

<b>Dorr v London Terrace Towers Owners, Inc.</b>
2009 NY Slip Op 30406(U)
February 24, 2009
Supreme Court, New York County
Docket Number: 105451/06
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. JUDITH J. GISCHE**  
J.S.C.

PART 10

Justice

INDEX NO.

105451/09

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

**FILED**

FEB 25 2009

COUNTY CLERK'S OFFICE  
NEW YORK

**motion (a) and cross-motion (a)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 2/24/09

**HON. JUDITH J. GISCHE** 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: PART 10

-----X  
Cheri Dorr and Dorr Design Associates, Inc.,

Plaintiffs,  
-against-

London Terrace Towers Owners, Inc., The Board of Directors of London Terrace Towers, Inc., London Terrace Towers Condominium, The Board of Managers of London Terrace Towers Condominium, Douglas Elliman Property Management, Westfair Restoration Services, Inc., Nancy Frawley, Steven Engel and Kay Waterproofing Corp.,

Defendants.

-----X  
Peter Kaufmann and Jenny Kaufman,

Plaintiffs,  
-against-

London Terrace Towers Owners, Inc., The Board of Directors of London Terrace Towers, Inc., London Terrace Towers Condominium, The Board of Managers of London Terrace Towers Condominium, Douglas Elliman Property Management, Westfair Restoration Services, Inc., Nancy Frawley, Steven Engel and Kay Waterproofing Corp.,

Defendants.

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

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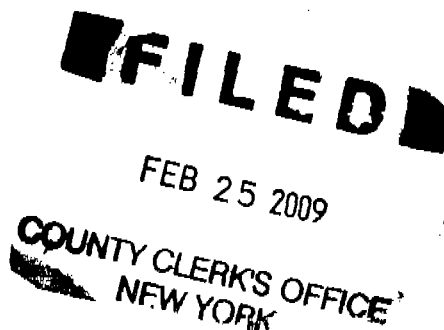
Papers	Numbered
Plaintiff's OSC (CPLR § 3126), GKV affirm, CB affid, JK affid, exhs	1
Defs VRL affirm in opp	2

DECISION/ORDER

Action #1  
Index No.: 105451/06  
Seq. No.: 003

Present:  
Hon. Judith J. Gische  
J.S.C.

Action #2  
Index No.: 102219/06



Plaintiff's reply affirm (GKV), CD affid, exhs ..... 3  
 Plaintiff's OSC (CPLR § 3126) ..... 4

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These actions, which have been consolidated for the purposes of discovery, arise from property damage caused by flooding at the plaintiffs' residential cooperative units. Plaintiffs have now moved by Order to Show Cause for an order: [1] striking defendants' answer and affirmative defenses for willful failure to comply with certain discovery demands and requests, or, in the alternative, precluding the defendants from offering evidence at trial; and [2] compelling certain of the defendants to repair the units, or, in the alternative, granting plaintiffs leave to amend their complaints to add a cause of action for equitable relief, and upon such amendment, granting the aforementioned equitable relief.

On November 13, 2008, the court heard oral argument on the instant motion, along with another motion concerning overlapping discovery disputes (motion sequence 002) in a related subrogation action entitled Great Northern Ins. v. London Terrace, Index Number 117190/06. The court decided the related motion, as well as the discovery disputes contained in the instant motion, on the record, and granted defendants' request for an adjournment to interpose opposition to plaintiffs' instant application insofar as plaintiffs seek equitable relief. This motion was adjourned to December 4, 2008. The court's decision follows.

There are two units at issue here. In Action # 1 (the "Dorr action"), plaintiff Cherri Dorr is the owner of cooperative shares issued appurtenant to a residential studio

apartment, 18C (the "Dorr Unit"), located at 470 West 24<sup>th</sup> Street, New York, New York (the "premises"). Ms. Dorr is the principal of plaintiff Dorr Design Associates, Inc. (collectively herein referred to as the "Dorr plaintiffs"), which allegedly conducted business out of the Dorr Unit. Plaintiffs Peter and Jenny Kaufmann (collectively herein referred to as the "Kaufmann plaintiffs") are owners of cooperative shares issued appurtenant to residential unit 18E/F (the "Kaufmann Unit") at the premises.

