

**Board of Mgrs. of the Evans Tower Condominium v
Rosenberg**

2021 NY Slip Op 32749(U)

December 23, 2021

Supreme Court, New York County

Docket Number: Index No. 151220/2017

Judge: David Benjamin Cohen

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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. DAVID B. COHEN **PART 58**

Justice

-----X

INDEX NO. 151220/2017

THE BOARD OF MANAGERS OF THE EVANS TOWER
CONDOMINIUM,

Plaintiff,

MOTION SEQ. NO. 003

- v -

SONIA BENATAR ROSENBERG a/k/a SONIA B.
ROSENBERG,

Defendant.

**DECISION, ORDER AND
JUDGMENT**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

In this action seeking, inter alia, injunctive relief, plaintiff The Board of Managers of the Evans Tower Condominium (“the Board”) moves against defendants Sonia Benatar Rosenberg a/k/a Sonia B. Rosenberg (“Sonia”), Robert Rosenberg (“Robert”), and Joel Rosenberg (“Joel”) (collectively “the Rosenbergs”) for an order granting the following relief:

- a. So-Ordering the Order and Judgment attached as Exhibit 4 to the Agreement dated January 16, 2021 (attached as Exhibit 1 to this motion);
- b. Issuing a Judgment and Warrant of Ejectment/Eviction enabling the Sheriff of New York County to eject and/or evict Defendant Sonia Rosenberg a/k/a Sonia B. Rosenberg, and all other occupants including, but not limited to, Robert Rosenberg and Joel Rosenberg, from Apartment 11B at 171 East 84th Street, New York, New York 10028;
- c. An injunction, pending service of the Warrant of Ejectment/Eviction, prohibiting defendant from engaging in destructive conduct (i.e., pouring and/or spraying excessive bleach and water) and allowing inspections by plaintiff’s personnel to inspect and confirm that defendant is in compliance with the order of this Court;
- d. An award in favor of plaintiff of its costs and expenses, including reasonable attorneys’ fees, incurred as a result of defendant’s breach of the agreement; and

e. For such other and further relief as this Court deems just and proper.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Sonia Rosenberg a/k/a Sonia B. Rosenberg (“Sonia”) was the owner of apartment 11B (“the apartment”) at the Evans Tower Condominium (“the condominium”), located at 171 East 84th Street, New York, New York. Doc. 1. For more than a decade, Sonia engaged in a pattern of pouring large amounts of water and bleach on the floor of her apartment. Doc. 1. Sonia used so much water and bleach on the floor of her apartment that water damage spread from her own apartment to the adjacent apartment, unit 11C. Doc. 1. As a result of Sonia’s actions, repairs have been made to unit 11C on at least four occasions, most recently in 2015, when mold growth was detected in the walls of the bathroom of unit 11C and on the walls of the 11th floor hallway. Doc. 1. In the Spring of 2016, the condominium spent approximately \$80,000 to repair the damage to the neighboring bathroom. Doc. 1.

Despite the foregoing, Sonia has nevertheless continued to pour water and/or bleach on the walls of her unit. Doc. 1. An inspection of her apartment in January 2017 revealed high levels of moisture in the floor and walls, rusting on the metal door frames, and buckling of the wooden floor tiles, indicating that further mold growth may develop. Doc. 1. Sonia’s conduct resulted in over \$70,000 in damage to the common elements of the condominium. Doc. 1.

The by-laws and the declaration for the condominium gave it the right to access the units therein to inspect them and perform any necessary maintenance or repairs. Docs. 1, 13. They also required the unit owners to keep their apartments in good repair and allowed the condominium to recover costs and expenses from a unit owner who breached the rules of the condominium. Docs.

1, 13. Additionally, the by-laws allowed the condominium to seek injunctive relief in order to enjoin any unit owner from continuing any conduct which violated the by-laws. Docs. 1, 13.

Given Sonia's conduct, the Board commenced this action against her on February 7, 2017. Doc. 1. In its complaint, the Board sought: 1) a temporary restraining order and preliminary and permanent injunction prohibiting Sonia from pouring water and/or bleach on the walls and floors of her unit; 2) a declaratory judgment determining that it had the right to access Sonia's apartment to perform inspections and, if necessary, repairs, that her conduct constituted a violation of the condominium's declaration and by-laws, and that Sonia was responsible for all costs and expenses incurred by the condominium caused by her conduct; 3) a finding that Sonia was required, pursuant to Real Property Law § 339-j, to post a bond in the amount of \$100,000 to ensure her future compliance with the declaration and by-laws; and 4) all costs and expenses, including attorneys' fees, it incurred due to Sonia's conduct. Doc. 1.

