Meadow Lane Equities Corp. v Hill
2008 NY Slip Op 32479(U)
September 3, 2008
Supreme Court, Nassau County
Docket Number: 0439-07/a
Judge: Thomas P. Phelan
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AMENDED SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. THOMAS P. PHELAN,
Justice

TRIAL/IAS PART 5
NASSAU COUNTY

MEADOW LANE EQUITIES CORP.,

Plaintiff,

-against-

JOEY HILL AND LINDA HILL f/k/a
LINDA COHEN,

Defendants.

ORIGINAL RETURN DATE: 06/16/08
SUBMISSION DATE: 07/14/08
INDEX No.: 439/07

AMENDED SHORT FORM ORDER

MOTION SEQUENCE #9, 10

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This motion by plaintiff Meadow Lane Equities Corp. (the "Cooperative") for an order pursuant to CPLR 3212 granting it summary judgment directing defendants to: (1) remove the two (2) skylights installed by them and to restore the roof area to the condition it was in prior to the skylight's installation; (2) to remove the compressor relative to the second heat pump, the concrete pad on which the compressor is seated, any and all electrical installations on the exterior of the building, including all wires, duct work and the electrical box, and directing defendants to seed or sod the ground on which the concrete pad was placed and to close the penetration made through the exterior siding, all to the reasonable satisfaction of the Cooperative; (3) directing defendants to pay a fine to the Cooperative in the amount of $2,500.00, or such other amount determined by the Court, for the unauthorized replacement of their interior staircase; and (4) setting this matter down for a hearing to determine the amount of legal fees owed by defendants to the Cooperative pursuant to paragraph 28 of their Proprietary Lease, is granted as provided herein.

This cross-motion by the Hill defendants for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and awarding it judgment on its first and second counterclaims is denied.

In this action, plaintiff Cooperative seeks to compel the Hill defendants', as owners of Unit No. 71, compliance with their Proprietary Lease and its Rules and Regulations. The Hills have counterclaimed and seek to recover for, *inter alia*, as and for their first counterclaim, the Cooperative's Board of Directors' breach of their Proprietary Lease, By-Laws, Offering Plan and Rules and Regulations; and, as and for their second counterclaim, the Board of Directors' breach of the covenant of quiet enjoyment and their breach of their fiduciary duties.

The pertinent facts are as follows:

By letter dated November 30, 2005, the Hills requested permission to create a master bathroom suite, which included a skylight. The Cooperative's Board of Directors required additional information by letter dated January 13, 2006. Additional information was supplied by defendants' architect and by letter dated March 8, 2006, defendants' application was denied because of a possible increase in the Cooperative's taxes. In the denial letter, the Cooperative's managing agent, Total Community Management Corp., by Beth Ocers, explained "[d]ue to the major extent of the proposed renovations, and the fact that a request of this magnitude has never been addressed by the Cooperative, the Board must make certain that this renovation does not adversely affect the Cooperative as a whole." More specifically, the letter explained as follows:

> One of the Board's concerns was if this type of renovation, which requires the filing of building permits, would have a detrimental impact on the Co-op's tax obligations if it would invite re-assessment by the Town of Hempstead or Nassau County Assessor. At the Board's direction, T.M. contacted Meadowland's tax certiorari attorneys, to inquire further about this concern and was advised that a renovation like the one proposed could, in fact, increase the Co-op's taxes. Unfortunately, there is no way of confirming if or when the increase might be imposed, or to what degree the increase might amount to. There is also no legal way that the Co-op could limit the increase to only your shares, even if you so desired."

By letter dated March 13, 2006, defendants revised their application and requested permission to proceed "without raising the ceiling or adding skylights." By letter dated April 6, 2006, Total Community Management Corp. informed defendants that their revised application had been approved as follows: "Please be advised that the Board has granted your request for permission to renovate your upstairs bathroom and bedroom, as described in your letter of March 13, 2006 which modifies your earlier letter of February 6, 2006 and removes the installation of skylights and certain roof work from the proposed plans."

The Hills commenced the work on their unit in or about November 2006. In December, the Cooperative's Board of Directors learned that the Hills had added a second heat pump and created a second heating zone which involved work done to both the interior and exterior of their unit. The interior work included extensive additional venting, ducting and wiring; and the Hills installed a second compressor on a concrete slab, an electrical box on the exterior of the building, and made a penetration through the exterior siding on the outside of their unit to connect the compressor to the new interior installations. The Hills never sought permission for these alterations. The Cooperative's Board of Directors also learned that two skylights were installed in the Hills' bathroom, despite the Board of Directors' denial of permission to do that and the Hills' agreement with that decision.

On or about January 9, 2007, the Cooperative commenced this action to compel defendants to remove the skylights and heat pump as well as to restore all of the areas involved.

By order of this Court dated January 12, 2007, the Hills were prohibited from performing any work other than specifically detailed finishing work without the Board of Directors' approval. Defendants' application to amend that order to include work on their staircase was denied by order of this Court dated March 15, 2007, this Court stating that "at best, defendants have established that the January 12, 2007 so ordered stipulation contained a unilateral mistake. . . ." This Court held that in essence the decision of whether or not to permit the replacement of the interior staircase is one for the Board of Directors rather than the Court. By letter dated May 3, 2007 the Board approved the Hills' request to replace their interior staircase, contingent on: (1) a prior inspection by the Cooperative's engineer; (2) the Hills obtaining and delivering a Building Permit for the staircase's installation to the Board prior to the commencement of the work; and (3) the use of a licensed and insured contractor. The Hills installed the new staircase without any prior notice to the Board, before its engineer could inspect and without producing a Building Permit. Thereafter, following a conference, by Stipulation and Order dated June 7, 2007, defendants agreed to diligently pursue an application for a building permit by June 13, 2007. That Stipulation provides that the Cooperative shall levy a fine against defendants for the installation of the stairway without the Board's approval, but the Hills specifically reserved the right to challenge that fine. A proper building permit for the staircase has not been procured because the Board of Directors withheld its consent to the building department application which was prepared on behalf of the Hills because it included all of the work done, including the unauthorized alterations. By letter dated August 21, 2007, the Board of Directors imposed a $2,500 fine on the Hills, which has not been paid.