Defendants London Terrace Towers Owners, Inc. ("London Terrace"), the Board of Directors of London Terrace Towers, Inc. ("Board of Directors"), London Terrace Towers Condominium ("Condominium"), The Board of Managers of London Terrace Towers Condominium ("Board of Managers") and Douglas Elliman Property Management ("Douglas Elliman", and the preceding defendants collectively herein referred to as the "LTDE Defendants") own, manage, maintain, control the premises and/or supervise the everyday activities at the premises. Defendant Nancy Frawley and Steve Engel was and/or still is the President of defendants London Terrace, Board of Directors, Condominium and/or Board of Managers at the time of the occurrence.

In September 2004, there were two hurricanes which caused flooding in both units and consequential property damage. Ms. Dorr states in her affidavit that her unit has been uninhabitable since the flooding occurred. Jenny Kaufmann also has submitted an affidavit wherein she claims that the condition of the Kaufmann Unit continues to deteriorate due to ongoing water incursions. Plaintiffs contend that the LTDE Defendants have proven themselves to be unable and/or unwilling to repair and remediate the subject units. Plaintiffs seek an order directing the LTDE defendants to

hire Rand Engineer, or another reputable independent engineering company, subject to plaintiffs' approval, to determine the source and to fix and test the leak areas, and that the London Dorr/Douglas Elliman Defendants hire Olmsted Environmental Services as a Certified Industrial Hygienist to test, prepare the protocols and perform clearance testing after the remediation.

The Dorr and Kaufmann plaintiffs have each asserted causes of action sounding in: [1] negligence, to wit, that the defendants were negligent in their ownership, operation, maintenance, etc., of the subject premises, coop unit 18C in London Towers because they, or any one of them, failed to address and properly repair leaks and water incursions in the building; [2] breach of the lease agreement by causing the subject units to be uninhabitable; [3] breach of the warranty of habitability; [4] constructive eviction; and [5] fraudulent misrepresentation of the fact that the subject units were properly remediated, tested and were clean and habitable.

The defendants argue that plaintiffs' request for injunctive relief is essentially a motion for summary judgment under CPLR § 3212. Plaintiff, in reply, maintains that a private nuisance exists by way of the condition of the subject units, and therefore, the court should order the equitable relief requested.

Defendants also claim that the motion for injunctive relief is moot because the Dorr Unit has been fully repaired and made available to Ms. Dorr on November 20, 2008. With respect to the Kaufmann Unit, the defendants maintain that an inspection was performed on November 18, 2008, and that they are currently awaiting a report from the Kaufmann's expert before proceeding with further work. Defendants state:

Assuming the report is consistent with what our experts believe should be done, the [LTDE Defendants] will proceed promptly to complete the repairs. If it is not, the [LTDE Defendants] will promptly submit a counter proposal detailing the work they believe should be completed forthwith.

## Discussion

### Injunctive Relief

Under CPLR § 6301, a preliminary injunction may be granted in any action where it appears that the defendants are doing something in violation of plaintiffs' rights respecting the subject of the action and tending to render the judgment ineffectual. In order to be entitled to a preliminary injunction, a movant must clearly demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. Paine v. Chriscott v. Blair House Associates, 70 A.D.2d 571 (1<sup>st</sup> Dept. 1979); Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860 (1990).

The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2<sup>nd</sup> dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Id. A mandatory injunction, which orders an affirmative act, should not be granted, absent extraordinary circumstances, especially where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, *pendente lite*. St. Paul Fire and Marine Ins. Co. v. York Claims Serv., 308 AD2d 347 (1<sup>st</sup> Dept 2003).

