

Baker v 16 Sutton Place Apt. Corp.

2008 NY Slip Op 30586(U)

February 26, 2008

Supreme Court, New York County

Docket Number: 0106380/2002

Judge: Barbara Kapnick

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

PRESENT: **BARBARA R. KAPNICK**
J.S.C.
Justice

PART 12

Index Number : 106380/2002
BAKER, ALIXANDRA C.
vs
16 SUTTON PLACE APT. CORP.
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross motion are


**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

FEB 27 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/26/08


BARBARA R. KAPNICK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
ALIXANDRA C. BAKER and STUART D. BAKER,

Plaintiffs,

- against -

16 SUTTON PLACE APARTMENT CORPORATION,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 106380/02
Motion Seq. No. 004

Plaintiffs Alixandra C. Baker and Stuart D. Baker move for summary judgment in their favor and against defendant 16 Sutton Place Apartment Corporation on the fifth cause of action of plaintiffs' First Amended Verified Complaint, insofar as it seeks an order permanently enjoining defendant from constructing or contracting to construct a garden on the roof of the twenty-story building located at 16 Sutton Place, New York, New York.¹

Defendant opposes the motion and cross-moves for summary judgment dismissing plaintiffs' First Amended Verified Complaint in its entirety.

Plaintiffs, whose Penthouse Apartment is directly underneath the roof of the building, contend that the construction of a roof

¹ All other issues raised in this action, including plaintiffs' claims for damages arising out of leaks into their Apartment from the roof, have been resolved between the parties pursuant to Stipulation of Partial Settlement dated April 28, 2006 and so-ordered by this Court on May 9, 2006.

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garden would (a) constitute a breach of their Proprietary Lease, and (b) violate their license to use, decorate, furnish and maintain the hallway outside of their Apartment.

Article I, paragraph SEVENTH of the Amended and Restated Proprietary Lease, which plaintiffs signed in 1998 in connection with the purchase of this Apartment, provides, in relevant part, that

Lessor shall have the right to erect equipment on the roof, including radio and television aerials and antennas, for its use and the use of the lessees in the building and shall have the right of access thereto for such installations and for the maintenance and repair thereof.

Plaintiffs contend that pursuant to the principle of *inclusio unius est exclusio alterius*, the specification in this provision of a certain permitted use, i.e., the erection of equipment, should be read as implicitly prohibiting other uses, including the proposed roof garden. See, Two Guys from Harrison-N.Y. v. S.F.R. Realty Assoc., 63 N.Y.2d 396 (1984).

Defendant, however, argues that plaintiffs' interpretation of this provision of the Proprietary Lease conflicts with paragraph Fourteen of the Rules and Regulations which contemplates other permissive uses for the roof.²

² Paragraph Fourteen of the Rules and Regulations provides, in relevant part, as follows:

Defendant further argues that while Article 1, paragraph SEVENTH explicitly grants defendant the right to erect equipment on the roof, it was never intended to prohibit defendant from using the roof for other purposes.

In reviewing virtually the same provision of a Proprietary Lease in another case, the Appellate Division, First Department held that "plaintiffs failed to establish that they had been allocated the north [roof] terrace for their exclusive use or that defendant waived its right to use that area [emphasis supplied]" as a common sitting area for all the residents of the building.³ O'Neill v. 225 East 73 Owners Corp., 298 A.D.2d 239 (1st Dep't 2002), lv. denied, 100 N.Y.2d 504 (2003).

Likewise, this Court finds that Article 1, paragraph SEVENTH of the Proprietary Lease cannot be read to constitute a waiver by

No planting beds, shrubs, trees, boxes or planting containers of any kind, or statuary, shall be permitted on roof or penthouse terraces or balconies except where such units are installed in accordance with the terms of a special written agreement with the Lessor permitting such installation, in which the Lessor shall also specify the method of such installation.

