

Shapiro v 350 E. 78th St. Tenants Corp.

2009 NY Slip Op 31831(U)

August 14, 2009

Supreme Court, New York County

Docket Number: 105318/07

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
J.S.C.
Justice

PART 55

Index Number : 105318/2007
SHAPIRO, FLORENCE
vs.
350 EAST 78TH STREET
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/25/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED
1-4
5-8
9-10

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 is decided together with motion 05 in accordance with the annexed memorandum decision and order.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/14/09

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
FLORENCE SHAPIRO and ADAM SHAPIRO,

Plaintiffs,

-against-

Index No.: 105318/07

350 EAST 78TH STREET TENANTS CORP.,
ROSS J. PATTEN, MARCELLA C. STANLEY,
ELIZABETH KRUEGER, JOHN E. SELEY,
STANLEY J. STANLEY, ELIZABETH O.
THADDEUS JUDE MORROW,

DECISION, ORDER and
PARTIAL JUDGMENT

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).*

Defendants,
-----x

SOLOMON, J.:

Motion sequence nos. 004 and 005 are consolidated for disposition. In motion sequence no. 004, plaintiff Florence Shapiro (Plaintiff) moves, pursuant to CPLR 3212 (a), for partial summary judgment on her claims for breach of contract and for an injunction requiring defendant 350 East 78th Street Tenants Corporation (Corporation) to repair the roof appurtenant to Plaintiff's apartment.

The first cause of action in the amended complaint alleges that the Corporation's acts prohibiting Plaintiff from using the roof breached both the Corporation's offering plan (Offering Plan) and Plaintiff's proprietary lease (Lease). The second cause of action alleges that the Corporation's failure properly to maintain the roof so as to permit Plaintiff's use thereof constitutes a breach of both the Lease and the Offering Plan. The third cause of action demands a mandatory injunction

requiring the Corporation to make such repairs or improvements necessary to permit Plaintiff to use the roof as provided for in the Offering Plan and Lease. The Corporation asserts counterclaims for breach of Plaintiff's fiduciary duty to it arising from her tenure as president of its board of directors, for negligence, and for breach of the Lease.

In motion sequence no. 005, the Corporation moves by order to show cause for a protective order barring a deposition set by the court of its proposed witness, Marcella Stanley, and, pursuant to CPLR 5015 (a), for an order vacating this court's April 27, 2009 order, insofar as it both set the date for Marcella Stanley to be deposed, without providing for the deposition of Plaintiff, and it ordered defendant to allow Plaintiff to place three chairs on the roof. In the temporary restraining order that I signed on April 30, 2009, Ms. Stanley's deposition was stayed.

The facts underlying this action are set out in this court's March 10, 2008 decision and order, and are summarized in this court's August 14, 2008 decision and order. Briefly, again, plaintiffs allege that on or about June 20, 2005, the Corporation required Plaintiff to remove decking and planters that she had installed on the roof, in order to have a structural engineer evaluate the condition of the roof, and that, since then, the Corporation has failed to repair the roof and has thus, in

effect, barred Plaintiff from even walking on the roof. I note that, as recently as April 29, 2009, the Corporation contended that the roof is in a condition of disrepair such that three persons cannot safely sit on chairs placed upon it.

The Offering Plan provides, in relevant part, that the Plaintiff's apartment "will have the exclusive use of the roof of the Front House (and penthouse thereon) subject to the right of Apartment Corporation to have access thereto whenever necessary for the maintenance and operation of the buildings," and the Lease provides that:

[i]f the apartment includes a ... roof, and/or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the ... roof and/or that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of this lease and to the use of the ... roof by the Lessor to the extent herein permitted.

The Lease also provides that "[t]he Lessor shall at its expense maintain and manage the building as a first-class apartment building"

The Corporation disputes neither that Plaintiff is entitled to use the roof, nor that it considers the condition of the roof to be such as to preclude Plaintiff from using it. In the summer of 2005, Plaintiff removed, at her expense, the decks, furniture, and planters that she had placed on the roof. For purposes of deciding the instant motions, I need not consider

whether, 10 years earlier, Plaintiff had such permission as she then needed from the Corporation to install those decks and planters. In the four years since Plaintiff removed the decks, it is undisputed that the Corporation has failed to repair the roof in a manner that would allow Plaintiff to use it. The question is not, as the Corporation appears to believe, whether Plaintiff has an absolute right to install whatever decking and furniture she wishes on the roof -- plainly, she does not-- but whether, for the last four years, the Corporation has violated the Offering Plan and the Lease by depriving Plaintiff of any residential use of a major part of what she paid for when she purchased the shares appurtenant to her apartment, and what she continues to pay for on a monthly basis. Neither the Offering Plan, nor the Lease, requires Plaintiff to undertake construction of decks, or anything else, prior to enjoying the use of the roof guaranteed to her by those documents.

