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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

NED O'GORMAN, DONALD STONE, ABRAHAM ALFRED CHERNEY, LAIMA DROBAVICIUS,

Plaintiffs,

- v -

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF LATTER-DAY SAINTS, a Utah corporation, TWO LINCOLN SQUARE, LLC, BROWN, HARRIS, STEVENS RESIDENTIAL MANAGEMENT, LLC,

Defendants.

INDEX NO. 104084/2008

MOTION DATE 5/13/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 15 were read on this motion for preliminary injunction

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-C	1-5
Answering Affidavits — Exhibits	6-8
Replying Affidavits — Exhibits	9
Replying Affidavits — Exhibits	10-11
Copies of Leases & Rent-Stabilization Riders	12-15

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion for a preliminary injunction is decided in accordance with the annexed memorandum decision and order.

Dated: 8/21/08
New York, New York

J.S.C.
HON. MICHAEL D. STALLMAN

Check one: ☐ FINAL DISPOSITION X 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 7

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NED O'GORMAN, DONALD STONE,
ABRAHAM ALFRED CHERNEY,
LAIMA DROBAVICIUS,

Index No. 104084/08

Decision and Order

Plaintiffs,

- against -

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF LATTER-DAY SAINTS, a Utah corporation, TWO LINCOLN SQUARE, LLC, BROWN, HARRIS, STEVENS RESIDENTIAL MANAGEMENT, LLC,

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

Plaintiffs, tenants living in rent-stabilized apartments, seek to enjoin defendants, the landlord, lessors and managers of the building, from proceeding with their plans to demolish the currently windowless east wall of each of the plaintiffs' respective apartments in order to install wall-to-wall windows overlooking Central Park.

BACKGROUND

Plaintiffs argue that they would be severely and irreparably damaged by the removal of the wall and by the dust, fumes, noise, and vibrations associated with the construction proposed by their landlord, the Corporation of the Presiding Bishop of the Church of Latter-Day Saints.[1] Plaintiffs Cherney, Drobavicius, and Stone each claim to have resided in their respective apartments for over 20 years and are of an age such as to qualify as senior citizens under the rent stabilization laws.

[1] According to plaintiffs, the remaining defendants are either net lessees or managing agents of the Corporation of the Presiding Bishop of the Church of Latter-Day Saints.

Cherney swears that he is 87 years old and undergoes kidney dialysis several times weekly. Drobavicius swears that she suffers from severe allergies and a broken wrist. Cherney and Drobavicius swear they will suffer potentially life-threatening health consequences if defendants are allowed to proceed, and that their health conditions preclude their staying in their apartments for the duration of the demolition and construction, or their relocation to another apartment.

In addition to expressing concerns about health risks, plaintiff Stone swears that the proposed construction would knock through a wall that is now covered by antiques, books, and watercolors. Stone further swears that he particularly chose the apartment in which he lives because the east wall, which defendants seek to demolish, lacks windows, thus enabling him to use it to store and display his property. Stone states that the vibrations from the construction work and the light from the new windows will endanger his valuable belongings.

Plaintiffs swear that they would have no place to go during the renovations and should not be forced to reside in the midst of a construction project involving a major demolition inside of their apartments that would force them to pack up and move themselves and their belongings. They also state that the planned construction would materially and permanently change their apartments as they currently exist, and thus fundamentally alter the nature of their bargained-for space.

Defendants oppose the motion, submitting the affidavit of Daniel DeAlmada who swears that he is an employee of defendant Two Lincoln Square, LLC and non-party Southeast Commercial LLC, the net lease holders. DeAlmada states that he manages the building in which the tenants reside. He further states that the construction project involves installing picturesque windows in the apartments located on the twenty-second through thirty-seventh floors of the building, with the objective of providing the tenants in those apartments with a magnificent view of Central Park and

improving the building aesthetically with energy-saving windows which would provide more sunlight to tenants. Including as an exhibit an unsworn article that touts the benefits of sunlight, defendants argue that they should not be required to exclude plaintiffs' apartments, because defendants believe that windows need to be installed on all of the indicated floors for the building to be aesthetically balanced, which they contend is an important design feature in New York City.