³ Paragraph 7 of the Proprietary Lease in that case provided, in relevant part, that

The Lessor shall have the right to erect equipment on the roof, including radio and television aerials and antennas, for its use and the use of the Lessees in the Building and shall have the right of access thereto for such installations and for the repair thereof.

the defendant of its right to use the space on the roof as a garden. In addition, the provision cannot be interpreted to constitute a restrictive covenant precluding a roof garden. See, Bovin v. Galitzka, 250 N.Y. 228 (1929); Modell's N.Y., Inc. v. Macerich Queens Center Limited Partnership, 309 A.D.2d 625 (1st Dep't 2003); Val-Kill Co. v. Cities Service Oil Co., 278 A.D. 164 (1st Dep't 1951), aff'd, 303 N.Y. 823 (1952).

Plaintiffs next argue that the construction of a roof garden would violate an important right appurtenant to the Lease, namely their license to use, decorate, furnish and maintain the hallway outside of their Apartment, which they decorated at their own considerable expense,⁴ and for the hallway to be only occasionally used by others in the manner contemplated by and consistent with the Lease.⁵

Plaintiffs contend that the presence of a roof garden would result in frequent and considerable noise and activity directly

⁴ There is no dispute that defendant encourages the building's tenants to decorate, furnish and maintain the hallways by contributing \$1,000 to each tenant every few years towards the cost thereof. The manner in which the hallways are decorated and furnished is left to the tenants on each floor to determine amongst themselves. Plaintiffs are the only tenants on the penthouse floor.

⁵ Plaintiffs cite to Paragraph One of the building's Rules and Regulations which specifically states that the public halls shall not be used "for any purpose other than ingress to and egress from the apartments in the building."

over their heads, and the real possibility of things being dropped or thrown onto their private, wrap-around terrace, and would turn the hallway outside of their Apartment, which plaintiffs claim is integrally a part of the leased premises, into a noisy and busy thoroughfare for tenants and their guests in the building.

However, plaintiffs have not cited any provision in the Proprietary Lease which grants them the exclusive right to use the common hallway.

Finally, Alixandra C. Baker claims that when she and her husband were considering buying this Apartment in the building in the fall of 1997,⁶ she asked two different members of defendant's Board of Directors, Gerald Keller, the then-President, and Fred Cavanagh, about "some kind of dilapidated deck on the roof of the building that had once been used as a roof garden" and that she

was assured by each of them that it was not usable, and that the building would not build a roof garden in the future. Mr. Keller told me that there would be no roof garden in the future because the Board was aware of problems the old roof garden had caused..., and damage to the Apartment resulting from leaks from the roof garden when the Apartment was owned by the prior tenant, Ms. Wang.

⁶ They originally lived in a different apartment on a lower floor which they occupied from approximately February, 1989 through January, 2000.

Plaintiffs further claim that had there been a roof garden in use at the time they purchased the Penthouse Apartment in 1998, they would not have purchased it.

Defendant, however, has submitted an Affidavit from Zev Popovic, the Superintendent of the building who has been employed there since 1988, who claims that

[t]he use of the roof garden was discontinued because of a concern as to whether it had caused leaks in the roof. However, it was later determined that those leaks were unrelated to the garden, and, instead, were caused due to conditions around drains and other equipment in other areas of the roof.

In addition, defendant contends that the determination of whether a garden shall be placed on the roof rests within the discretion and business judgment of the entire Board. See, Levandusky v. One Fifth Ave., 75 N.Y.2d 530 (1990).

Finally, defendant argues that any challenge to the exercise of the Board's judgment is premature at this juncture since specific plans for the roof garden have not yet been developed.


Based on the papers submitted and the oral argument held on the record on August 29, 2007, this Court finds that plaintiffs have failed to establish that the construction of a garden on the

roof would violate any of plaintiffs' rights under or appurtenant to the Proprietary Lease.

Plaintiffs' motion for a permanent injunction is, therefore, denied and defendant's cross-motion for summary judgment is granted. The Clerk may enter judgment dismissing plaintiffs' First Amended Verified Complaint in its entirety with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: February 26 2008


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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