The Cooperative presently seeks summary judgment in the form of declarative relief and an award of the fine and attorney's fees. The Hills seek summary judgment dismissing the complaint and an award of judgment on their first and second counterclaims.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70,

74 [2d Dept. 2004], aff'd. as mod., 4 NY3d 627 [2005], citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]. "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 [2d Dept. 2006], citing Secof v Greens Condominium, 158 AD2d 591 [2d Dept. 1990].

To obtain a permanent injunction, a party must show that irreparable injury will result if the injunction is not granted; that other remedies are inadequate; and that a balancing of the equities favors it.

In reviewing the Cooperative's actions, " 'absent claims of fraud, self-dealing, unconscionability or other misconduct, a court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the corporation.' " Captains Walk Homeowners Association v Penney, 17 AD3d 617 [2 Dept. 2005], quoting Gillman v Pebble Cove Home Owners Ass'n., 154 AD2d 508 [2d Dept. 1989]; see also, Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530 (1990); Walden Woods Homeowners' Association v Friedman, 36 AD3d 691 [2d Dept. 2007]. "To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose; or (3) in bad faith." (40 W. 67th St. v Pullman, 100 NY2d 147, 155 [2003]).

There is no evidence of fraud, self-dealing or unconscionability here. The Cooperative has established that it has never approved skylights in the Cooperative's twenty plus years of existence. The only skylights on the property were installed by the original builder at the purchaser's request. In addition, the Board of Directors has also established that its tax certiorari counsel advised it that skylights would cause an increase in property taxes. The Board of Directors had legitimate concerns about imposing this burden on all cooperative unit owners as well as the potential tax increase should other owners seek to install skylights, too. Nothing short of an injunction can insure that the Board of Directors does not suffer the harm which would result should the skylights be permitted to remain, i.e., cooperative unit owners' allegations in the future that permission to install skylights is being unreasonably withheld, coupled with Cooperative unit owners' insistence that they, too, be permitted to install skylights. The Board of Directors "could be irreparably injured from being placed on a 'slippery slope,' by which all current or future unit owners could deem themselves entitled to disobey certain of the By-Laws to which they are otherwise bound. . . without obtaining necessary approval, resulting in potential risk to other persons and property." Lawrence Park Condominium v Karabachi, NYLJ, March 15, 2000, p. 30, col. 6 [Supreme Court Rockland Co.]. Thus, with respect to the skylights, it is clear that absent an injunction, the Board of Directors will suffer irreparable harm.

As for the second heat pump, it was installed in complete derogation of the Cooperative's rules and regulations: Permission was never even sought even after this action was commenced. This, alone, warrants the injunctive relief sought with respect to that alteration. See, Captain's Walk Homeowners Association v Penney, supra; Forest Hills Gardens Corporation v Evan, 12 AD3d 563 [2d Dept. 2004]; Hidden Ridge at Kutsher's Country Club Homeowner's Association, Inc. v Chasin, 289 AD2d 652 [3d Dept. 2001].

As for the $2,500 fine, while a cooperative corporation may impose a fine for the violation of a by-law (Cooperative Corporations Law § 14, subd. [1]), the penalty must be reasonable. Vernon Manor Co-Op Apartments, Section 1, Inc. v Salatino, 15 Misc2d 491 [County Court Westchester Co. 1958]. The Hills have reserved their right to challenge the fine and the Cooperative has failed to establish its reasonableness. A hearing on that issue is directed. See, Behler v Ten Eighty Apartment Corp., NYLJ, April 11, 2001, p. 18, col. 4 [Supreme Court New York Co.].

Similarly, while the Proprietary Lease clearly affords the Cooperative a right to recover attorneys fees under the circumstances presented here, that amount, too, must be determined at a hearing.

The Cooperative's motion for summary judgment is granted to the extent that the Hills are directed to comply with the Cooperative's By-Laws and Rules and Regulations by (1) removing the two (2) skylights installed by them and to restore the roof area to the condition it was in prior to the skylight's installation; (2) removing the compressor relative to the second heat pump, the concrete pad on which the compressor is seated, any and all electrical installations on the exterior of the building including all wires, duct work and the electrical box and seeding or sodding the ground on which the concrete pad was placed and to close the penetration made through the exterior siding, all to the reasonable satisfaction of the Cooperative.

This matter is referred to the Calendar Control Part (CCP) for a hearing on the issues of the reasonableness of the $2,500 fine as well as the amount of attorney's fees which the Cooperative is entitled to recover, to be held on September 30, 2008, at 9:30 a.m. Plaintiff shall file and serve a Note of Issue, if not previously filed, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order.

The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer [JHO], or a Court Attorney/Referee, as he or she deems appropriate. A JHO or Court Attorney/Referee shall not be used however unless said JHO or Court Attorney/Referee has the power to hear and determine -- and not merely hear and report (see CPLR Article 43).

This decision constitutes the order of the court.

ENTERED
SEP 0 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: 9-3-08

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J.S.C.

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