

Mulberry Condominium Assoc., Inc. v Fernando

2007 NY Slip Op 30802(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0114648/2006

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

MULBERRY CONDOMINIUM ASSOCIATES, INC.,

INDEX NO. 114648/06

Plaintiff,

FILED

MOTION DATE

- v -

APR 19 2007

MOTION SEQ. NO. 001

RANJIT FERNANDO,

MOTION CAL. NO.

Defendant.

NEW YORK COUNTY CLERK

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 001 and 002 are consolidated herein for decision. This action involves a dispute between a residential condominium located on Mulberry Street in Manhattan and one of its unit owners. The condominium, plaintiff Mulberry Condominium Associates, Inc., alleges that the owner of Unit 3A, defendant Ranjit Fernando, has performed unauthorized alterations and repairs in his apartment, including opening walls, tampering with the building sprinkler system and sanding the paint off of brick walls. The plaintiff claims that, in tampering with the sprinkler system, the defendant's contractor improperly capped one of the sprinkler lines or heads, causing water in the roof water tank to pour down and flood several units and parts of the common areas. However, the plaintiff's primary complaint about the defendant's alleged activities is that his sanding the paint off of his brick walls has created dust having harmful levels of lead which has contaminated some of the surrounding units and common areas in the building. The plaintiff also alleges that the defendant's attempts to remove the dust has only exacerbated the problem by further blowing the dust around the building.

Alleging that the defendant has refused to desist from performing this work, the plaintiff has now moved in motion sequence number 001, by order to show cause, for a preliminary injunction enjoining him from making any further alterations without plaintiff's prior authorization and from taking any steps to remediate the dust which he has created. In signing the order to show cause, the court issued a temporary restraining order enjoining the plaintiff from engaging in any further work in his apartment pending the court's determination of plaintiff's motion for a preliminary injunction. In motion sequence number 002, the defendant has moved for an order, pursuant to CPLR 6314, vacating the TRO.

Discussion

As to the plaintiff's claim that the defendant has opened walls and tampered with the building's sprinkler system without the plaintiff's prior authorization, the defendant flatly denies that he has engaged in any such work. Other than the plaintiff's assertion and the defendant's denial, neither side has offered any proof with respect to the sprinkler system. As to opening walls, the defendant contends that a portion of the ceiling was exposed with the plaintiff's authorization in order to install sound installation and that the work has now been completed. He also claims that a circular hole in the wall which is shown in a photograph submitted by the plaintiff was already present when he purchased the apartment. Given the fact that the defendant does not deny that work involving the sprinkler system and the opening of walls is clearly structural and, as such, requires the plaintiff's prior authorization, it is entirely appropriate to enjoin him from engaging in any such unauthorized work. Indeed, since he claims that he does not intend to perform such work, the injunction will not impose any hardship on him.

As to the sanding, the plaintiff claims that, under the condominium by-laws, such work requires its prior authorization. The court disagrees. The by-laws only require prior authorization for structural

alterations, additions, improvements or repairs. Clearly, in this provision, the word "structural" is meant to apply to all four types of work and not, as plaintiff suggests, to just alterations. Otherwise, prior authorization would somehow be required for such minor work as repainting an apartment or refinishing a floor. The court is not persuaded that this provision was intended to cover such activities. Since merely stripping brick of covering layers of paint is akin to sanding walls in preparation for a repainting and is not therefore structural in nature, the defendant was not required to obtain the plaintiff's authorization prior to doing so.

As to the presence of hazardous lead-bearing dust, the plaintiff asserts that the dust created by this work has permeated a number of surrounding units, including the unit directly above plaintiff's apartment, portions of the common areas such as hallways and nearby restaurants. It has submitted a report from a company named JLC Environmental Consultants which found that samples of dust which it swiped from the apartment directly above plaintiff's on August 28, 2006 contained an amount of lead above the legal threshold. It has also submitted a report from the New York City Department of Health and Mental Hygiene finding that samples of dust taken from the hallway around defendant's unit on September 7, 2006 contained lead in excess of the regulatory ceiling and, as such, constituted a nuisance under the New York City Administrative Code by posing a condition "dangerous to human life and detrimental to the health of persons within, and in close proximity to such premises."

In opposition, the defendant argues that there is no evidence that the dust which was sampled emanated from his apartment. Indeed, he suggests that the dust may have come from sanding which the condominium performed in the building's stairwells in late 2005. The defendant is unlikely to succeed on the merits of this argument. First, Eric Alexander Deutsch, the owner of the unit directly above the plaintiff's apartment, has submitted an affidavit in which he states that a substantial amount of dust entered his apartment at the time the defendant was sanding his walls. Indeed, the plaintiff has submitted a photograph of Mr. Deutsch's unit, taken September 9, 2006, which shows that there was sufficient dust on his floor to enable someone to etch a visible word. It is difficult to believe that Mr. Deutsch would have tolerated such a condition for even a short period of time, much less for nine months. Second, as the plaintiff points out, the sample of dust taken by the New York City Department of Health and Mental Hygiene was located only in the hallway area surrounding the defendant's apartment. Indeed, the agency's report specifically stated that no dust was found in a number of other areas which were inspected. Moreover, there is no evidence that there was any discernible dust in the building at the time the defendant began to sand the walls in his apartment. Since the plaintiff has thus shown that it is likely to succeed on its claim that the defendant has created hazardous dust in the building and since the presence of such dust poses irreparable danger, it is entitled to the preliminary injunction which it seeks.

Nevertheless, on his motion to vacate the TRO which the court previously issued, the defendant argues that there is no need to prevent him from continuing to sand the walls in his apartment because the apartment is free of any paint containing lead in levels above the legal threshold. In support of this motion, he has attached a report from a company named Exclusive Testing Labs, Inc. ("ETL") which conducted a lead-based paint examination of his apartment on February 23, 2007. The report found that there was no lead-based paint present on the walls.

If, indeed, this report is accurate and comprehensively covers all of the areas where the defendant intends to sand, the court agrees that he should be allowed to do so. However, in view of the health and safety threat which lead-laden paint dust poses to the building's residents and visitors, it would be inappropriate and premature for the court to permit the defendant to proceed with sanding based solely on a report which he himself commissioned. Although the continuation of an injunction against the defendant may ultimately prove to have been unnecessary, the injunction should nevertheless remain in effect until the defendant convinces either the plaintiff or, following an evidentiary hearing, the court that the ETL report is accurate and that any continued sanding of his walls will not create any additional dangerous dust.

Accordingly, in motion sequence number 001, the plaintiff's motion for a preliminary injunction is granted and it is hereby ordered that, while this proceeding is pending, the defendant and all other persons acting under his direction are enjoined and restrained from (1) making any further alterations to his apartment which involve opening walls, tampering with the building sprinkler system and sanding paint off of any area of the premises, and (2) from taking any steps to remediate the dust which he has created in his apartment. An undertaking is hereby fixed in the sum of \$50,000.00 on the condition that if it is finally determined that the plaintiff was not entitled to an injunction, it will pay to defendant all damages and costs which may be sustained by reason of this injunction. In motion sequence number 002, the defendant's motion to vacate is denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on May 1, 2007 at 10 a.m. for a preliminary conference at which the parties should be prepared to discuss the evidence, if any, they will need to obtain through discovery in order to prepare for an expedited evidentiary hearing on the issue of whether to continue the preliminary injunction with respect to the sanding of the defendant's walls and the remediation of the dust in his apartment.

ENTER ORDER

Dated: 4/12/07



MARYLIN G. DIAMOND, J.S.C.
[X] NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

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