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

PRESENT: FAVIOLA SOTO J.S.C. PART 7

Justice

McMullan

-v-

HRH Construction

INDEX NO. 106432/06

MOTION DATE 5/25/06

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 09 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: June 6, 2006

FAVIOLA SOTO J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Copies mailed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

ALASDAIR McMULLAN and KATRINA CARDEN, Index No. 106432/06

Plaintiffs,

-against-

DECISION & ORDER

HRH CONSTRUCTION, LLC, et al.,

Defendants.

HONORABLE FAVIOLA A. SOTO, J.:

Plaintiffs move, by order to show cause dated May 11, 2006, for a preliminary injunction. Defendants HRH Construction, LLC (HRH), 155 West 21st Street Holdings, LLC (155 Owner), Abraham Daniels Real Estate Investors, Inc., Abraham Daniels, and Adam Daniels (collectively, the Daniels defendants), Lalezarian Developers, Inc., and Kevin Lalezarian (collectively, the Lalezarian defendants), Alex Papadopoulos and Anthony Rafaniello, (all said defendants collectively referenced as the 155 defendants or the defendants) oppose. On the return date of May 25, 2006, the temporary restraining order was continued pending determination of the motion.

Plaintiff Alasdair McMullan is the lessee of the Garden Floor with Basement apartment located at 153 West 21st Street, pursuant to an initial lease dated July 18, 2002; the lease has been renewed. He occupies the apartment, with plaintiff Katrina Carden. The apartment is colloquially known as a "railroad apartment" or a "floor through", with the kitchen and bedroom areas located adjacent to the outdoor garden area. Prior to the fences being removed by certain of the 155 defendants without plaintiffs' or the 153 property owner's permission, in April 2005,

the only access to the garden was through plaintiffs' apartment.

Each of the HRH defendants has either a property interest or a development/construction function at the adjacent property, known as 155 West 21st Street, a project under development. For purposes of this motion, distinctions are not always made between the various 155 defendants.

The Complaint

The underlying summons with verified complaint, dated May 9, 2006 and filed with the order to show cause, asserts eleven causes of action, including negligence, trespass, harassment, intentional infliction of emotional distress, nuisance, prima facie tort, breach of contract, tortious interference with contract, and permanent injunction.

In relevant part to this motion, plaintiffs allege in the complaint that from April 1, 2005 through the present date, while they were tenants lawfully residing in their apartment, the 155 defendants have been engaged in construction work, and, from June 24, 2005 on, in the course of their performing such construction work, caused flooding and other damage to plaintiffs' apartment and personal property. Further, they allege that the construction equipment broke through their walls and resulted in personal injuries to plaintiff Carden.

Plaintiffs allege that from April 13, 2005 through May 31, 2005, the 155 defendants trespassed on their property and unlawfully destroyed personal property, including but not limited to tearing down fences, cutting down a tree, and otherwise destroying the garden and preventing plaintiffs' meaningful use of their background.

They further allege that from March 1, 2005 through the present date, the 155 defendants intentionally entered, remained, and/or left their construction equipment, materials and/or debris,

on plaintiffs' private property, without lawful permission or authority, and repeatedly and continually engaged in conduct including trespass on the property, tearing down fences, killing plants in their garden, leaving dangerous debris including nails and broken boards, and repeatedly interfering with plaintiffs' use and/or quiet enjoyment. They allege that the defendants refuse to leave the property when directed to leave, bolted closed and otherwise blocked off plaintiffs' required means of emergency egress from their home, and harass and intimidate plaintiffs while on plaintiffs' property, forcing plaintiffs to call the police.

They additionally allege that on or about May 31, 2005, a written contract was entered into between plaintiff Alasdair McMullen and defendant Kevin Lalezarian, as a member on behalf of defendant 155 owner and as agent for certain of the 155 defendants. The contract provided, inter alia, that defendant 155 owner and A.D. Real Estate Investors, Inc.: 1) will pay tenant's full rent per month retroactive to April 2005 and continue to do so until "completion of whatever work they need to do on the walkway and garden and return of that area to substantially the condition it was in before they [the 155 defendants] knocked down that fence in April"; 2) the "work on the walkway and in the backyard will be undertaken with utmost care" and ADR will undertake good faith to make the remaining area of the backyard safe during the course of the construction activities; 3) they will not perform excavation work immediately outside tenants' bedroom windows before 8:00 a.m.; 4) will not interfere with tenant's possession of the bedrooms, will not board up windows and will not interfere with the air conditioners.

