 16TH ST. OWNERS CORP., and  
BOARD OF DIRECTORS OF THE 161 WEST 16TH  
ST. OWNERS CORP.,

**DECISION & ORDER  
ON MOTION**

Defendant(s).

-----X

Plaintiff moves (Motion #1) for summary judgment. Defendants cross-move to dismiss or for summary judgment. Plaintiff moves (Motion #3) for a preliminary injunction.

**The following papers filed on NYSCEF were read on the motion:**

**Doc. Nos.**

Notice of Motion (#1), Affidavit, Exhibits (18), and Memo of Law	9-29
Notice of Cross-Motion, Affidavit, Exhibits (7), and Memo of Law	45-54
Affidavit in Reply, Exhibits (2), and Memo of Law	56-59
Order to Show Cause (#3), Affirmation, Affidavit, and Exhibits (5)	60-68
Affidavit in Opposition, Exhibits (2), and Memo of Law	70-73
Affidavits (2) in Reply, Exhibits (4), and Memo of Law	74-80

By way of background, October 25, 2019, plaintiff commenced this action with the filing of a summons and complaint. The complaint alleges that plaintiff is the proprietary lessee and shareholder of apartment 5C (Apartment) at a premises known as 161 West 16th Street, New York, New York (Building). The complaint alleges that defendant 161 West 16th St. Owners Corp. (Co-op) is a cooperative housing corporation, which owns the Building. The complaint alleges that defendant Board of Directors of the 161 West 16th St. Owners Corp. is the board of directors of the Co-op (Co-op Board), which manages all maintenance and affairs of the Building. The complaint alleges that plaintiff has undertaken a renovation project with respect to the Apartment (Renovations), which includes improvements to a portion of the roof area directly appurtenant to the apartment (Roof) and to which defendants agreed (Agreement). The complaint alleges that defendants have now refused to sign the necessary forms, approvals and/or consents as required for plaintiff to complete the Renovations as they relate to the Roof. This action ensued. The complaint sets forth causes of action for declaratory relief, injunctive relief, breach of contract, and a claim for violation of Civil Rights Law § 52-a.

The first claim seeks a declaration that, among other things, defendants agreed to the Renovations and that plaintiff is entitled to complete the Renovations as they relate to the Roof and that plaintiff is entitled to use the Roof. The second claim seeks an injunction, directing, among other things, that defendants comply with the Agreement as it relates to the Roof and allow plaintiff to use the Roof and remove the surveillance cameras that are monitoring the Roof. The third claim seeks, in the alternative to the first and second claims, monetary damages as a result of defendants' alleged breach of the Agreement in refusing to sign the necessary forms, approvals and/or consents as required for plaintiff to complete the Roof portion of the Renovations. The fourth claim seeks monetary damages due to defendants' installation of surveillance cameras on the Roof in alleged violation of Civil Rights Law § 52-a.

After commencement, defendants interposed an answer with certain affirmative defenses, including that "Plaintiff's alleged damages, if any, have been caused by the acts or omission[s] of third parties over whom Defendants have no control or responsibility and other circumstances for which Defendants are not responsible." Now, plaintiff moves for summary judgment and defendants move to dismiss or for summary judgment.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant makes a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the movant makes such a showing, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

### **The Parties' Contentions**

In support of the motion, plaintiff proffers various documents, including the condominium declaration (Declaration) and by-laws (By-laws), the proprietary lease relating to the Apartment, and certain documents relating to the Renovations and the Agreement. Plaintiff asserts that the Renovations are complete except as they relate to the Roof and that defendants are now refusing to allow plaintiff to complete this portion of the Renovations contrary to the Agreement. Based on the proffered evidence, plaintiff asserts that defendants agreed to the Renovations as they relate to the Roof and that plaintiff is entitled to use the Roof and defendants should be directed to facilitate this work. Plaintiff also asserts that defendants should be directed to remove the surveillance cameras that are monitoring the Roof. Regarding the claim under Civil Rights Law § 52-a, plaintiff asserts that defendants installed surveillance cameras in the area of the Roof and that they are directed at the Apartment.

