

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

D36814
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_____AD3d_____

Submitted - November 5, 2012

PETER B. SKELOS, J.P.
RUTH C. BALKIN
THOMAS A. DICKERSON
SYLVIA HINDS-RADIX, JJ.

2011-05305
2011-10084
2011-11355

DECISION & ORDER

Board of Managers of the Britton Condominium,
respondent, v C.H.P.Y. Realty Associates, appellant.

(Index No. 17732/10)

Samuel Chuang, Flushing, N.Y., for appellant.

Smith, Buss & Jacobs, LLP, Yonkers, N.Y. (Jennifer L. Stewart and Jeffrey D. Buss
of counsel), for respondent.

In an action, inter alia, for a judgment declaring that the plaintiff has the right to access certain water pipes for the purpose of altering and repairing the same, the defendant appeals (1) from an order of the Supreme Court, Queens County (Weiss, J.), entered February 2, 2011, which granted the plaintiff's motion for a preliminary injunction directing it to grant the plaintiff access to certain water pipes for the purpose of altering and repairing the same, (2), as limited by its brief, from so much of a resettled order of the same court entered September 8, 2011, as granted the plaintiff's motion for a preliminary injunction directing it to grant the plaintiff access to certain water pipes for the purpose of altering and repairing the same, and (3) from stated portions of an order of the same court entered June 27, 2011, which, among other things, denied that branch of its motion, denominated as one for leave to renew pursuant to CPLR 2221(e), but, which was, in actuality, one for leave to reargue its opposition to the plaintiff's prior motion for a preliminary injunction, and denied, in effect, that branch of the same motion which was to vacate the preliminary injunction pursuant to CPLR 6314.

ORDERED that the appeal from the order entered February 2, 2011, is dismissed, as

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that order was superseded by the resettled order entered September 8, 2011; and it is further,

ORDERED that the resettled order entered September 8, 2011, is reversed insofar as appealed from, on the law, the order entered February 2, 2011, is vacated, and the plaintiff's motion for a preliminary injunction is denied; and it is further,

ORDERED that the appeal from so much of the order entered June 27, 2011, as denied that branch of the defendant's motion, denominated as one for leave to renew pursuant to CPLR 2221(e), but which was, in actuality, one for leave to reargue its opposition to the plaintiff's prior motion for a preliminary injunction is dismissed, as no appeal lies from an order denying leave to reargue; and it is further,

ORDERED that the order entered June 27, 2011, is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the defendant.

The plaintiff, Board of Managers of the Britton Condominium, commenced this action against the defendant, C.H.P.Y. Realty Associates, an owner of commercial units in the condominium building, for a judgment declaring that the plaintiff has the right to enter one of those units for the purpose of accessing certain water pipes in order to alter and repair the same. In an order entered February 2, 2011, the Supreme Court granted the plaintiff's motion for a preliminary injunction and directed the defendant to grant the plaintiff access to the subject unit for the purpose of altering and/or repairing certain water pipes. The order was resettled in an order entered September 8, 2011. Additionally, in an order entered June 27, 2011, the Supreme Court, inter alia, denied, in effect, that branch of the defendant's motion which was to vacate the preliminary injunction pursuant to CPLR 6314.

“To obtain a preliminary injunction, a movant must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor” (*Arthur J. Gallagher & Co. v Marchese*, 96 AD3d 791, 791-792; *see L & M 353 Franklyn Ave., LLC v S. Land Dev., LLC*, 98 AD3d 721; *91-54 Gold Rd., LLC v Cross-Deegan Realty Corp.*, 93 AD3d 649). “The purpose of a preliminary injunction is to maintain the status quo pending determination of the action” (*Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643; *see Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072; *Kelley v Garuda*, 36 AD3d 593, 596).

Here, although the plaintiff may ultimately be successful in this action, the resettled order of the Supreme Court entered September 8, 2011, effectively altered the status quo and granted the plaintiff the exact relief which it sought in the complaint (*see 306 Rutledge, LLC v City of New York*, 90 AD3d 1026; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728). Furthermore, the plaintiff failed to demonstrate that it would suffer irreparable harm in the absence of a preliminary injunction (*see Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 716; *Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763). Accordingly, the plaintiff's motion for a preliminary injunction should

have been denied.

The defendant's remaining contentions either are without merit, need not be reached in light of our determination, or are improperly raised for the first time on appeal.

SKELOS, J.P., BALKIN, DICKERSON and HINDS-RADIX, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court