Plaintiffs allege that defendants failed to abide by and breached the contract.

Plaintiffs additionally bring a cause of action for a permanent injunction.

The Motion

Plaintiffs argue in their motion papers that they require injunctive relief on an emergent basis. They repeat certain of the allegations in the complaint, and set forth specific and repeated conduct by the 155 defendants for which they require the court's intervention. These include, as recently as April 2006 and the first week of May 2006, repeated unauthorized activities by the 155 defendants' construction personnel on plaintiffs' property, including entering the property, cursing at plaintiffs, and intimidating plaintiffs and refusing to leave; specific incidents of said behavior are detailed. They also specify the numerous unauthorized actions and intrusions and the damage done to their apartment and the garden prior to April of 2006, and the vibrations and other effects they experience in their apartment from the construction.

They state that on April 27, 2006, in response to a complaint by plaintiff McMullan, the New York City Department of Buildings issued a violation to the construction site property owner for blocking and total obstruction of a means of egress from plaintiffs' apartment. They argue that defendants have no proper basis for being on their property or engaging in said conduct, as defendants do not have their permission and the construction workers are not on the property for work on 153 West 21st, but for work on the adjoining construction project.

In addition to the lease, plaintiffs rely on, inter alia, an e-mail dated April 13, 2005, from the property manager for the owner of the 153 building, which, responding to plaintiffs' complaint concerning the contractors from the building next door taking down the fences in "your [plaintiffs'] background", advises them that taking down the fences was not authorized and that the 153 owner will be contacting the contractors responsible to restore the backyard fences as soon as possible.

Plaintiffs further assert that when they entered into the contract, they believed the construction work would be substantially completed in August 2005 and then were led to believe would be substantially completed on or before January 2006. Plaintiffs revoked the contract upon defendants' repeated failure to conduct their construction activities in compliance with the contract, and when they learned, upon receipt of a three day notice dated February 9, 2006 demanding unpaid rent from August 1, 2005 on, that defendants failed to pay plaintiffs' rent despite the contract terms.

They seek a preliminary injunction enjoining defendants from entering the premises located at 153 West 21st Street, including but not limited to the basement, ground floor and outdoor areas and from leaving, bringing or leaving their equipment, materials or debris on the subject premises.

The 155 defendants assert, by attorney affirmation, six page affidavit from the Project Manager, an employee of HRH, and a four page affidavit from defendant Kevin Lalezarian, a principal of 155, that plaintiffs are not entitled to the relief they seek. They argue, inter alia, that: defendants' construction project has a 45 million dollar budget which requires access to the 153 Property to complete the masonry work on the rear of their 155 building; they are currently negotiating an access agreement with the owners of 153 Property, so that the work can go forward in the normal course; plaintiffs do not have exclusive possessory rights to the area at issue, and are without standing or a right to demand a preliminary injunction; the motion is a transparent effort to achieve nothing more than a bolstering of plaintiffs' alleged tort claims.

The 155 defendants argue that in 2005 they required, and now again require to complete the facade of the rear of the building, that their workers perform certain tasks from the

garden/courtyard area of the 153 property, and that access both in the past and as anticipated in the coming months has been and will be permissive. They argue that it is clear from the lease that plaintiffs have no recognized property right to the garden/courtyard area, and that from May 2005 until September 24, 2005, they had a license, now expired, with the then-owner of the 153 property for access to the designated area including the garden and courtyard area to perform work on the Project.

Additionally, defendants argue that: as provided for in the contract with plaintiff McMullan, the agreement was contingent on the fact that the Garden and walkway were part of the tenant's leased area; McMullan never had a possessory right to the garden and courtyard and they therefore had no obligation to pay his rent; when the license with the property owner expired they considered the McMullan contract also to have terminated and ceased making payments.

They argue that plaintiffs' two reported incidents, of flooding to the basement and a backhoe causing damage to a wall of the building, were referred to the insurance company, and that plaintiffs bring this meritless motion because plaintiffs' negotiations with the insurance companies have not resulted in a resolution of the property and minimum personal injury claims.

The 155 defendants further argue that: 1) many of the causes of action in the complaint are based on the same factual allegations, and that the allegations are recycling of other claims; 2) with the exception of the eleventh cause of action, all the claims represent traditional tort action for which plaintiffs plead damages, thereby constituting judicial admissions that monetary damages are sufficient to compensate plaintiffs for the alleged wrongs; and 3) the complaint consists of nothing more than run-of-the-mill property and thin personal injury claims.