Almost immediately after the commencement of the captioned action, the Board filed an order to show cause ("OSC") against Sonia (mot. seq. 001) seeking: 1) permission for access to the apartment to inspect for mold growth and abate any found; 2) to enjoin Sonia and any other resident of the apartment from pouring water or chemicals on the walls and floor of her apartment; 3) to require Sonia to post a \$100,000 bond to ensure her compliance with the declaration and by-laws; and 4) an award to the condominium of costs and expenses, including attorneys' fees, associated with the application. Doc. 2. On February 16, 2017, this Court signed the OSC, granting a temporary restraining order ("TRO") against Sonia pending the hearing on the application. Doc. 20.

By so-ordered stipulation dated July 12, 2017, the parties adjourned the hearing on the OSC until October 18, 2017, and agreed that the TRO would remain in effect until that date. Doc.

37. By order entered October 24, 2017, this Court granted the OSC to the extent that it: 1) enjoined Sonia and any other individuals living in the apartment from pouring water and/or chemical solutions on the walls, floors and surfaces of the apartment, causing the walls, floors and surfaces of the apartment, or any common elements or other units, to become saturated with water and/or chemicals. Doc. 41. This Court also preliminarily enjoined Sonia from interfering with the Board's right of access to the apartment, specifically directing that she allow the building to inspect all areas of the apartment every two weeks on 24 hours notice, unless an emergency existed, in which she was to provide immediate access. Doc. 41. By separate order filed March 22, 2018, this Court directed Sonia to post a bond of \$75,000. Doc. 72.

In June, 2018, the Board moved (mot. seq. 002) to hold Sonia in contempt due to her refusal to provide the condominium access to her apartment, her continued use of water and chemicals to clean her apartment, and her failure to post a \$75,000 bond. Docs. 78-79.

By so-ordered stipulation filed July 11, 2019, this Court directed, inter alia, that "[a]ll prior injunctions against [Sonia were] to continue." Doc. 111.

On January 16, 2020, the Board entered into a settlement agreement with Sonia, her husband Robert, and their son Joel,¹ pursuant to which they agreed, inter alia, that:

1. Sonia has engaged in conduct which has damaged the apartment and other units of the condominium, which constituted a violation of the declaration and by-laws;
2. This Court issued a preliminary injunction prohibiting Sonia from engaging in any conduct injurious to the condominium; directing Sonia to permit access to the apartment twice per month, and requiring Sonia to pay an undertaking of \$75,000;
3. That the Board commenced a separate action against Sonia in this Court under Index Number 157346/18 to recover unpaid monies for common charges, assessments, and other amounts due pursuant to the declaration and by-laws ("the common charge action"), which was also to be resolved pursuant to the settlement agreement, that the condominium agreed to accept a sum less than that owed in order to resolve the

¹ As part of the settlement agreement, the parties stipulated to add Robert and Joel as additional defendants. Doc. 121 at 3, Ex. 1 to Doc. 121.

- common charge action, and that the Board agreed to withdraw its motion for contempt against Sonia (mot. seq. 002) in exchange for her agreement to vacate the apartment by August 1, 2020;
4. The Rosenbergs agreed to vacate the apartment by August 1, 2020, and that, as of that date, they would be permanently barred from using, occupying or residing in the apartment or any other unit in the building;
 5. Sonia remained responsible for payment of common charges and all other amounts due under the by-laws and declaration until the apartment was sold;
 6. If the Rosenbergs failed to vacate the apartment on or before August 1, 2020, the condominium would have the immediate right to execute the order and judgment and warrant of ejectment by the Sheriff or Marshall of New York County to permanently eject and evict them from the apartment without further proceedings or application to the court;
 7. Any non-breaching party was entitled to recover from the breaching party all costs and expenses, including reasonable attorneys' fees, incurred as a result of the breach, including as a result of having to enforce this agreement (Doc. 121 at par. 7[d]);
 8. The parties were all represented by counsel and consulted with counsel prior to entering into the settlement agreement, were aware of their rights, duties and obligations under the agreement, had the legal capacity to enter into the agreement, and freely entered into the same; and
 9. The settlement agreement could not be changed, modified, or altered unless done so by written agreement of the parties.

Doc. 121.

On October 8, 2020, the condominium served the Rosenbergs with a default notice setting forth their violations of the by-laws and declaration, including their failure to pay all monies owed pursuant to the agreement, and demanding that they cure the same. Docs. 120, 122.

