

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32733
H/mv

_____AD3d_____

Argued - October 13, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
JEFFREY A. COHEN, JJ.

2010-09968

DECISION & ORDER

Jerome Cooper, et al., appellants, v Board of
White Sands Condominium, et al., respondents.

(Index No. 12458/10)

Mark L. Lubelsky, New York, N.Y., for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, N.Y. (Peter A. Meisels and Kathleen A. Daly of counsel), for respondents.

In an action, inter alia, to recover damages for breach of fiduciary duty, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Galasso, J.), dated August 24, 2010, as denied their motion for a preliminary injunction.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiffs are owners of a condominium unit located in the White Sands Condominium, while the individual defendants are members of the condominium board. The plaintiffs moved for a preliminary injunction compelling the board to repair the exterior walls, a common element of the condominium, alleged to be the source of flooding in the plaintiffs' unit, compelling the removal of certain liens, and enjoining the board from assessing and collecting common charges from the plaintiffs so long as their unit was wholly or partially unusable.

The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*see Tatum v Newell Funding, LLC*, 63 AD3d 911). Where the movant does not demonstrate a likelihood of success on the merits, irreparable damage, and a balance of the

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equities in his or her favor, the motion should not be granted (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840; *Blinds & Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691; *Alexandru v Pappas*, 68 AD3d 690; *Apa Sec., Inc. v Apa*, 37 AD3d 502; *Rattner & Assoc. v Sears, Roebuck & Co.*, 294 AD2d 346). “While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff’s likelihood of success on the merits . . . to such a degree that it cannot be said that the plaintiff established a clear right to relief” (*Advanced Digital Sec. Solutions v Samsung Techwin Co.*, 53 AD3d 612, 613).

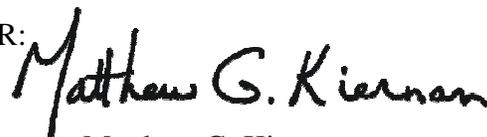
Here, the plaintiffs failed to demonstrate their entitlement to the drastic remedy of a preliminary injunction. Since the source of the alleged flooding is in such sharp dispute, thereby subverting the plaintiffs’ likelihood of success on the merits, “it cannot be said that the plaintiff[s] established a clear right” to preliminary injunctive relief (*Milbrandt & Co. v Griffin*, 1 AD3d 327, 328). In addition, the plaintiffs failed to demonstrate that they would suffer irreparable damage if the injunction was not granted (*see Blinds & Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691).

The plaintiffs’ remaining contentions are without merit or have been rendered academic.

Accordingly, the Supreme Court properly denied the plaintiffs’ motion for a preliminary injunction.

ANGIOLILLO, J.P., FLORIO, LEVENTHAL and COHEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court