Additionally, the 155 defendants argue that the requested injunctive relief is not

supported by the affidavits and complaint, as plaintiffs purport but fail to delineate volatile events or any danger and the assertions are self serving. They further argue that the motion must be denied as each cause of action lacks substantive merit and plaintiffs fail to show that the drastic relief is appropriate to these circumstances, and that if the fascia on the rear of the building is not completed, it is possible that the City could deny the Project a Temporary Certificate of Occupancy, holding the entire Project in abeyance.

They additionally argue that should the court grant any type of relief, it must require plaintiffs to post a bond, and, considering the vast potential for substantial damages to the Project and as the project is financed, the amount of the bond should be in an amount of at least five million dollars, or $2 Million per month for the likely duration of the litigation.

Plaintiffs reply that: the description of the demised premises as set forth in the lease has "Garden" handwritten in; defendants misconstrue the provisions of the lease; defendants fail to provide any affidavit from someone with personal knowledge as to the lease to support their interpretation; defendants fail to specifically rebut the many allegations of trespass and wrongful conduct, especially following September 2005. They argue that although the 155 defendants fail to appreciate why plaintiffs do not want strangers walking through one's property, staring into their window, leaving dangerous debris, blocking emergency means of egress, causing flooding, having backhoes coming through the walls, refusing to leave the property, engaging in menacing behavior and giving an obscene and nasty gesture, such conduct is causing irreparable injury to plaintiffs.

Additionally, plaintiffs argue that while the 155 defendants characterize their motive as greed and strategy to enhance the lawsuit, they bring this action and seek this relief because the

landlord started serving notices threatening to evict them and because the construction workers repeatedly continue to trespass and have begun engaging in menacing acts, and it is now clear that their continuing good faith efforts at resolution without court intervention have been to no avail.

Discussion

The showing needed for a preliminary injunction is well established. A movant on a preliminary injunction motion has the burden of establishing: 1) a likelihood of success on the merits; 2) irreparable injury in the absence of the injunction, and 3) a balancing of the equities in movant's favor. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862. The granting of a preliminary injunction is a drastic remedy that should be used sparingly, and movant must establish a clear right to relief based on the law and the undisputed facts presented. Koultukis v. Phillips, 285 A.D.2d 433. Provided movant has demonstrated the elements for the granting of an injunction, however, the existence of an issue of fact is not, in itself, grounds for denial of the motion, and a likelihood of success on the merits may be shown even where the facts are in dispute and the evidence is inconclusive. Four Times Square Associates, L.L.C. v. Cigna Investments, Inc., 306 A.D.2d 4; Ma v. Lien, 198 A.D.2d 186; CPLR Rule 6312(c).

A preliminary injunction is a provisional remedy, designed to maintain the status quo. Uniformed Firefighter's Association of Greater New York v. City of New York, 79 N.Y.2d 236. Where the denial of the relief would render a final judgment ineffectual, the degree of proof needed to establish a likelihood of success on the merits is reduced. Republic of Lebanon v. Sotheby's, 167 A.D.2d 142. The granting or denying of a preliminary injunction is subject to the sound discretion of the trial court. Borenstein v. Rochel Properties, 176 A.D.2d 171.

While at first blush it might appear that here the facts are sharply disputed, the following critical facts and the authenticity of certain critical documents are not disputed.

Plaintiff(s) reside in their apartment pursuant to lease; the lease annexed as an exhibit is a valid lease and is currently in effect; the lease identifies the demised property as the "Garden [Ground is crossed out and Garden handwritten in] FLOOR With Basement APARTMENT"; Paragraph 3 of the rider to the lease provides that throughout the lease term, tenant "shall be in exclusive control and possession of the demised premises"; Paragraph 11 of the rider provides that tenant shall permit landlord reasonable access for the proper operation and maintenance of the building in which the premises are located, with such work to be done in such manner to avoid unreasonable interference with tenant's use of the premises, but there is no provision is the lease providing for access to the demised premises for construction workers or employees or agents of the 155 defendants to perform work on the 155 project.