In response, defendants proffer, among other things, an affidavit from Eric Bomze, president of the Co-op and a member of the Co-op Board. Mr. Bomze notes that, pursuant to the Declaration, a condominium (Condo) owns the Building and that the Declaration divided the Building into a residential and commercial unit (respectively, Residential Unit and Commercial Unit). Mr. Bomze asserts that the affairs of the Condo are governed by the Board of Managers (Condo Board). Mr. Bomze asserts that the Co-op does not own the Building, but rather owns and the Co-op Board operates the Residential Unit. Mr. Bomze asserts that the Roof is not part of the Residential Unit, but part of the Commercial Unit. As such, Mr. Bomze asserts, the Condo owns and the Condo Board operates the Commercial Unit of which the Roof is a part. Regardless, defendants assert that the Agreement does not support plaintiff's position that defendants agreed to the Renovations as they relate to the Roof. Regarding the claim under Civil Rights Law § 52-a, defendants note, among other things, that the statute is inapplicable because plaintiff does not allege that the surveillance cameras took "images of the recreational activities which occur in [plaintiff's] backyard."

In reply, plaintiff asserts that her claims are now ripe for summary judgment since the parties agree that the parties' respective rights and obligations are established by the Agreement and the Building's governing documents. In particular, plaintiff notes that the Declaration provides that the Roof is a "commercial limited common element" to which the owner of the Commercial Unit has only limited access to maintain and service certain of its HVAC equipment. As such, plaintiff contends that, under the Declaration, no single unit owner (either of a Residential Unit or the Commercial Unit) has exclusive use to the Roof and, therefore, defendants can approve plaintiff's access to and the Renovations to the Roof based on a theory of equitable estoppel due to the parties' course of conduct over fifteen years. Regarding the claim under Civil Rights Law § 52-a, plaintiff asserts that the surveillance cameras are directly pointing into plaintiff's living room, which is more invasive than a "backyard."

### Discussion

The Declaration states that it is the intention of the owners of the Building to submit it to the provisions of Article 9-B of the Real Property Law, which is known as the Condominium Act. The Declaration divided the Building into a Residential Unit and Commercial Unit (Art. I, § 1.2). The Declaration defines the two units. "The Commercial Unit consists of major portions of the cellar, and the entire first through fourth floors, except for the Residential Unit vestibule, entrance lobby and passenger elevators located on the first floor, and except for those areas designated as Common Elements" (Art. V, § 5.1). "The Residential Unit consists of portions of the cellar and first floor and the entire fifth through nineteenth floors and penthouse level" (Art. V, § 5.2). The Declaration defines the common elements. "The Common Elements are comprised of [] the General Common Elements . . . the Residential Limited Common Elements . . . and the Commercial Limited Common Elements" (Art. VI, § 6.1 [a]). The By-laws explain that "[t]he Common Elements shall be used only for the furnishing of the services and facilities for which they

are reasonably suited and which are incidental to the use and occupancy of Units” (Art. V, § 11 [b]). The Declaration explains that the Commercial Limited Common Elements shall consist of, among other things, the Roof and that the owner of the Commercial Unit would have access to the Roof for limited purposes. In particular, the Declaration provided that:

“The Commercial Unit Owner shall have an easement to maintain the [Roof] and its air conditioning equipment on such roof provided that (i) due care be taken to safeguard the security of the residential occupants of the Building, and (ii) such equipment does not, in the Condominium Board’s reasonable judgment, create noise or vibrations which unreasonably disturb the residential occupants of the Building, and, if the Condominium Board requests, such equipment shall be located behind screens or barriers so as not to disturb the views of the occupants of the Residential Unit.”

(Art. VI, § 6.1 [d]). The Declaration explains that the Residential Limited Common Elements consist of:

“[T]hose rooms, areas, corridors, interior walls, doors, partitions, floors, ceilings, hallways, vestibules and other portions of the Building (other than the Units, the General Common Elements, and Commercial Limited Common Elements) as well as those facilities therein or elsewhere, either currently or hereafter existing for the exclusive use of, or which service only, or enclose the Residential Unit or the Residential Unit Owner (as the case may be). The Residential Limited Common Elements include the residential terraces and all roof areas above the fifth floor, other than the main roof.”

(Art. VI, § 6.1 [c]). Pursuant to its offering plan, the Co-op “acquire[d] fee title to the Residential Unit subject to the terms and conditions of the Condominium Declaration” (Offering Plan at 6-7). The offering plan further provided that the Co-op “will own and manage the Residential Unit, employ its own staff and make any and all decisions relating solely to its operation” (Offering Plan at 7).

