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

PRESENT: FRIEDMAN PART 57

Hon. Marcy S. Friedman *Justice*

135 EAST 57TH

-v-

GALLERIA CONDOMINIUM

INDEX NO. 601436/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED
OCT 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10-18-07

Hon. Marcy S. Friedman 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

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135 EAST 57TH STREET, LLC,

Plaintiff,

- against -

GALLERIA CONDOMINIUM and THE BOARD OF MANAGERS OF GALLERIA CONDOMINIUM,

Defendants.

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Index No.: 601436/07

DECISION/ORDER

In this action for an injunction and damages, plaintiff 135 East 57th Street, LLC ("LLC") moves for a preliminary injunction ordering defendant to remove all protective measures, including a platform and sidewalk shed, on plaintiff's commercial property. By separate motion, defendants Galleria Condominium and the Board of Managers of Galleria Condominium ("Galleria") seek a license to enter plaintiff's property in order to make repairs to its own adjoining property.

It is undisputed that the parties entered into an agreement, dated June 20, 2005, under which plaintiff granted permission to Galleria to erect a sidewalk shed extending over the property line of plaintiff's property and above a pocket park located on plaintiff's property. The agreement expressly provided that "[t]he shed is being constructed in connection with facade restoration work to be done to the east and south facades of 117 East 57th Street, New York, New York ("the Work") [the Galleria property] during 2005 and 2006. It is anticipated that the Work

on the east facade will be performed and completed in full in 2005. * * * * The shed will then be removed and reinstalled in the Spring of 2006 for the portion of the Work covering the south facade. We anticipate the work in 2006 will begin as soon as weather reasonably permits and will continue for several months."

Plaintiff contends that the facade work has been completed and that defendant refuses to remove the protective measures. Plaintiff further contends that defendant's work caused heavy materials to fall through a skylight above a store at plaintiff's property rented by Alice Kwartler Antiques, and that plaintiff has been unable to repair the damage due to defendant's failure to remove protective measures affixed to the skylight. Defendant contends that the purpose of the facade work was to comply with New York City Local Law 11 and to correct substantial water penetration into the interior of the Galleria property. Defendant further contends that after experiencing problems with the facade work, it retained a new architect, Israel Berger Architects, PC ("IBA"). In November 2006, IBA concluded that the original windows were contributing to the water penetration, and recommended that they be replaced. IBA asserts that the protective measures are necessary to enable the original facade work to be completed and the windows to be replaced. Defendant represents, however, that it has no objection to "the one week removal of certain portions of the subject protective scaffolding solely for the purpose of repairing the skylight to Alice Kwartler Antiques." (Aff. In Opp., ¶ 47.)

It is well settled that a preliminary injunction is a drastic remedy which will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor (Grant Co. v Srogi, 52 NY2d 496, 517; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172,

lv denied 67 NY2d 606)." (Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996].) "The movant has the burden of establishing a right to this equitable remedy." (McLaughlin, Piven, Vogel, 114 AD2d at 172.) "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite." (St. Paul Fire & Marine Ins. Co. v York Claims Serv., Inc., 308 AD2d 347, 349 [1st Dept 2003]; Rosa Hair Stylists, Inc. v Jaber Food Corp., 218 AD2d 793 [2d Dept 1995].)

Here, the evidence shows that replacement of all of the original windows in the Galleria building was not recommended until after the parties executed their June 20, 2005 agreement, and therefore was not contemplated by that agreement. There is no evidence that defendant attempted to negotiate an extension of the license with plaintiff in order to allow for the window replacement. Defendant's conduct in this regard was thus unneighborly, at best. However, the court declines at this juncture to order the removal of all protective measures. That is the ultimate injunctive relief sought in this action. Moreover, in its separate motion for a license pursuant to RPAPL § 881, defendant raises a bona fide issue as to whether the protective measures are necessary to enable it to perform the window replacement.

RPAPL § 881 provides in pertinent part:

> When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought.