Notwithstanding the Corporation's contention that the business judgment rule shields it from liability for whatever decisions it made in connection with the roof, that rule is inapplicable to Plaintiff's claims in the first and second causes of action. The business judgment rule generally protects a co-op or condominium board from liability in tort for decisions that it takes in good faith. It does not, however, insulate a board from liability for breach of contract (*Anderson v Nottingham Village*

Homeowner's Assn., Inc., 37 AD3d 1195 [4th Dept 2007]; *Whalen v 50 Sutton Place South Owners, Inc.*, 276 AD2d 356 [1st Dept 2000]; *Dinicu v Groff Studios Corp.*, 257 AD2d 218 [1st Dept 1999]).

The failure to repair the roof is tantamount to an actual eviction of Plaintiff from a portion of her leasehold. Notably, on May 26, 2006, the Corporation affirmatively and summarily rejected plaintiff Adam Shapiro's offer to have the roof replaced and a deck built at his expense. Former defendant Stanley's response, on behalf of the Corporation, to Adam Shapiro's offer was an e-mail stating "I'm sorry. The matter is closed." (Shapiro Aff., Exh. G). Given that the roof has been largely unusable for the last four years, Ms. Stanley's e-mail effectively barred Plaintiff from any residential use of the roof. For the foregoing reasons, Plaintiff is entitled to summary judgment as to liability on her first and second causes of action.

Plaintiff's request for injunctive relief arises from the termination of her contractual right to use and enjoy the roof, and from her desire to sell her apartment for its full value. She claims that such a sale cannot go forward, or at least, cannot go forward profitably, without a repaired roof. The diminution in value can be compensated by an award of damages, but the harm Plaintiff suffers from the loss of enjoyment from using the roof is not compensable in money

damages. Plaintiff has established her right to a mandatory injunction to protect her rights under the contracts, and accordingly her motion for summary judgment on the third cause of action is granted.

Insofar as the Corporation's CPLR 5015 (a) motion is addressed to the issue of placing chairs upon the roof, it does not rely on any basis articulated in CPLR 5015(a) as grounds for vacatur, and offers no evidence (counsel's opinion notwithstanding) that the use permitted by the April 27, 2009 order would harm the building. Accordingly, that branch of the motion is denied.

With regard to discovery, given the absence of medical evidence that a deposition of Plaintiff cannot now proceed, which the motion invited, the parties should now adhere to the normal priority of depositions.¹ Discovery should resume on the remaining claims, and in connection with Plaintiff's damages under the first and second causes of action. Damages on Plaintiff's first and second causes of action presumably is measured by a portion of the maintenance fees Plaintiff has paid, and continues to pay, without being able to use the roof. As to her tortious interference claim, if she prevails, her damages presumably will be measured by the difference between what

¹ If Plaintiff needs a reasonable accommodation for her age and health condition, such as having her deposition in her home, counsel are urged to provide it.

Plaintiff could have sold the apartment for without roof access and with the Corporation's ongoing violation of the Lease, and the price she was offered for the apartment with roof access. As to both of these, expert opinion undoubtedly is required.

Accordingly, it hereby is

ORDERED that that branch of Plaintiff's motion which seeks partial summary judgment is granted to the extent that plaintiffs are granted partial summary judgment as to liability against the Corporation on the first and second causes of action in the amended complaint; and it further is

ORDERED and ADJUDGED that that branch of Plaintiff's motion which seeks summary judgment on her claim for a mandatory injunction is granted, and the Corporation is enjoined to make repairs or improvements as necessary to restore Plaintiff to her use of the roof space, said work to be completed within ninety days of service of a copy hereof with notice of entry; and it further is

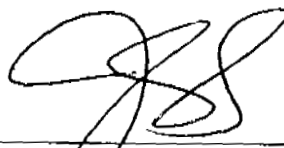
ORDERED that defendant's motion to vacate that portion of the April 27, 2009 order of this court which ordered defendant to allow Plaintiff to place three chairs upon the roof is denied; and it is further

ORDERED that discovery shall resume in accordance with the foregoing, and the stay of discovery in the April 30, 2009 order to show cause is vacated; and it further is

ORDERED that counsel shall attend a compliance conference regarding discovery issues in Part 55 on September 8, 2009 at 11 AM; counsel are admonished to have thought through what discovery is essential to the speedy filing of a note of issue in view of Plaintiff's age.

Dated: August 14, 2009

ENTER:



J.S.C.
JANE S. SOLOMON
J.S.C.

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