Although plaintiffs have requested leave to amend their complaint to assert a

cause of action seeking equitable relief, they have failed to provide a proposed pleading (CPLR § 3025 [b]). Therefore, plaintiff's request to amend the complaint must be denied due to this defect. However, the court rejects the defendants' contention that because plaintiffs only seek money damages, preliminary injunctive relief is unavailable. CPLR § 6301 provides that preliminary injunctive relief is available where defendants' actions may alter the subject matter of the action to the detriment of the plaintiffs (see also Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 NY2d 541 [2000]). Here, at least in the Kaufman action, the Kaufmann Unit is clearly the subject matter of that action, where Peter and Jenny Kaufmann continue to reside in that apartment (compare Babho Realty Co., Inc. v. Feffer, 230 AD 866 [1930]) and claim is that the apartment is, at least in part, uninhabitable.

Here, there is no dispute that water incursions continue to occur at the Kaufmann Unit. Nor have defendants disputed that they are obligated to repair this problem. Instead, the LTDE Defendants claim that they await plaintiffs' expert's report about the condition of the Kaufmann Unit and will expeditiously submit a proposal to do the repair work. Based on these undisputed facts, the Kaufmann plaintiffs have demonstrated a likelihood of success on the merits. Moreover, the Kaufmann plaintiffs have established that they will suffer irreparable injury if the water incursions continue. Jenny Kaufmann states in her affidavit that mold is growing in and on the walls, that the unit is "always damp and dank", that there are portions of the unit that is uninhabitable and that her family's health has been affected. Also, based on the foregoing, the balance of equities clearly weigh in the Kaufmann plaintiffs' favor, especially where the LTDE Defendants

do not dispute that they should, and intend, to do the necessary repair work to rehabilitate the Kaufmann Unit. Accordingly, the court finds that the Kaufmann plaintiffs are entitled to a preliminary injunction to the limited extent of compelling the LTDE Defendants to perform repair work on the Kaufmann Unit to stop any further water incursions. The court, however, will not order the LTDE Defendants to specifically utilize the services of plaintiffs' proposed engineer and industrial hygienist. This portion of plaintiff's application must be denied because it is overbroad and unnecessary for the LTDE Defendants to fulfill their obligations to the Kaufmann plaintiffs.

However, preliminary injunctive relief is not available in the Dorr action because such relief is not necessary to maintain the status *quo*; Ms. Dorr has not presented to the court any evidence that the condition of the Dorr Unit is deteriorating. Rather, the money damages sought would make the Dorr plaintiffs whole based on the allegations in the complaint. Therefore, the Dorr Unit is not the subject matter of the Dorr action (Babho Realty, supra). Moreover, injunctive relief is not necessary to prevent irreparable harm to the Dorr plaintiffs because Ms. Dorr does not live at the Dorr Unit and on this record, Dorr Design Associates has failed to demonstrate that the condition of the Dorr Unit has had any impact on its business operations. Accordingly, the Dorr plaintiffs are not entitled to a preliminary injunction.

Although the defendants have not asked for such relief, pursuant to CPLR § 6312 (b), the Kaufmann plaintiffs are required to post an undertaking prior to the granting of a preliminary injunction. Since the defendants have not requested an undertaking in any amount, the court orders that the Kaufmann plaintiffs post an undertaking in the sum of

\$5,000, in the event it is finally determined that they are not entitled to an injunction.

#### Discovery Disputes

In her affirmation, defendants' counsel, Victoria Reilly Lehning, Esq., "respectfully request[s] that this Court order the depositions of [two defense witnesses], [Thomas] Arbuckle and [Izzy] Betancourt go forward as proposed as agreed upon by three out of four counsel to the combined actions, beginning on January 6, 2009 and continuing day to day until completed." Even if this date had not already passed, the "request" is denied outright. This "request" for relief is improperly before the court because defendants did not make a proper cross-motion, and therefore failed to put their adversaries on notice of such an application.

Although the court has already made an order regarding discovery on this motion, the court will still address the disputes raised herein. At oral argument on November 13, 2008, the court gave defendants 45 days to respond to plaintiffs' discovery demands. Although the remaining issues on this motion was marked submitted on December 4, 2008, before defendants' time to respond had expired, defendants had already furnished plaintiffs with their responses to the aforementioned discovery demands, and no further responses from the defendants are pending. Therefore, the court will address the remaining issues concerning discovery raised herein.

