

Stieglitz v 284-285 Cent. Owners Corp.

2021 NY Slip Op 32684(U)

December 2, 2021

Supreme Court, Queens County

Docket Number: Index No. 701405/20

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IAS Part 2
Justice

MICHAEL STIEGLITZ,

Index No. 701405/20

Plaintiff,

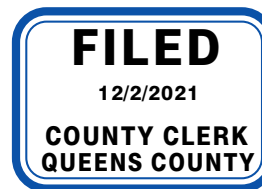
Motion Date: 8/11/21

-against-

Motion Seq. No. 2

284-285 CENTRAL OWNERS CORP.,
AMIANTOS, LLC, et al.,

Defendants.



The following papers EF numbered below read on this motion by plaintiff Michael Stieglitz for, inter alia, a preliminary injunction directing defendant 284-285 Central Owners Corp. to comply with paragraph 6 of the Remediation Stipulation and on this cross motion by the defendants for an award of attorney's fees

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	55-74
Notice of Cross Motion - Affidavits - Exhibits	76-90
Answering Affidavits - Exhibits	
Reply Affidavits	92-98, 99-101
Memoranda of Law	

Upon the foregoing papers it is ordered that the motion and cross motion are denied.

I. Background

On January 27, 2020, plaintiff Michael Stieglitz began this action by the filing of a summons and complaint which asserts causes of action for breach of contract, breach of the statutory warranty of habitability, negligence, and injunction relief. Defendant 284-285 Central Owners Corp. (the cooperative) is the owner and proprietary lessor of an apartment complex located at 284-285 Central Avenue, Lawrence, New York, and the complex contains twelve two story garden-style apartment buildings having a total of approximately seventy two cooperative apartments. Plaintiff Michael Stieglitz owns shares in the cooperative and holds a proprietary lease executed on or about July 2, 2003 for Apartment B5 at 284 Central Avenue, Lawrence, New York (the apartment). His second floor apartment, the home of the plaintiff, his wife, and their four children, has three bedrooms, a kitchen, a dining room, a living room and two bathrooms.

II. The Allegations of the Complaint

The plaintiff alleges the following:

Between 2005 and 2018, water coming from the exterior of the building repeatedly damaged the walls and ceilings of the apartment. The plaintiff complained to the defendant cooperative, the individual defendants who serve on the Board of Directors, and defendant Alexander Wolf & Company, Inc. (AWC), the managing agent for the cooperative. The defendants occasionally responded to the plaintiff's complaints, but only to the extent of inspecting the apartment and then scraping and painting over the water damage. Before 2019 the cooperative never attempted to correct the defects in the roof and facade of the building that permitted water to infiltrate the plaintiff's apartment.

By 2019 mold had appeared on the walls and other surfaces of the apartment. In May, 2019, the plaintiff demanded that the cooperative have the apartment tested for mold and other hazardous substances, and in response the cooperative hired an environmental testing company, defendant Amiantos, LLC, to inspect the apartment for mold, lead, and asbestos contamination. Amiantos reported, inter alia, that high levels of mold had been detected in the two children's bedrooms and in the living/dining room of the apartment. The cooperative then engaged a remediation contractor, Environmental Services Group (ESG) to submit a proposal for mold remediation work at the apartment. The cooperative contacted the plaintiff to inform him that mold had been detected, and he was directed to vacate the apartment on or before July 12, 2019. The plaintiff and his family vacated the apartment on or about July 3, 2019 and have not lived there since then.

Unsatisfied with the ESG proposal, the plaintiff hired his own environmental testing company, Five Boro Mold Specialist, Inc. (Five Boro), to retest the entire apartment. The Five Boro report dated July 17, 2019 found high levels of mold throughout the apartment and recommended remediation work more extensive than that of the ESG proposal. The Five Boro report also identified large cracks in the exterior façade masonry as the likely source of the water problems. The plaintiff subsequently engaged Microecologies, Inc. to perform invasive testing and probes throughout apartment, and the company performed the testing on August 16, 2019 and October 24, 2019. Microbiologies found extensive mold infestation throughout the apartment and recommended extensive remediation work. An architect hired by the plaintiff found defects in the roof and facade of the building that permitted water penetration.

This action ensued when the cooperative failed to do the remediation work required by the experts hired by the plaintiff.

III. The Plaintiff's Allegations Concerning the Remediation Stipulation

After the commencement of this action, continuous delays by the cooperative, and negotiations, the³ plaintiff's attorney sent a final draft of a

remediation stipulation to the attorney for the cooperative. The cooperative executed the remediation stipulation on October 29, 2020.

The remediation stipulation stated that the cooperative had obtained a proposal from the Finer Fire Restoration Corporation (Finer) concerning (1) the disposal of all non-salvageable personal property in the apartment, (2) the moving, storage, and cleaning of all salvageable personal property located in the apartment, (3) the remediation of the mold condition and (4) the restoration of the apartment. The cooperative agreed to have such work done by Finer.