According to DeAlmada, permits for the work were recently issued, and the defendants repeatedly informed the tenants of the upcoming work. To support this point, DeAlmada submits three letters. One of the letters, which is undated, states that the work would involve inconveniences from time to time, and that in some cases it would be necessary to have access to a limited number of apartments, in which case individual notices would be provided in advance. Whether such notices were sent to plaintiffs cannot be determined here; no such notices were submitted on this motion. In another letter, dated less than three weeks before the date that it states the work was to commence, the building's management offered to meet with tenants to explain the work. The third letter concerns roof access, not access to individual apartments.

Defendants also submit what they state is their response plan for tenant concerns (Response Plan) (Handel-Harbour Mov. Aff., Exh. C). The Response Plan indicates that the defendants planned to address tenant concerns, including those involving health, and that there would be a brief written outline of a response plan designed for each tenant. However, no such outlines have been submitted.

The leases of Drobavicius, O'Gorman, and Stone each contain access provisions that state that the landlord has the right to enter the apartment during reasonable hours to make decorations, repairs, alterations, improvements or additions as it deems necessary or desirable, including permitting the landlord to take all materials into and upon the premises that may be required, without

the same constituting an eviction in whole or in part.[2] The Cherney lease states that other than for emergencies, the owner may enter the apartment during reasonable hours to make necessary repairs, or changes that it decides are necessary.

DISCUSSION

Plaintiffs maintain that they are entitled to the quiet enjoyment of their apartments and that there is no basis in law or fact that would allow defendants to perform structural alterations to their rent-stabilized apartments in the manner that defendants propose for a cosmetic purpose. In support, tenants provide a copy of the "Rent Stabilization Lease Rider for Apartment House Tenants Residing in New York City" (the Rider), dated February 2006, and issued by the Division of Housing and

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[2] Specifically these leases provide that:

"15. Tenant shall permit Landlord to erect, use and maintain pipes and conduits in and through the demises premises. Landlord . . . shall have the right to enter the demised premises during reasonable hours, to examine the same and to show them to prospective purchasers or lessees of the building and to make such decorations, repairs, alterations, or additions as landlord may deem necessary or desirable, and Landlord shall be allowed to take all materials into and upon said premises that may be required therefore without the same constituting an eviction in whole or in part, and the rent reserved shall in no wise [*sic*] abate while said decorations, repairs, alterations, improvements or additions are being made, because of the prosecution of any such work, or otherwise. For a period of seven months prior to the termination of this lease, Landlord shall have the right, during reasonable hours, to enter said premises for the purpose of exhibiting the same to persons desiring to rent or buy the same. If during the last month of the term, Tenant shall have removed all or substantially all of Tenant's property therefrom, Landlord may immediately enter and alter, renovate and redecorate the demised premises, without elimination or abatement of rent . . . and such acts shall have no effect upon this lease. If Tenant shall not be personally present to open and permit an entry into said premises, at any time, when for any reason an entry therein shall be necessary or permissible hereunder, Landlord . . . may enter the same forcibly, if necessary, without rendering Landlord . . . liable therefore . . . and without in any manner affecting the obligations and covenants of this lease"

(Handel-Harbour Mov. Aff., Exh, C, ¶ 15).

Community Renewal (DHCR), which contains a section concerning eviction. That provision states that an owner may commence a Civil Court proceeding to evict a tenant during the term of the lease if a tenant has unreasonably refused the owner access to the apartment for the purpose of making necessary repairs, or improvements required by law or authorized by DHCR. Plaintiffs also rely on Rent Stabilization Code (RSC) § 2524.3. Based on the Rider and the RSC, plaintiffs argue that a landlord's access to a rent stabilized tenant's apartment is restricted to making necessary repairs, or improvements required by law or authorized by DHCR. Plaintiffs further argue that if the court determines otherwise, landlords would be able to enter any rent-stabilized apartment for whatever reason they see fit, thereby enabling bad landlords to harass and evict tenants.

Plaintiffs contend that absent a reason premised on the health and safety of the apartment occupants, there is nothing in their leases that permits the landlord to enter and make the proposed modifications to the structure of their apartments. They further contend that in the event that the Court determines that the leases do provide for such modifications, the language would conflict with the RSC, by providing unbridled access to the owner of the rent-stabilized apartments to make cosmetic improvements, and therefore would be unenforceable.

