

WA Special 9 LLC v Kilar

2008 NY Slip Op 30473(U)

February 7, 2008

Supreme Court, New York County

Docket Number: 0117356/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JUDITH J. GISCHE, J.S.C.

PRESENT: _____

PART 10

Justice

WA Special 9 LLC

INDEX NO. 117356/06

Robert Kilar

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

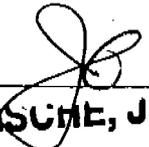
Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
FEB 20 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/17/08


JUDITH J. GISCHA, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x
WA SPECIAL 9 LLC,

Plaintiff,

-against-

ROBERT KILAR, DOUGLAS BEER, ALICE
DE CALLARAY AND JESSE BIGELOW,
individually and as members of the BOARD
OF MANAGERS OF 49 EAST 21ST STREET
AND 49 EAST 21ST STREET CONDOMINIUM,

Defendants.
-----x

Decision/Order

Index No.: 117356/06

Seq. No. : 003

Present:

Hon. Judith J. Gische

J.S.C.

FILED
FEB 20 2008
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Pltf's motion [contempt] w/KAM affid in support, exhs	1
Def's opp w/DBS affirm, exhs	2
Pltf's RJO reply affirm in further support, exhs	3

-----x

Upon the foregoing papers, the decision and order of the court is as follows:

At issue herein is plaintiff's Condominium Unit (the "apartment") and the repair of same as a result of a pipe burst in April 2006. By decision and order dated September 21, 2007, this court previously decided plaintiff's motion for summary judgment which was granted in part and denied in part (the "prior decision"). The court held, *inter alia*, that the Board is obligated to restore and repair the apartment as a result of the pipe burst, and that the Board is to permit plaintiff to do the rehabilitation and/or restoration work, "pursuant to a proper proposal made under Section 5.2(A) of the Bylaws."

Plaintiff now moves for a finding that defendants are in contempt of court for violating the injunctive provisions contained in the prior decision.

Plaintiff claims that defendants have willfully and maliciously refused to permit restoration of plaintiff's condominium unit. Plaintiff specifically claims that defendants have placed obstacles and other impediments inconsistent with the prior decision, "including the giving up of plaintiff's rights and claims against defendants, continuing to use plaintiff's [apartment] as a public toilet and dressing room and continuing to store their warehouse materials, fixtures, garbage and other materials extraneous to plaintiff's apartment and embarking on a plan or scheme to inhibit plaintiff's use or even ability to offer or show such apartment for sale."

Plaintiff further states that after the prior decision was rendered, it sent attorney for defendants "a marked up Alteration Agreement" (the "proposed modified alteration agreement"). It is undisputed that the standard alteration agreement was substantially modified by plaintiff, marking numerous paragraphs "waived", "N/A Subject to court order dated Sept. 21, 2007" or "Subject to court order dated Sept. 21, 2007."

In opposition, defendants claim that the proposed modified alteration agreement does not comply with the Bylaws and therefore, defendants are not required to allow plaintiff to proceed with the proposed rehabilitation and/or restoration work. Defendants claim that submission of an alteration agreement is a normal requirement where a unit owner is doing substantial work in the apartment, and that to hold otherwise would to force the condominium to abdicate its role to enforce the Bylaws and protect the unit owners.

Defendants also maintain that the usage of the apartment by the contractors for

storage and other purposes, has been without its knowledge or consent until plaintiff notified defendants thereof, and that "management was instructed to quash such conduct."

Contempt is a drastic remedy which should not be granted absent a clear right to such relief. Pinto v. Pinto, 120 A.D.2d 337 (1st Dept. 1986); see also Usina Costa Pinto SA v. Sanco Sav Company Limited, 174 A.D.2d 487 (1st Dept. 1991). To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party had knowledge of a clear and unequivocal court order, which he/she violated, thereby prejudicing the rights of another party to the litigation. See, Judiciary Law § 753(A)(3); Dalessio v. Kressler, 6 A.D.3d 57 (2d Dept. 2004).

Plaintiff has failed to establish that the defendants violated the prior decision. The proposed modified alteration agreement does not constitute a proper proposal made under Section 5.2(A) of the Bylaws. Plaintiff has modified what is otherwise appears to be a standard alteration agreement, by marking many provisions in a way that is not in keeping with the court's finding that defendant allow plaintiff to complete the rehabilitation and restoration work, subject to the Bylaws.

The court cannot find on this motion that plaintiff's failure to reach a suitable alteration agreement was the result of a refusal or willful neglect. Indeed, defendants' failure to agree to the alteration agreement is not unreasonable because plaintiff seeks to make many provisions subject to the prior order where the prior order is utterly inapplicable, for example: plaintiff's duty to control refuse, dirt, dust, lead based paint, plaintiff's acceptance of responsibility for damage by the work, design work being unapproved by the condominium, the breach by plaintiff and remedies of the

[* 5]
condominium, and the condominium's right to revoke permission.

As to the improper use of the apartment by the contractors, plaintiff has failed to show that such use was with defendants consent and/or knowledge. Defendants claim that they have properly instructed management to eliminate these conditions and plaintiff has not otherwise stated that defendants reaction has been ineffective and/or rises to the level justify an adjudication of contempt.

Accordingly, plaintiff's motion to have defendants found in contempt is denied.

Dated: New York, New York
February 7, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
FEB 20 2008
NEW YORK
COUNTY CLERK'S OFFICE