It is further not disputed that, prior to 155 defendants removing the fences, without permission, the only access to the garden was through plaintiffs' railroad apartment; the 155 defendants' construction workers involved with the project, and agents or employees of the 155 defendants, have been entering the 153 property for work not on the 153 West 21st Street building; a violation was issued for the blocking by the 155 defendants of an egress to plaintiffs' apartment.

Additionally, it is not disputed that: the 155 defendants do not now have an agreement with the plaintiffs to be on the property; the 155 defendants do not now have an agreement with the owner of 153 West 21st Street to be on the 153 West 21st Street property; by agreement entitled "TEMPORARY LICENSE AGREEMENT" with the then owner of the 153 property

dated May 24, 2005, temporary access was granted to designated area(s); the agreement expired by its terms; it provided that the licensee is to repair the damage done and restore the license area to its condition prior to the commencement of the period; the parties to the temporary license agreement acknowledged that a breach of the agreement "may cause the non-breaching party irreparable injury and shall entitle such non-breaching party to injunctive relief"; the temporary license agreement provides that in exercising the rights, the licensee and their contractors "shall use their commercially reasonable efforts to not adversely interfere with, or disturb the use, occupancy and quiet enjoyment of the occupants of Licensor's Property (the 'Tenants')".

Also not disputed is that the contract annexed as an exhibit is the contract entered into between the parties; the defendants did not pay plaintiffs' rent as provided in the contract (although the reason for the non-payment is disputed); the contract is no longer in effect; the construction work on the project continues and the 155 defendant construction workers have been entering and remaining on the 153 property and accessing the 155 property through the 153 property; the construction workers have left debris from that project on the 153 property; the police was called (although defendants dispute the need for the police); and defendants' construction workers have been engaging in at least some, if not most or all, of the conduct detailed by plaintiffs, although defendants maintain that the conduct is not, in their opinion, needing court intervention or causing irreparable injury.

The court has carefully examined the papers and the circumstances herein and finds that plaintiffs have shown on these undisputed facts and otherwise a likelihood of success on the merits, irreparable injury absent the injunction, and that a balance of the equities lies in plaintiffs' favor.

The 155 defendants' arguments to the contrary are not persuasive. Moreover, their papers are often conclusory in nature and lack sufficient support.

The 155 defendants argue, in essence, that they were and are entitled --and plaintiffs have no basis to object-- to trespass on the 153 property despite the admitted absence of a current agreement with plaintiffs or the 153 property owner, to tear down fences and trees and uproot plants, to block ingress or egress to plaintiffs' home, to leave debris in the garden and courtyard of one's neighbors, to otherwise engage in the conduct of which plaintiffs complain, and to remain on the 153 property for which they have no right to enter and not to leave until the police are called to intervene.

Simply put, defendants are wrong–they have no rights now to be on the property located at 153 West 21st Street, and defendants have no basis for engaging in the conduct of which the plaintiffs complain.

Defendants also argue, without a sufficient evidentiary basis, that plaintiffs do not have exclusive possessory rights--despite the plain language of the lease and the physical layout of the premises, particularly prior to the 155 defendants' tearing down the fences, when the only access to the garden was through plaintiffs' apartment.

Moreover, even assuming that the court accepts the 155 defendants' arguments that the garden is not part of plaintiffs' demised premises–and the court finds that plaintiffs have sufficiently shown for purposes of this motion that it is–defendants have not shown, or even argued, that they currently have a license or agreement from the owner to be on the garden or in the courtyard or otherwise on the 153 property. While defendants appear to be arguing that despite the lack of permission from the owner or the plaintiffs that are entitled to be on the 153

property nonetheless, they have failed to make any valid showing in support.

For example, even assuming that under certain emergency circumstances an adjoining property owner might have a right to enter a neighbor's property, the 155 defendants have not shown, or even argued, that the work they seek to undertake on the project at 155 West 21st Street is of an emergency nature. Similarly, while they argue in conclusory language that the only way they can complete the work they need for the rear facade of the 155 project is by trespassing on the 153 property and interfering with plaintiffs' rights to the property and their quiet enjoyment, they have not shown by affidavit or building plan why this is so. Nor have they argued, much less shown, why they have a right to block plaintiffs' second egress, or to leave construction material and debris on the 153 West 21st property, or to refuse to leave the garden or other areas, or to engage in the behavior set forth by plaintiffs.

Plaintiffs have met their burden and demonstrated a likelihood of success on the merits.