In support of its motion for a license, defendant submits an affidavit sworn to on June 6, 2007 by Stanford Chan, its architect at IBA. Mr. Chan attests that the windows must be replaced in order to correct substantial water penetration (Chan Aff., ¶ 2); that the facade restoration work is still ongoing; and that the work, including window replacement, should be concluded in approximately seven months. (Id., ¶ 3.)[1] As to the necessity for the license on plaintiff's property, Mr. Chan asserts: "In order for the Galleria's window contractor to conduct the subject window replacement, the current scaffolds must be kept in place. The replacement of the windows cannot be done without the presence of the scaffold. This scaffold provides needed protection for the ground below the work." (Id., ¶ 5.) As noted above, defendant thus raises an issue as to whether a license is needed to install protective measures.

Notably, defendant's architect also states that certain tenants replaced their windows prior to the facade work, and that these windows do not need to be replaced again. (See id., ¶ 6.) It is undisputed that the owners who previously replaced their windows had the work done from inside their apartments, without a license to install protective measures on plaintiff's property. Defendant's architect's affidavit thus raises a question as to whether the remaining windows can also be replaced by interior work, thereby obviating the need for the license. Neither the architect's affidavit, nor any of defendant's other submissions, includes any evidentiary detail supporting the claimed need for the license. Moreover, IBA's November 20, 2006 written proposal in fact raises questions as to the necessity for exterior work. Paragraph 6.1 states, with respect to reinforcement of windows that were previously replaced: "By installing the clip from

[1]Defendant's managing agent submits an affidavit, also sworn to on June 6, 2007, which estimates that the window replacement project will take approximately 10 months. (Apfel Aff., ¶18.) He requests a license to May 31, 2008 to ensure that the work will be completed. (Id., ¶ 21.)

the exterior, it avoids the need for interior access* * *." Paragraph 6.2, with respect to windows to be replaced, states: "[T]he original window frames will be reinforced with clips on the interior, prior to the installation of the new aluminum trim at the head." The issue of whether exterior work is necessary to replace the windows, or is merely preferred by defendant, therefore cannot be determined on this record.

In moving for a license, rather than commencing a special proceeding, defendant failed to comply with the procedural requirements of RPAPL § 881. Given defendant's failure on the motion to make an adequate factual showing that the license is necessary, the court declines to convert the motion to a special proceeding. (See McMullan v HRH Constr., LLC, 38 AD3d 206 [1st Dept 2007]; Mindel v Phoenix Owners Corp., 210 AD2d 167 [1st Dept 1994], lv denied sub nom Kaming v Phoenix Owners Corp., 85 NY2d 811 [1995].) Defendant's motion will therefore be denied without prejudice to defendant's right, if so advised, to commence a special proceeding that remedies this omission.

It is accordingly hereby ORDERED that plaintiff's motion is granted to the following extent: 1) Defendant is directed, within 10 days after service of a copy of this order with notice of entry, to remove the protective measures above the skylight to the Alice Kwartler Antiques store at plaintiff's property; and 2) Provided that defendant has commenced a proceeding for a license pursuant to RPAPL § 881: Defendant may move to restore the protective measures upon plaintiff's completion of the repairs to such skylight or upon plaintiff's failure to complete the repairs to the skylight within 60 days after removal of the protective measures; and 3) Defendant shall remove all protective measures from plaintiff's property, within 20 days after service of a copy of this order with notice of entry, unless defendant has, within such time period,

commenced a proceeding for a license pursuant to RPAPL § 881; and it is further

ORDERED that defendant's motion for a license is denied without prejudice to defendant's right, if so advised, to commence a special proceeding for a license pursuant to RPAPL § 881; and it is further

ORDERED that plaintiff's cross-motion for a bond is denied as moot.

This constitutes the decision and order of the court.

Dated: New York, New York
October 18, 2007

MARCY FRIEDMAN, J.S.C.