In opposition, defendants argue that there will be no injury to the plaintiffs if they temporarily relocate during the work, and that upon their return to their apartments plaintiffs will gain a splendid view of the city. If plaintiffs are dissatisfied with the view, defendants state, a sheet rock wall could be installed over the window, which would allow Stone to continue to use the wall for shelving. Alternatively, defendants state that they will provide a solar shade to protect valuables. Defendants maintain that the leases permit the landlord access to make improvements at its discretion, and that maintaining uniform windows throughout the building is required to balance the building

aesthetically, and is desired by the landlord. They also argue that if plaintiffs do not provide access, they will be in breach of a substantial provision of their respective leases.

To be granted a preliminary injunction, the movant must show a probability of success on the merits, the danger of irreparable injury in the absence of an injunction, and a balance of the equities in its favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]). Such relief will not be granted where any of these three elements is missing.

Probability of Success

The parties dispute the meaning of the previously discussed lease provisions (Access Provisions) and whether under the leases and law the landlord may access the subject apartments and implement its proposed window project. Defendants characterize the Access Provisions as permitting access for work that the landlord considers necessary in its sole opinion. Plaintiffs disagree.

"[I]t is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]). In interpreting a contract, "'the document must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized'" (*Aivaliotis v Continental Broker-Dealer Corp.*, 30 AD3d 446, 447 [2d Dept 2006], quoting *Snug Harbor Square Venture v Never Home Laundry*, 252 AD2d 520, 521 [2d Dept 1998]). A related consideration in contract interpretation is the surrounding circumstances existing at the time of the agreement's execution (*see William C. Atwater & Co. v. Panama R.R. Co.*, 246 NY 519, 524 [1927] [advising that a court should examine the contract as a whole considering

the relationship of the parties and the circumstances under which the agreement was made, with regard to the apparent purpose the parties sought to accomplish]).

At common law, generally, absent a lease provision otherwise, a tenant had the "sole and exclusive right to the occupation and control of the demised premises during the term" (*Zwerin v Geiss*, 38 Misc 2d 306, 309-310 [Civ Ct, NY County 1963]). Indeed, in such circumstances, the landlord had no right to enter the premises even for repairs (*id.* at 310). Where a multiple dwelling is involved, the consequences of such restricted access, in terms of tenants' safety and health, as well as the protection of the property of both landlords and tenants, can be severe. Thus, residential leases routinely include provisions permitting the landlord access to building apartments under certain circumstances. In addition, statutes and code provisions, such as Housing Maintenance Code § 27-2009 (NYC Code § 27-2009), provide recourse where a tenant refuses a landlord access to premises to make necessary repairs or improvements required by law.

The premises at issue are residential rent-stabilized apartments for which the plaintiffs entered into leases in the 1970s. At that time, the parties were contracting for apartments in which people would reside during New York City's seemingly ever-present shortage of affordable housing. It is against this backdrop that the leases must be reviewed.

The language of the leases permitting the landlord access to the premises for the purposes of making "decorations, repairs, alternations, improvements or additions" is contained in several provisions in the leases, including those addressing the tenant's responsibility to remedy damages he or she may cause to the building, and the landlord's responsibilities in the event that it is unable to, or delayed in performing "any repair, additions, alterations or decorations" (Handel-Harbour Mov. Aff., Exh. D, ¶ 23 [entitled "Inability to Perform"]; *see also id.*, ¶ 6 [entitled "Repairs"]).

Certainly landlords and tenants might reasonably understand that the Access Provisions, as a whole, and in context, would permit the landlord access to the apartments to make the alterations, improvements or additions that landlords typically make. It is beyond the scope of this decision to discuss the range of possible changes or repairs that access provisions in residential leases might be interpreted to encompass, and, of course, necessary that each case be reviewed on its own facts and merits.

In this case, it is not a fair reading of the Access Provisions, or the lease, as permitting the landlord unfettered access and permission, in the demised residential apartments, to conduct the major, but purely cosmetic, structural modifications that defendants propose (*see Opatoshu v Concord Properties Inc.*, 38 Misc 2d 544, 546 [Sup Ct, NY County 1963]). The other clauses in the lease containing the same language do not appear to encompass structural modifications of this nature. Furthermore, the interpretation that defendants advocate would leave residential tenants unable to reside in their homes, possibly for long stretches of time, or entail their residing in apartments in which conditions could be hazardous, after which the tenants would end up with an apartment indelibly changed in character and nature from the one they rented. For example, under defendants' interpretation, a landlord could have limitless discretion to erect or demolish walls inside an apartment so as to add or reduce the number of rooms or radically change their configuration from that which the parties reasonably anticipated when the apartment was leased.