Contrary to the arguments of the 155 defendants, the court finds that plaintiffs similarly have met their burden in demonstrating irreparable injury. The injuries they demonstrate in their papers and before the court are those that cannot be remedied by monetary damages alone, and have been found to constitute irreparable injury. That they also assert in their complaint a cause of action for personal injury, for example, or also seek therein monetary damages, or that the defendants find plaintiffs' complaint repetitive and the claims stemming from the same operative facts, does not defeat plaintiffs' showing of irreparable injury.

The 155 defendants similarly fail to defeat plaintiffs' showing that a balance of the equities lie in plaintiffs' showing. On this element as well defendants have asserted most of their opposition in conclusory language. Defendants point to various factors as ones the court should

consider in balancing the equities and hardships or in otherwise denying the relief, but they do not supply the court with sufficient support for their arguments.

Plaintiffs have detailed how the 155 defendants' repeated prior, present and undisputed continuing incursions and intrusions on their property without their or the owner's permission have damaged the garden and have interfered with the use and enjoyment of the apartment and garden. The 155 defendants, however, only assert in a conclusory manner that a balance of the equities lie in their favor for they need to finish the rear facade of the 155 building and access can only be achieved through the 153 property. The defendants claim hardship resulting from the injunction, and that their hardship will be greater than that endured by plaintiffs, but do not provide the court with the requisite evidentiary showing to weigh these factors or to support these assertions.

The 155 defendants do not support, by building plans or evidentiary facts in the affidavits, why access to the rear of the 155 building can be achieved only though the 153 property–why is there no access through the 155 building or property or by hoist from the 155 roof or windows or by scaffolding?

They also do not set forth the amount of work remaining on the rear facade –is it six days, six weeks, six months? They do not specify the amount of work otherwise remaining on the construction project. They only argue in conclusory language that if the rear facade "work is postponed for any significant period of time, it would cause delay of the Project and significant costs to the owners, developers and contractors ".

They similarly assert in conclusory language that absent the work on the rear facade they may be prevented from obtaining a temporary certificate of occupancy and thereby may lose

money as a result of financing. But they do not give an anticipated date for completion of the project or submission of an application for a temporary certificate of occupancy. They do not provide a copy of the financing agreement or set forth the financing terms.

Yet, they argue that their need to complete the rear facade of the 155 building outweighs plaintiffs' rights to use or enjoyment of the garden or their home.

And, most troubling to the court, the 155 defendants dismiss as inconsequential plaintiffs' claims of trespass, nuisance, interference with plaintiffs' and the 153 West 21st property rights to quiet enjoyment and the wrongful conduct complained of–defendants' cavalier attitude and disregard of plaintiffs' rights thereby giving additional weight to plaintiffs' showing of the need for the injunction.

Accordingly, plaintiffs have shown, and the 155 defendants have failed to defeat, that they are entitled to the preliminary injunction they seek. While clear on its terms, the injunction is limited to the 155 defendants' unauthorized use of the 153 property, and does not prevent the 155 defendants from otherwise continuing their construction work on the 155 project.

In setting the amount of the undertaking, the court is mindful that the undertaking's purpose is to reimburse the non-moving party for damages sustained if it is later determined that the injunction was erroneously granted. The amount is within the court's sound discretion, and, while not scientific or precise in nature, is rationally related to the quantum of damages and not based on a speculative claims of damages.

Based on the facts and circumstances herein and noting that this action will be expedited, with the court ordering discovery to be completed and the note of issue filed in approximately six months, if not sonner, the court determines that the undertaking is set at $100,000.00.

Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is granted, and defendants, their agents, servants, employees, subcontractors and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendants or otherwise, from the following acts: 1) from entering onto the premises located at 153 West 21st Street in the State, City and County of New York (the Subject Premises), including but not necessarily limited to the basement, ground floor and outdoor areas of the Subject Premises, and 2) from bringing or leaving their equipment, materials and/or debris onto the Subject Premises, including but not necessarily limited to the basement, ground floor, and outdoor areas of the Subject Premises; and it is further

ORDERED that the undertaking is fixed in the sum of $100,000.00, conditioned that the plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to the defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that a preliminary conference is scheduled for June 22, 2006, promptly at 9:30 a.m., at 111 Centre Street, Room 949; only counsel who are familiar with the action and fully authorized, including settlement and stipulating to dates for expedited discovery, shall appear.

Dated: New York, New York
June 6, 2006

VIOLA A. SOTO, J.S.C.

Copies mailed