The parties stipulated, inter alia: (1) As to exterior repairs, the cooperative had made repairs to the roof, parapet, and facade, and the cooperative warranted that the exterior work had been completed, the apartment was free of leaks and water infiltration, and the apartment was now ready for interior mold removal and restoration. (2) The plaintiff had prepared a list of salvageable personal property which Finer would remove from the apartment for cleaning and storage and a list of nonsalvageable personal property which Finer would dispose of. The cooperative would hire a company to certify that the salvageable personal property had been restored to a safe condition. (3) The cooperative would perform the remediation work required by the Finer report and other necessary remediation work. (4) After Finer had performed the remediation work, the cooperative would engage Lawrence ENV, LLC to test through air monitoring and material sampling whether the remediation work had been successful.

The cooperative breached the remediation stipulation. For example: (1) The cooperative did not provide the plaintiff with the required certification that the plaintiff's personal property has been restored to a safe condition. (2) The cooperative did not provide the plaintiff with a clearance test report that is satisfactory to the plaintiff. (3) The cooperative did not repair and restore the apartment.

The plaintiff's attorneys sent to the cooperative's attorneys a proposed letter agreement dated March 31, 2021 in which Stieglitz, inter alia,

agreed to accept the Lawrence ENV report dated March 17, 2021 concerning the post-mold abatement inspection and testing of the apartment. Steiglitz alleges: “I had some reservations about the continued presence of mold in the Apartment. Yet to avoid delaying any work, I indicated that I would agree to accept the results of the March 17, 2021 Lawrence ENV Report concerning the Apartment, provided that the Cooperative moved ahead expeditiously with the restoration work and testing of my personal property.” Stieglitz further alleges that weeks have gone by without any response from the cooperative. On the other hand, the cooperative alleges that on or about April 7, 2021, its attorneys informed Stieglitz's attorney of its rejection of the proposed letter agreement. The cooperative alleges: “Essentially, in the initially proposed Letter Agreement, Stieglitz attempted to redraft the Remediation Stipulation by forcing the Co-op Defendants to clean and remediate the Apartment in perpetuity - even if any future leaks and mold growth are not due to any fault of the Co-op Defendants. ***Further, the Letter Agreement sought to supplement the personal property certification requirements of the Remediation Stipulation. *** Stieglitz, without any basis, would not permit the Co-op Defendants to restore the Apartment unless the Co-op Defendants agreed to the terms of the Letter Agreement, thereby causing the delays he complains of.”

The plaintiff filed the instant motion on April 23, 2021 and submitted it on August 11, 2021. The motion seeks a preliminary injunction compelling the cooperative to comply with various terms of the remediation stipulation such as returning the apartment to a habitable condition.

IV. Discussion

The plaintiff's motion lacks merit.

CPLR 6301, “Grounds for preliminary injunction and temporary restraining order,” provides in relevant part: “ A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual ***.” (Emphasis added.) The remediation agreement is not

the subject of any cause of action asserted by the plaintiff. If the contrary view is taken, then the plaintiff is seeking ultimate relief for, inter alia, breach of contract. “[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment ***.” (*SHS Baisley, LLC v. Res Land, Inc.*, 18 AD3d 727, 728 [2nd Dept 2005]; *Board of Managers of Wharfside Condominium v. Nehrich*, 73 AD3d 822 [2nd Dept 2010].) Moreover, although the plaintiff has demanded injunctive relief in his complaint, he did not show on this motion that he would be “entitled” to such relief. (See, CPLR 6301.)

In any event, even treating the remediation agreement as the subject of a cause of action for its breach, the plaintiff did not successfully make the required three prong showing necessary for the issuance of a preliminary injunction. A party moving for a preliminary injunction has the burden of establishing by clear and convincing evidence (1) a likelihood of ultimate success on the merits; (2) irreparable injury if the provisional relief is withheld; and (3) a weight of the equities in his favor. (*Cangemi v. Yeager*, 185 AD3d 1397 [4th Dept 2020]; *Mangovski v. DiMarco*, 175 AD3d 947 [4th Dept 2019]; *Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212 [4th Dept 2009].) In regard to the first prong, the numerous conflicting allegations of the parties concerning who has acted unreasonably in implementing the remediation agreement prevent the court from finding that it is likely the cooperative is in breach. The showing made by the plaintiff is not clear and convincing. Moreover, the record does not permit the court to determine which party’s mold expert has the most reliable testing criteria. While the plaintiff has indicated in reply papers that he offered to accept the March 17, 2021 Lawrence ENV Report from the cooperative’s expert, his acceptance was made with conditions that are unsatisfactory to the cooperative, and the record is not clear and convincing that the cooperative’s rejection of the proposed letter agreement is unreasonable.. In regard to the second prong, the plaintiff did not show that he will sustain irrevocable injury in regard to items of personal property. Those items can be replaced, and any injury caused to them can be compensated by money, The plaintiff has an adequate remedy for unuseable personal property in the form of monetary damages, and injunctive relief is both

unnecessary and unwarranted. (*See, Mangovski v. DiMarco, supra.*) Moreover, while the plaintiff and his family cannot live in the apartment until its restoration, he has found another place to live during the pendency of this action, and he did not show that anyone will sustain irreparable injury by living elsewhere. The plaintiff failed to meet at least two parts of the tripartite test, and his motion must be denied.

In regard to the cross motion which seeks an award of attorney's fees pursuant to paragraph 14 of the remediation stipulation, the cooperative's application is premature since the court did not determine here which party is in breach of the agreement.

Dated: December 2, 2021



J.S.C.