It also appears that the landlord seeks intrusion into the plaintiffs' apartments beyond reasonable hours. While the leases permit the landlord to leave in the premises all materials, it does not seems likely that a reasonable definition of "materials" includes a temporary exterior wall between the plaintiffs' residential living space and airspace.

In addition, Rent Stabilization Code § 2524.1 (a), applicable to these rent-stabilized leases, provides that as long as the tenant continues to pay the rent, "no tenant shall be . . . removed from any housing accommodation by . . . exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, except on one or more of the grounds specified in this Code." RSC § 2524.1 (c) provides that "[n]o tenant of any housing accommodation shall be removed or evicted unless and until such removal or eviction has been authorized by a court . . . on a ground authorized in this Part or under the Real Property Actions and Proceedings Law." RSC § 2524.3, entitled "Proceedings for eviction--wrongful acts of tenant," discusses the grounds upon which an action or proceeding to recover possession of any housing accommodation may be commenced without DHCR approval. Those grounds include occasions when a tenant "unreasonably refuse[s] the owner access to the housing accommodation for the purpose of making necessary repairs or improvements required by law or authorized by the DHCR" (RSC § 2524.3 [e]). A lease provision in a New York City residential rent-stabilized apartment that is inconsistent with the RSC is unenforceable (9 NYCRR 2520.12; *see also* 9 NYCRR 2520.3 ["(t)his Code shall be construed so as to carry out the intent of the Rent Stabilization Law to ensure that such statute shall not be subverted or rendered ineffective, directly or indirectly . . ."]).

It appears that defendants' proposed work would materially preclude the tenants from the use, possession, and occupancy of a portion of the leasehold, as well as the use of the apartment in the manner in which the tenants are long accustomed, thereby constituting a partial actual eviction (*see Scolamiero v Cincotta*, 128 AD2d 224, 226 [3d Dept 1987] [stating that actual eviction occurs where a tenant is physically excluded from the use of a portion of the demised premises]; *see also Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 82-82 [1970]; *cf. Greenberg v Higgins*, 167

AD2d 216 [1st Dept 1990] [upholding DHCR's determination barring the landlord from its plans to renovate the building to include the installation of an elevator shaft that would have required 50 square feet of the tenant's apartment]; *Hamilton v Graybill*, 19 Misc 521 [Sup Ct, App Term 1897] [determining that two separate door entrances were integrally a part of the premises at execution of the lease, and appurtenances thereto, and that the landlord's physical expelling of the lessee from the use of one of the doors, by blocking it off was a partial actual eviction]). Defendants have not asserted that the plaintiffs will enjoy the same space they currently enjoy under their leases,[3] or argued convincingly that the proposed work will not impermissibly infringe on the rights of these rent-stabilized tenants. Rather, plaintiffs have demonstrated the contrary. Moreover, the cases to which defendants cite to support their position concern the replacement of existing windows only (*see e.g. 87th Street Owners Corp. v Olnick Organization*, 189 AD2d 552 [1st Dept 1993]; *27 Victoria Owners Corp. v Colbert*, NYLJ 11/3/93, at 22, col 3 [Sup Ct, NY County 1993]), and not a project of the nature and scope described here. Finally, it is clear that the work is not a necessary repair, or required by law, and there is no evidence that it has been authorized by DHCR. In light of the foregoing, plaintiffs have meet their burden of demonstrating the probability of success on the merits.

Irreparable Injury

Plaintiffs assert that if a preliminary injunction is not issued they will suffer irreparable harm. To be "irreparable," the injury the movant alleges must be incapable of being adequately compensated with money damages (*see OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42

[3] While defendants state that sheet rock could be installed in front of the windows to provide a wall, they have not demonstrated that this modification would not also impinge on space to which the tenants are entitled.