Plaintiffs maintain that the defendants have failed to provide any response to the following discovery demands: [1] additional directives contained in Preliminary Conference Order dated October 6, 2005; [2] the Dorr plaintiffs' Second Notice to Produce dated March 24, 2006; and [3] the Dorr plaintiffs' Second Notice to Produce

dated October 15, 2008.

Plaintiffs also argue that the defendants' responses to the Dorr plaintiffs' First Request for Document Production and the Kaufmann plaintiffs' Notice to Produce do not comply with CPLR 3122 because the defendants did not organize their responses according to the categories delineated in the respective requests. Plaintiffs claim that the defendants have instead produced numerous Bate-stamped documents along with a "key" of which numbered documents correspond to each numbered demand. Plaintiffs state that "[t]his is a puzzle that takes a lot of hours to put in an organized, sensible form."

Based on the record, the court does not find that the defendants' document production did not comply with CPLR 3122. CPLR 3122 (c) provides, in pertinent part:

Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.

According to plaintiffs' own description of the production, the documents were labeled and organized. In fact, defendants' responses organize the documents and indicate which documents are responsive to which demands.

Plaintiffs also generally argue that since the defendants' responses were untimely, they have waived any objection other than "palpably improper." Therefore, plaintiffs seek to have the defendants' objections stricken. The court rejects this argument. Defendants have incorporated a series of general objections in each of their discovery responses on the basis that the discovery demands are either palpably

improper or that the discovery sought is precluded under CPLR § 3101. These objections can be raised at this point in the litigation, despite having been made more than twenty days after the discovery demands were served, because the failure to timely raise these objections does not preclude the defendants from relying on them now (see CPLR §§ 3101, 3103; CPLR 3122; Sgambelluri v. Recinos, 192 Misc2d 777 [2002]; Haller v. North Riverside Partners, 189 AD2d 615 [1 Dept 1993]).

Finally, plaintiffs argue that the following responses are unresponsive or otherwise insufficient: [1] defendants' Response to Demand for Experts and Expert Information in the Dorr action; [2] defendants' Response to Demand for a Verified Bill of Particulars on Affirmative Defenses in the Dorr action; and [3] defendants' Response to Notice to Produce in the Kaufmann action. With respect to the first item of discovery, plaintiff argues that defendants response is "totally meaningless" because "[n]owhere in the document does it provide even one opinion that the proposed expert will testify to."

CPLR § 3101 (d) (1) provides, in pertinent part:

Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

In relevant part, defendants' response to plaintiffs' Demand for Experts and Expert Information is as follows:

b. disclose, in reasonable detail, the subject matter upon which each expert is expected to testify:

**Response** - Leighton Associates, by Robert Leighton, is expected to testify consistently with the reports of the inspections which are annexed hereto as Exhibit A, and more specifically about the methods of mold testing,

including how the various samples are obtained. Additionally, he will testify regarding the specific results obtained in the inspections of the subject apartment which are documents in the annexed reports.

c. provide the substance of the facts and opinions upon which each expert is expected to testify:

**Response** - Leighton Associates, by Robert Leighton is expected to testify consistently with the reports of the inspections which are annexed hereto as Exhibit A. The facts contained within those reports detailing his personal testing of the subject apartment as well as the testing results are among the facts upon which he is to base his testimony. He will form his opinions based upon the facts in the annexed reports as well as his training and experience which are detailed in the copy of his curriculum vitae which is annexed as Exhibit B.

The court finds that plaintiffs have not shown that the expert disclosure fails to comply with CPLR § 3101 (d) (1). Defendants disclosed the proposed expert's curriculum vitae, the report which the expert prepared, and the subject matter of the expert's testimony. Although the expert report plaintiff received has not been given to the court, one would expect that the report would set forth in reasonable detail the subject matter on which the expert is expected to testify about and a summary of the grounds for the expert's opinion. Without the report, the court cannot agree with plaintiff.