On October 24, 2020, an entity called Intertwin, Inc. made a payment of \$87,636 to the condominium on behalf of the Rosenbergs. The condominium refused to accept the check because it stated in the memo line "67,296 past cc, 20,350 prepaid", which was insufficient to cover the balance owed by the Rosenbergs as of that time. Doc. 120. Nevertheless, by letter agreement dated

November 2, 2020, the condominium agreed to accept the payment without prejudice and credited the Rosenbergs' ledger accordingly. Docs. 123-124.

After the payment from Intertwin, Inc., however, the Rosenbergs' failure to pay common charges persisted, and the condominium continued to receive complaints regarding strong odors of bleach and chemicals permeating their hallway. Doc. 120. According to the Board, the damage to the hallway carpeting and door jam and saddle of the Rosenberg's apartment was consistent with the inappropriate application of chemicals to those surfaces. Doc. 120. Further, the Board asserts that the chemicals used by the Rosenbergs may have been causing structural damage to the condominium. Doc. 120.

The Board now moves for the relief set forth at page one of this decision. Docs. 119-120. In support of the motion, the Board submits the affidavit of Taub Swartz, its president, who avers that the Rosenbergs breached the settlement agreement by failing to vacate the apartment, continuing to spray excessive amounts of water and chemicals, and failing to pay common charges and other monies owed to the condominium. Doc. 120. Although Swartz represents that the Rosenbergs were technically in breach of the settlement agreement when they failed to vacate by August 1, 2020, he concedes that the condominium allowed them to stay past that date, and to refrain from taking any action to enforce the settlement agreement, as a courtesy to them due to the Covid-19 pandemic. Doc. 120.

In opposition, counsel for the Rosenbergs argues that the Board breached the settlement agreement by failing to credit the Rosenbergs in the amount of \$76,235.56, as promised in the settlement agreement. Doc. 126. Next, they assert that, although Swartz represents that there are still complaints about the Rosenbergs' conduct, he has no personal knowledge of the same and, thus, there must be a hearing regarding whether they are still engaged in the conduct giving rise to

this action. Doc. 126. They also maintain that they cannot be evicted due to the moratorium on evictions imposed by the Centers for Disease Control (“CDC”). Doc. 126.

Sonia submits an affidavit in opposition to the motion, in which she insists that she is not spraying any bleach or other chemicals inside or outside of her apartment. Doc. 130. She further maintains that there are no strong odors outside of her apartment and that any complaints of such odors are from anonymous sources and, therefore, constitute inadmissible hearsay. Doc. 130. Additionally, Sonia maintains that Swartz did not refrain from evicting her due to the Covid-19 pandemic since the default notice was sent on October 8, 2020, six months into the pandemic. Doc. 130.

Robert submits an affidavit in opposition to the motion, in which he attests that the Board breached the settlement agreement by failing to credit the Rosenbergs \$76,235.56. Doc. 128.

In reply, counsel for the Board argues that the Rosenbergs clearly breached the settlement agreement by failing to vacate the apartment, as they had promised they would by August 1, 2020. Doc. 131. Counsel further asserts that the CDC eviction moratorium does not preclude the Board from enforcing the settlement agreement, since the said moratorium was enacted solely to avoid evictions based on financial hardship and not to protect those engaged in “nuisance-type behavior.” Doc. 131. Counsel further asserts that, contrary to the Rosenbergs’ contention, Swartz had personal knowledge regarding Sonia’s use of bleach due to complaints by resident of the building. Doc. 131. In any event, argues counsel, it is irrelevant whether Sonia still sprays water and bleach since she has already agreed to vacate the apartment pursuant to the settlement agreement. Doc. 131. Finally, counsel asserts that the Rosenbergs are not entitled to a credit of \$76,235.56 since their unpaid common charges are still accumulating and any amount owed to them will be credited to them when their account is reconciled. Doc. 131.

In an affidavit in reply, Swartz asserts that he has personal knowledge of the Rosenbergs' default of the settlement agreement. Doc. 132. He also says that, despite the Rosenbergs' claim that the condominium failed to credit them \$76,235.56, thereby breaching the settlement agreement, the Rosenbergs themselves breached the settlement agreement by failing to pay all outstanding arrears by September 1, 2020 and have failed to make common charge payments for "several years." Doc. 132.

In a reply affidavit in further support of the motion, Jan Ochlan, superintendent for the condominium, represents that he measured the moisture on the Rosenbergs' floor in June and August 2021 and determined that the moisture levels in the wall and carpet directly in front of the Rosenbergs' apartment were much higher than elsewhere on that floor. Doc. 133.