AD3d 348 [1st Dept 2007]). The elderly plaintiffs' displacement from their apartments for an indeterminate amount of time, the possible threat to their health, and the physical changes to their leasehold interests, including the undisputed loss of wall space and the probable loss of floor space, constitute harm for which money is inadequate compensation. Defendants' assertion that there will be no injury if plaintiffs relocate temporarily during the work, ignores plaintiffs' sworn statements, as well as the reality of displacing the elderly infirm.[4] In addition, while defendants state that plaintiffs have been granted several options, including relocation, they have not demonstrated what, if any, options were actually offered to the plaintiffs, or that they would be adequate to ensure that the tenants remain unharmed. Most significantly, the alteration would permanently, materially and unquestionably change the nature of the space demised to the tenants by several leases.

Balancing the Equities

Defendants assert that the equities balance in their favor, as they cannot instantly recommence the project, and delays would require that they reapply for permits, re-hire contractors, and breach their construction contract. Defendants, however, have stated that their purpose in conducting the work is essentially a subjective, cosmetic improvement from which they seek to profit in the future when plaintiffs vacate; the equities lie in the tenants' favor where the projected changes would cause an irreplaceable loss of a significant portion of a property interest and the displacement of the elderly from their homes.

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[4] Plaintiffs characterize the landlord as greedy. Defendants characterize the plaintiffs as money-driven. The Court will not assume that plaintiffs' submission of sworn statements concerning their health is a pretext designed to extract a financial settlement.

The Undertaking

CPLR 6312 (b) requires plaintiffs to furnish security as a condition of obtaining a preliminary injunction in order to provide a remedy to a defendant who is injured by an injunction that is later determined to be unjustified. An undertaking or bond must be in an amount rationally related to the damages defendants would suffer in the event that the court determines that the relief was erroneously granted. Defendants seek no less than $100,000 per plaintiff, and DeAlmada swears that this is the amount of defendants' expected damages if the project does not proceed.

Plaintiffs argue that it is unnecessary to post security because defendants would be compensated only if the Court eventually rules that it was erroneous to grant the preliminary injunction, which will not happen here because plaintiffs will prevail on the law. This reasoning ignores the purpose for the issuance of an undertaking, and presumes to predict the future. Plaintiffs also assert that as retired senior citizens, they are not in a position to match the resources of the landlord, and that the defendants must establish the damages to which they would be entitled.

Despite contending that their damages from the injunctive relief will be $100,000 per plaintiff, defendants provide a spreadsheet of their costs that appears to indicate that the delay in installing windows in the four apartments would total $94,123.26, including an unexplained and unsubstantiated $69,000 in "Liquidation Costs" for 92 days and a 5% "markup." This document is an inadequate source from which to determine either an accurate additional cost and length of construction for these four attachments or an appropriate security. In any event, defendants' cost of construction delays is not an appropriate measure to set the undertaking in this case. Rather, the "proper elements of damages occasioned by reason of the injunction" are the attorneys' fees defendants would incur in any successful effort to vacate the preliminary injunction. Hanley v Fox,

90 AD2d 662, 663 (3d Dept 1982); see also Shu Yiu Louie v David & Chiu Place Rest., 261 AD2d 150, 152 (1st Dept 1999). Defendants should not be heard to complain about delays in construction from this litigation, when they themselves chose to go ahead with construction and run the risk of almost certain litigation over whether they were permitted substantial structural changes to rent-stabilized apartments that would result in displacement of tenants who are senior citizens. Thus, the Court sets the amount of the undertaking at $5,000 per each plaintiff.

Finally, none of the parties has addressed whether the landlord was required or permitted to obtain an order from DHCR concerning the proposed work. The relief granted here, therefore, is without prejudice to the parties seeking any relief to which they may be entitled from DHCR.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED that the undertaking is fixed in the sum of $5,000 per each plaintiff, conditioned that the plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to defendants all damages and costs which may be sustained by reasoned of this injunction; and it is further

ORDERED that defendants, their agents, servants, employees 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,

any of the following acts:

Installing new windows inside plaintiff's apartments where none now exist; entering plaintiffs' apartments for window installation work or any preparation, demolition, or other work related to it, or from doing any such work related to window installation to the interior portions of the plaintiffs' respective apartments.

Dated: August 21, 2008
New York, New York

ENTER:

J.S.C.
HON. MICHAEL D. STALLMAN

FILED
AUG 26 2008
COUNTY CLERK'S OFFICE
NEW YORK