Plaintiff contends that the defendants' Response for a Verified Bill of Particulars is insufficient because: [1] it is unsigned and not verified; and [2] and the responses are inadequate since they fail to particularize defendants' affirmative defenses. First, since the defendants' answer was verified, the Bill of Particulars must also be verified. CPLR 3044. Therefore, the defendants' response is technically improper because they must serve a Verified Bill of Particulars. Moreover, upon review of the Bill, the court finds that defendants' answers are insufficient in some respects. Plaintiffs ask defendants to "[s]et

forth in detail the duties defendants claim plaintiff breached pursuant to the administrative (sic) Code of the City of New York, and the New York Multiple Dwelling Law and the New York Sanitary Codes..." Defendants respond by stating that they "shall ask the court to take Judicial Notice of the applicable codes and law at the time of trial." This response is insufficient, because it is vague. The Verified Bill that defendants will herein be ordered to serve must adequately particularize defendants' affirmative defenses. CPLR § 3041.

The remaining demands contained in plaintiff's request for a Verified Bill are, however, too complex for the court to determine whether the defendants' responses are sufficient. Moreover, defendants maintain in their response that much of the information sought by plaintiffs is not available. The court cannot compel the defendants to respond where defendants do not have the requisite information to fashion a response. Accordingly, plaintiff's motion to compel discovery is granted only to the extent that defendants are hereby ordered to serve a responsive Verified Bill of Particulars, which adequately particularizes defendants' affirmative defenses.

Plaintiffs also generally maintain that defendants' response to the Kaufmann plaintiff's Notice to Produce is insufficient. The only specific response that plaintiffs challenge is the response to Number 54, wherein plaintiffs request "[c]opies of all photographs referred to in defendant Douglas Elliman's letter of 11/11/04 to Mr. Arnold Genovese." Defendants respond by stating that "[u]pon information an belief when the file was transferred from F&L Claims to Edison, New Jersey office of St Paul Travelers the photographs were not in the file. We are attempting to obtain same and shall

provide same if they are located." Plaintiffs challenge fails because if the photographs no longer exist, the court cannot compel the defendants to produce that which is not in their possession and cannot be reasonably obtained. Plaintiffs have otherwise failed to establish that the defendants' response to the Kaufmann plaintiffs' Notice to Produce was insufficient.

However, since there is no dispute that the defendants have failed to provide any response to certain discovery demands, the court will give the defendants thirty days to comply with these items of discovery, to wit: [1] the additional directives contained in Preliminary Conference Order dated October 6, 2005; [2] the Dorr plaintiffs' Second Notice to Produce dated March 24, 2006; and [3] the Dorr plaintiffs' Second Notice to Produce dated October 15, 2008. In the event that those demands are not complied with, then without further order of the Court, the answer shall be stricken upon the filing by plaintiff of a Notice of Default that is made on notice to the Defendants in this action.

### **Conclusion**

In accordance with the foregoing, it is hereby:

**ORDERED** that the portion of plaintiffs' motion which was reserved for decision with respect to plaintiffs' application for preliminary injunctive relief is granted only to the limited extent that the LTDE Defendants are hereby directed to perform repair work on the Kaufmann Unit to stop any further water incursions therein; and it is further

**ORDERED** that within 30 days, defendants are hereby ordered to: [1] serve a Verified Bill of Particulars in accordance with this decision and order; [2] respond to the additional directives contained in Preliminary Conference Order dated October 6, 2005;

[2] respond to the Dorr plaintiffs' Second Notice to Produce dated March 24, 2006; and

[3] respond to the Dorr plaintiffs' Second Notice to Produce dated October 15, 2008;

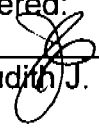
**ORDERED** that plaintiffs' motion is otherwise denied; and it is further

**ORDERED** that the Kaufman plaintiffs are directed to post an undertaking in the sum of \$5,000.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
February 24, 2009

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
FEB 25 2009  
COUNTY CLERK'S OFFICE  
NEW YORK