

133 Essex St. Condominium v Evanford, LLC

2009 NY Slip Op 31973(U)

August 28, 2009

Supreme Court, New York County

Docket Number: 112906/07

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: GISCHE
Justice

PART 10

BOARD OF DIRECTORS OF
133 ESSEX ST. CONDOMINIUM
- v -
EVANFORD, LLC, ETAL

INDEX NO. 112906/07
MOTION DATE _____
MOTION SEQ. NO. 05
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
AUG 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: August 28, 2009

J. GISCHE
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

133 Essex Street Condominium,
Plaintiffs,
-against-

DECISION/ORDER
Index No.: 112906/07
Seq. No.: 005

Evanford, LLC et al.,
Defendants.
-----X

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

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

Papers	Numbered
133's OSC w/AJ affirm, exhs	1
Calabrese opp w/LAD affid, exhs	2
133's reply w/AJ affirm, exhs	3
Affid of service of OSC	4
Steno minutes 12/18/08	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff, the Board of Managers of 133 Essex Street Condominium ("board") for a permanent injunction. Defendant Evanford, LLC ("Evanford") is a commercial tenant at the building located at 133 Essex Street, New York, New York ("building"). Evanford leases the ground floor store from defendant Calabrese Investors, LLC, the sponsor and commercial unit owner ("sponsor"). Evanford operates a bar/restaurant called the "Mason Dixon" in the commercial space.

The motion now before the court is for a preliminary injunction, requiring Evanford to pay its rent directly to the board, instead of the sponsor, because the sponsor allegedly has unpaid common charges and assessments. The motion is opposed by the sponsor. Evanford has taken no position on the motion, however Evanford indicates

in electronic correspondence to the board that he is "will[ing] to pay rent to whoever a judge legally chooses."

There have been prior motions by the board and decisions in this case which do not directly bear on the issues the court now has to decided. Therefore, those arguments and the court's decision thereon not be repeated here, and the reader is referred to this court's prior orders of April 4, 2008 and October 10, 2008.

Applicable Law

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1st dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 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 (2nd dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Thus even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, supra at 605.

Arguments

Calabrese, the substitute and current sponsor, owns the only two commercial units in the building which also has residential units. The sponsor leased the ground floor and a portion of the cellar to Evanford. The board and sponsor are engaged in an ongoing dispute about the leased space, particularly whether the sponsor granted to Evanford rights and privileges that the sponsor had no right to confer.

The board alleges that the sponsor has unpaid common charges and assessments of \$53,676.30. On November 6, 2008, the board filed a lien of common charges against the commercial units (Block 411 Lots 1101 and 102) in that amount. The board argues that section 339-kk of the Condominium Act ("RPL § 339-kk") applies, and therefore, all rent that Evanford is obligated to pay to the sponsor under their commercial lease agreement should be paid instead to the board. RPL § 339-kk provides as follows:

"§ 339-kk Rents.

(a) For the purposes of this section, "non-occupying owner" shall mean a unit owner in a condominium association who does not occupy the dwelling unit.

(b) If a non-occupying owner rents any dwelling unit to a rental tenant and then fails to make payments due for common charges, assessments or late fees for such unit within sixty days of the expiration of any grace period after they are due, upon notice in accordance with subdivision (c) of this section, all rental payments from the tenant shall be directly payable to the condominium association."

Despite the use of the words "dwelling unit" in the statute, the board argues this law applies to commercial units as well because its purpose is to protect the board against non-paying owners. Therefore, the board argues that unless the injunction is granted, it will suffer economic harm because it needs the money to pay the operating costs of the building. Furthermore, in light of a mortgage foreclosure action against the sponsor (*Chinatrust Bank v. Calabrese Investors, LLC. et al*, Index No.: 111127/08, Supreme Court, N.Y. Co.), the board argues that it is "likely" the sponsor will file for bankruptcy. Thus, the board argues these facts all establish the irreparable harm within the meaning of CPLR § 6301.

The sponsor opposes the motion, first arguing that RPL § 339-kk does not apply

to the facts of this case because the store is not a "dwelling" unit but a "commercial unit." Even if the section does apply, the sponsor contends that the units, if sold, are worth millions of dollars, and the board could satisfy any unpaid common charges and assessment from those proceeds, and therefore, there is no possibility of irreparable harm.