Simply put, the Declaration divided the Building into the Residential Unit and the Commercial Unit, with the Commercial Unit having certain limited rights to the Roof. The Declaration provided the Residential Unit with no rights to the Roof, specifically providing the Residential Unit with rights to “all roof areas above the fifth floor, other than the main roof.”

Turning to plaintiff’s evidence and viewing it in the light most favorable to plaintiff, there was a proposal to create a roof deck on the Roof (Exhibit 3), which was not

subsequently included in the initial application for work (Exhibit 4); there was another proposal with revisions that included plans to replace a certain window in the Apartment with different windows,<sup>1</sup> but did not include a proposal to create a roof deck on the Roof (Exhibit 5); the proposal was approved and an application for a permit was submitted, which did not include any reference to a roof deck (Exhibit 6); the proposal was further revised/amended, which did not include a proposal to create a roof deck on the Roof (Exhibit 9); the proposal was approved (Exhibit 10); the parties entered into a further agreement, which provided in pertinent part:

“The Corporation has consented to the installation of the window model . . . provided that the Shareholder agrees by execution of this Rider that Shareholder will not use the window as an entry to the roof of the adjacent unit owner, and will not, without the written consent of such owner of the adjacent unit, use said roof in any way or manner, including, without limitation, entry on that roof or permitting any person or pet of Shareholder to enter onto said roof.”

Although plaintiff contends that the “adjacent unit owner” means her neighbor in the Residential Unit or the Commercial Unit Owner, this reading is unsupported by the Declaration, wherein the Commercial Unit Owner is the only party to whom any rights to the Roof are accorded. Subsequently, plaintiff submitted a proposal to install a roof deck on the Roof to which a member of the Co-op Board indicated that it would not authorize it and referred plaintiff to the Co-op’s attorney (Exhibit 13).

Regarding the first claim, defendants have made a *prima facie* showing that they did not agree to plaintiff’s proposal to install a roof deck on the Roof and plaintiff has failed to proffer competent evidence sufficient to establish the existence of a material issue of fact. Regarding the second claim, defendants have made a *prima facie* showing that they do not have the authority to grant plaintiff the right to use the Roof and that plaintiff has presented no basis to remove the surveillance cameras and plaintiff has failed to proffer competent evidence sufficient to establish the existence of a material issue of fact. Regarding the third claim, as previously noted, defendants have made a *prima facie* showing that they did not agree to plaintiff’s proposal to install a roof deck on the Roof and plaintiff has failed to proffer competent evidence sufficient to establish the existence of a material issue of fact. Regarding the fourth claim, defendants have made a *prima facie* showing that Civil Rights Law § 52-a is inapplicable because plaintiff does not allege that the surveillance cameras took “images of the recreational activities which occur in [plaintiff’s] backyard” and plaintiff has failed to proffer competent evidence sufficient to establish the existence of a material issue of fact.<sup>2</sup>

<sup>1</sup> In the supporting affidavit, plaintiff refers to these windows as “custom terrace windows/doors” or a “door.” The proposal refers to them simply as “windows.”

<sup>2</sup> Civil Rights Law § 52-a provides in pertinent part:

**Conclusion**

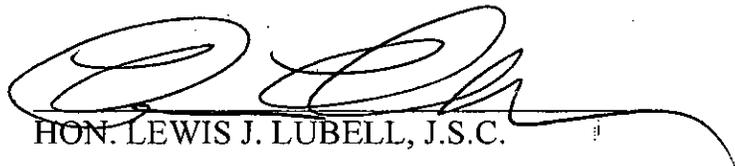
Based on the foregoing, it is hereby

ORDERED that plaintiff's motion (Motion #1) for summary judgment is DENIED; and it is further

ORDERED that defendant's cross-motion for summary judgment is GRANTED; and it is further

ORDERED that plaintiff's motion (Motion #3) for a preliminary injunction is DENIED as moot.

Dated: New York, New York  
November 15, 2021



HON. LEWIS J. LUBELL, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

“Any owner or tenant of residential real property shall have a private right of action for damages against any person who installs or affixes a video imaging device on property adjoining such residential real property for the purpose of video taping or taking moving digital images of the recreational activities which occur in the backyard of the residential real property without the written consent thereto of such owner and/or tenant . . . .”

While the Court may agree that surveillance cameras directed into a person's living room seems more invasive, this does not alter the plain language of Civil Rights Law § 52-a, which does not create a private right of action against a person who installs surveillance cameras directed into a person's living room.