

**Sisters of Charity Health Care Sys. Nursing  
Home, Inc. v Miceli**

2007 NY Slip Op 33844(U)

November 21, 2007

Supreme Court, Richmond County

Docket Number: 0103896/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

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**Index No.: 103896/2006  
Motion No.: 4**

**SISTERS OF CHARITY HEALTH CARE SYSTEM  
NURSING HOME, INC., d/b/a BAYLEY SETON  
HOSPITAL and SAINT VINCENT'S CATHOLIC  
MEDICAL CENTERS OF NEW YORK,**

*Plaintiffs*

*against*

**JACK MICELI, D.D.S., P.C.,**

*Defendant*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

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The following items were considered in the review of this motion for an injunction

<u>Papers</u>	<u>Numbered</u>
<b>Orders to Show Cause and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2, 3</b>
<b>Replying Papers</b>	<b>4</b>
<b>Exhibits</b>	<b>Attached to Papers</b>
<b>Memorandum of Law</b>	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

By order to show cause, the defendants move this court for an order enjoining and compelling the plaintiffs to repair the air compressor system affecting the subject premises of this lawsuit known as the "Northern Section of the 1<sup>st</sup> Floor of Building #7" at 75 Vanderbilt Avenue, Staten Island, New York [hereinafter "the premises"]. Additionally, the defendant seeks an order enjoining and compelling the plaintiffs to take any and all remedial measures that are necessary to abate the leaking and flooding in the x-ray room located within the premises. The plaintiffs oppose this motion.

The defendant in this action operates a multi-chair dental practice in the space owned by the plaintiffs, with the building and related services provided by the plaintiffs. The defendant argues that part of the essential utilities provided by the hospital to the defendant is compressed air. The defendant notes that compressed air is vital to the clinic as all of the drills/syringes (hand held tools) function through the use of compressed air; with air being a basic dental practice necessity.

Providing compressed air to the clinic is the plaintiffs' compressed air unit which is located in the basement of the building where the clinic is located. This unit provides air for the hospital's maintenance department, laundry/housekeeping department, as well as the dental clinic. The unit contains an electrical/mechanical air filtering system which continually filters the compressed air to eliminate contaminants making the air suitable for use in a dental setting.

It is alleged that within the last eight months the compressed air system, including the filtering system, became clogged causing the defendant to have a service company clean the valves from the various units. Each time the service company came, the valves were clogged due to excessive moisture penetrating into the system which disables the filtering units, causing water and foul odors to develop. It is alleged that after approximately six service calls, the service company checked all of the lines for compressed air which revealed the electrical/mechanical filtering system was unplugged due to the fact that the filter was malfunctioning. The defendant alleges that upon discovering the filter failure, the landlord has refused to remedy and restore the essential service, requiring the defendant to manually drain the lines on a daily basis. This however, is only a stop gap and not a remedy, as the manual drainage does not insure that 100% of the impurities found within the compressed air lines are removed, which is unsatisfactory when using the compressed air in a dental clinic. The defendant seeks an order compelling the plaintiffs to fix the compressor.

The defendant also seeks an order compelling the repair of the premises in a manner which would prevent flooding in the defendant's x-ray room. The defendant alleges that upon each significant rainfall, the defendant is prevented from using the x-ray room for at least one day and the staff has to physically remove the excess water from the room to protect the equipment and prevent the water from entering other treatment areas. The defendant also alleges that the persistent water penetrating the building and the x-ray room has now created a mold condition.

In opposition, the plaintiffs argue that the defendant's failure to pay rent, as well as the defendant's failure to vacate, or make any significant moves towards vacating the premise, precludes him from seeking this relief. The plaintiff argues that the hospital is being put in a position of being

required to continue to provide services in maintaining an old building solely for the benefit of the defendant.

To obtain an injunction from the court, the moving party must prevail on three separate points: (1) The likelihood of success on the merits; (2) the risk of irreparable harm; (3) a balancing of equities between the two parties.<sup>1</sup> Here, the defendant has met all three requirements. Specifically, this court, in its decision dated August 21, 2007 determined that the defendant has a valid possession in the premises through December, 2010 and is entitled to withhold rent because of its partial, actual eviction. The decision also notes that the defendant has a substantial personal investment in the premises. This is also a health issue. The plaintiffs' contention that the withholding of rent is compensable to the defendant's loss of use of the air compressor, as well as the compromised air issues due to the formation of mold is intellectually dishonest. The issue of non-payment credits due either party shall be handled at a later time.

The defendant also shows irreparable harm. In support of its motion, the defendant relies upon the mold report from Windsor Consulting Group obtained by the defendants in March 2007. This report states that in the x-ray room, the "airborne concentration of [microbial growth is] near maximum exposure limit for a normal healthy human." With respect to the adjacent dark room, the microbial growth is "nearly ten times above the maximum acceptable level for human exposure."

Finally, a balancing of the equities requires the plaintiff to repair the facility. The plaintiff argues that they are emerging from a long bankruptcy, though the finances of the plaintiff renders the repairs inconvenient. However, there has not been money budgeted from capital improvements to the building since at least 2004.<sup>2</sup> The defendant's own attempts to repair the air compressor, as well as minimize the flood and subsequent mold conditions, would lend itself to the premise that the

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<sup>1</sup> *Stockly v. Gorelik* 24 AD3d 535 [2d Dept 2005].

<sup>2</sup> See Deposition of Brian Fitzsimmons dated November 29, 2004 and attached to defendants reply papers as exhibit "F."

court balance the equities in the defendant's favor.

Accordingly, it is hereby:

ORDERED, that the plaintiffs repair the air compression system, including the electrical/mechanical filtration system within 30 days from receiving this order, or pay the defendant a sum of \$2,500.00 to cover the repairs; and it is further

ORDERED, that the plaintiffs have 90 days from receiving this order to repair the structural aspects of the building to abate the flooding in the defendant's x-ray room; and it is further

ORDERED, that the plaintiffs have 30 days from receiving this order to contract with a mold abatement company to remove the mold from the premises; and it is further

ORDERED, that all parties return to DCM 3 at 9:30 on **December 7, 2007** for a conference.

ENTER,

DATED: November 21, 2007

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Joseph J. Maltese  
Justice of the Supreme Court