The sponsor argues that the board has not proved a likelihood of success on the merits because the relief sought is tangential to the claims asserted against the defendants in the complaint. The complaint is for a permanent injunction against the Evanford, but this injunction is an affirmative injunction requiring the sponsor to pay rent.

The sponsor denies that it has any unpaid common charges and special assessments, but argues that even if it does, by statute, the lien for common charges is junior to the first mortgage of \$1,750,000 and the second mortgage of \$350,000. Neither of those mortgagees were served with this motion.

Finally, the sponsor argues that it is entitled to a credit and offset of \$16,000, not reflected in the board's motion, and in any event, the sponsor's affiliate ("PPM") has been providing janitorial services to the building without yet being paid for them. According to the sponsor, PPM has outstanding invoices of more than \$65,000.

Discussion

Although RPL § 339-kk refers to "dwelling unit" and the condominium does not define a "dwelling unit," RPL § 339-ii provides that the condominium act "shall be liberally construed to effect the purposes hereof." Section 339-kk is intended to protect the financial security of the condominium, by making sure that non-occupying owners who are charging a tenant rent are not lining their own pockets at the expense of the

other unit owners who are dutifully paying their common charges which are in turn used to maintain the premises. Thus, the modifier in the statute - "*any dwelling unit*" (emphasis added) - suggests that it applies across the board to any inhabited unit, whether commercial or residential, as opposed to something like a garage unit. Royal York Owners Corp. v. Royal York Associates, L.P., 8 Misc.3d 1002(A) (Sup Ct, N.Y. Co. 2005). The court, therefore, rejects the sponsor's argument that this section of the law is inapplicable and this argument does not defeat the board's motion.

The court also rejects the sponsor's argument, that the preliminary injunction should be denied simply because it veers from the allegations against it in the complaint. The payment of common charges is inextricably intertwined with plaintiff's claims against the sponsor. Therefore, this is not a reason to deny the board's motion either.

Assuming that the board's facts establish a balance of the equities in its favor, the board has not, however, proved the other necessary elements of a preliminary injunction which are a likelihood of ultimate success on the merits or that it will suffer irreparable harm unless the relief is granted. Paine v. Chriscott v. Blair House Associates, *supra*; Aetna Insur. Co. v. Capasso, *supra*.

The board has filed a lien of common charges against both commercial units. If they are sold as a result of the pending foreclosure action, then the board stands in line as a creditor. Bankers Trust Co. v. Board of Managers of Park 900 Condominium, 181 A.D.2d 274 (1st Dept. 1992) *aff'd* Bankers Trust Co. v. Board of Managers of Park 900 Condominium, 81 N.Y.2d 1033 (1993). According to the sponsor, the units are worth millions, given their location on the trendy lower east side. The first mortgage is less

millions, given their location on the trendy lower east side. The first mortgage is less than \$1.8 million. Consequently, if the board prevails, and even if the foreclosure happens, there is real property to secure the judgment and it will not be ineffectual. Moy v. Umeki, supra. Thus, the board has not shown irreparable harm.

Nor has the board proved a likelihood of success on the merits. Although likelihood of success does not require conclusive proof, the evidence presented by the board on this motion is incomplete. The board claims that more than \$53,000 is owed. However, it provides an invoice showing unpaid common charges of less than \$32,000. The sponsor denies it has unpaid common charges and it raises as a defense a number of credits and offsets which it claims it is entitled. According to sponsor, these credits and offsets, once applied, would surpass any unpaid common charges he might have.

The board has not met its burden on this motion. It has not proved it is entitled to a preliminary injunction requiring Evanford to pay its rent directly to the board, enjoining Evanford from paying rent to the sponsor, or requiring the sponsor to turn over any rent it has collected. The board has not requested any other alternative relief. Therefore, the motion by the plaintiff-board for a preliminary injunction is denied.

Conclusion

Plaintiff's motion for injunctive relief is denied for the reasons stated. Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: August 28, 2009
New York, New York

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