LEGAL CONCLUSIONS

"Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). Strict enforcement of stipulations of settlement serve the interest of efficient dispute resolution, and is essential to the management of court calendars and the integrity of the litigation process (*Hallock*, 64 NY2d at 230; *see Mitchell v New York Hosp.*, 61 NY2d 208 [1984]).

Pursuant to the settlement agreement, the Rosenbergs were permitted to stay in the apartment from January 2020, when the agreement was executed, and agreed to vacate the apartment by August 1, 2020, which they did not do because the Board accommodated them by allowing them to stay past August 1, 2020 due to the Covid-19 pandemic. However, since the Rosenbergs failed to pay monies owed to the condominium, they were served with a default notice in October 2020. The Rosenbergs cannot now be heard to assert that they are not subject to a

warrant of eviction, since that result is “merely the contracted-for ... consequence of ... [their] own failure to do that which they promised to do”, i.e., vacate the premises by August 1, 2020 (*1029 Sixth v Riniv Corp.*, 9 AD3d 142, 150 [1st Dept 2004], *appeals dismissed* 4 NY3d 795 [2005]). The Rosenbergs do not argue that the Board somehow waived its right to evict them pursuant to the settlement agreement simply because it permitted them to stay in the apartment until October 2020 due to the pandemic.

While this Court does, under certain circumstances, have the discretion not to enforce a stipulation (*see Siltan v City of New York*, 300 AD2d 298 [2d Dept 2002] [discretion to refuse to enforce a stipulation may be properly exercised where there is evidence of fraud, overreaching, unconscionability, or illegality]), such discretion would not be providently exercised in this case, where the settlement agreement clearly reflects that it was the product of negotiations between the attorneys for the parties (Doc. 121 at pars. 10, 19); that the parties consulted with their attorneys before executing the agreement, during which time they were apprised of their rights, duties, and obligations under the agreement before executing it; that the parties had the capacity to enter into the agreement; and that they freely entered into the same (*Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 155-156 [1st Dept 2006])

Given the circumstances under which the settlement agreement was executed, as well as the provisions beneficial to the Rosenbergs included therein, equity would not be served if the agreement were not enforced (*See Hotel Cameron*, 35 AD3d at 156). Additionally, this Court’s refusal to enforce the settlement agreement would discourage parties from resolving residential landlord-tenant disputes by means of a stipulation of settlement (*See Hotel Cameron*, 35 AD3d at 156).

The Rosenbergs' arguments in opposition do not warrant a different result. Although their attorney argues that the Board breached the settlement agreement by failing to credit them in the amount of \$76,235.56, as they claim was promised in the settlement agreement, there is no provision stating that they would be credited in that amount, and they do not cite to a provision which would address this claim. To the extent that the Rosenbergs rely on paragraph 7(b)(iii), which entitles them to a credit for any amounts they have paid, the ledger submitted by Swartz, as well as a letter from the Board's attorney to the Rosenbergs' attorney, dated November 2, 2020, reflect that the Rosenbergs were credited in the amount of \$87,636.00 on November 6, 2020, days after the Board received the check from Intertwin. Docs. 123-124.

The Rosenbergs' argument that Swartz had no personal knowledge regarding Sonia's conduct is of no moment herein. Pursuant to the settlement agreement, the Rosenbergs agreed to vacate the apartment by August 1, 2020, and this obligation was not contingent upon any other event.

Further, the Rosenbergs' claim that they cannot be evicted due to the moratorium on evictions imposed by the CDC is misplaced since hardship declarations submitted to the CDC only pertain to *financial* hardship, which the Rosenbergs do not assert herein. On September 2, 2021, the Legislature enacted L 2021 ch 417, which restored a moratorium on most residential eviction proceedings and allowed tenants in residential eviction matters to file a hardship declaration representing that they experienced financial hardship during, or due to, the COVID-19 pandemic. As the Court explained in its well-reasoned decision in *Casey v Whitehouse Estates, Inc.*, 2021 NY Slip Op 21245, 2021 NY Misc LEXIS 4898 (Sup Ct New York County 2021 [Lebovits, J.]), "Chapter 417, part C, subpart A, § 4 provides that if the tenant provides a hardship declaration to the court in any pending 'eviction proceeding in which an eviction warrant or

judgment of possession or ejectment has not been issued,’ the ‘eviction proceeding shall be stayed until at least January 15, 2022.’” However, noted Justice Lebovits:

The balance struck by the Legislature in chapter 417 turns on whether a residential tenant is or is not suffering hardship due to COVID-19 (*see* L 2021, ch 417, pt C, subpart A, §§ 4, 10); and, if she is suffering hardship, whether her eviction proceeding nonetheless should be permitted to continue because the tenant is alleged to have significantly damaged the property or to be engaging in persistent objectionable or nuisance-type behavior (*see id.* § 7).

(*Casey v Whitehouse Estates Inc*, 2021 NY Slip Op 21245 at *3 [2021]).

Here, the Board is clearly seeking the eviction of the Rosenbergs due to Sonia’s nuisance-type behavior, and they have submitted no indication that they have a financial hardship. Thus, this is not a valid ground on which to deny the Board’s motion.

In opposing the motion, the Rosenbergs rely on *Lewis v Thomas*, 192 AD3d 508, 509-510 (1st Dept 2021). However, in that case, which is clearly inapposite, the Appellate Division held that a hearing was needed to determine the intent of the parties in connection with a deed, since it contained contradictory provisions and ambiguous language. Here, however, there is no argument that the settlement agreement was ambiguous or contradictory in any way.

The branch of the motion seeking attorneys’ fees, costs and expenses is granted in accordance with the settlement agreement. Doc. 121 at par. 7(d).

Although the Board requests that this Court so-order the order and judgment attached as Exhibit 4 to the settlement agreement (Ex. 4 to Doc. 41), this Court will instead incorporate the language of the proposed order and judgment into the decretal paragraphs below.

Finally, the branch of the motion seeking injunctive relief is denied as moot, since, as noted above, this Court already granted a preliminary injunction against Sonia “and all others residing in her apartment” which remains in effect. Doc. 41.

Accordingly, it is hereby:

ORDERED that the branch of the motion by plaintiff The Board of Managers of the Evans Tower Condominium seeking injunctive relief is denied as moot, and the motion is otherwise granted; and it is further

ORDERED and ADJUDGED that defendants Sonia Benatar Rosenberg, Robert Rosenberg and Joel Rosenberg are permanently enjoined from using, occupying or possessing apartment 11B at 171 East 84th Street, New York, New York at any time after August 1, 2020, nunc pro tunc; and it is further

ORDERED and ADJUDGED that The Board of Managers of the Evans Tower Condominium is entitled to possession of 171 East 84th Street, Unit 11B, New York, New York as against defendants Sonia Benatar Rosenberg, Robert Rosenberg and Joel Rosenberg and any and all occupants of the aforementioned premises, on and after August 1, 2020, nunc pro tunc; and it is further

ORDERED and ADJUDGED that upon entry of this order and judgment, plaintiff The Board of Managers of the Evans Tower Condominium may exercise all acts of possession, including entry thereto, of the Premises at 171 East 84th Street, Unit 11B, New York, New York, as against the defendants, Sonia Benatar Rosenberg, Robert Rosenberg and Joel Rosenberg and any other occupants in the premises on and after August 1, 2020, nunc pro tunc; and it is further

ORDERED and ADJUDGED that a warrant of ejectment be issued in favor of plaintiff The Board of Managers of the Evans Tower Condominium forthwith against Sonia Benatar Rosenberg, Robert Rosenberg and Joel Rosenberg, as defendants with regard to apartment 11B in the building known as and located at 171 East 84th Street, New York, New York; and it is further

ORDERED and ADJUDGED that plaintiff The Board of Managers of the Evans Tower Condominium may execute on this order and judgment, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this order and judgment and payment of proper fees, is directed to place the plaintiff in possession of the premises, and to eject therefrom every person holding the same or any part thereof, adversely to the said plaintiff; and it is further

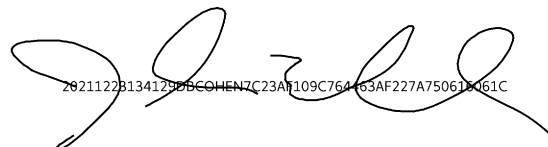
ORDERED that counsel for plaintiff shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that that this matter is referred to a Special Referee for the purpose of conducting a hearing to determine the amount of reasonable attorneys' fees, costs, and expenses to be awarded to plaintiff as a result of defendants' breach of the settlement agreement; and it is further

ORDERED that, within 20 days of the entry of this order on the NYSCEF system, plaintiff shall file a note of issue, pay the appropriate fees, and serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at sprefnyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that, within twenty days hereof, plaintiff shall serve a copy of this order on defendants and on the Clerk of the Trial Support Office at 60 Centre Street, Room 158 pursuant to the e-filing protocols of this Court.



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12/23/2021

DATE

DAVID B. COHEN, 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