

Weiner v 720 Park Ave. Corp.

2009 NY Slip Op 32059(U)

August 31, 2009

Supreme Court, New York County

Docket Number: 109727-09

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

WIENER, MALCOLM H.,
ETAL.

INDEX NO. 109727/09

MOTION DATE _____

- v -

720 PARK AVENUE CORPORATION

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP - 2 2009

RECEIVED
SEP 2 2009
CLERK'S MOTION SUPPORT OFFICE
NEW YORK COUNTY CLERK'S OFFICE - CIVIL

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

PC Oct 1, 2009 @ 9:30
em

MJG

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

Dated: AUG 31 2009

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST HON. JUDITH J. GISCHE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Malcolm H. Weiner, Carolyn H. Weiner, and
Malcolm Hewitt Wiener, *as trustee of the*
Malcolm Hewitt Wiener Trust,

Plaintiffs,

-against-

720 Park Avenue Corporation,
Defendants.

DECISION/ORDER

Index No.: 109727-09
Seq. No.: 001

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

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

Papers	Numbered
Pltf's OSC (prelim injunction) w/CSW affid, exhs	1
Def's opp w/RIC affirm, JN affid exhs	2
Summons and Complaint	3
Proof of service	4

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

This is an action by plaintiffs Malcolm H. Weiner ("Weiner"), Carolyn H. Weiner, ("Mrs. Weiner") and Malcolm Hewitt Wiener, as trustee ("trustee") of the Malcolm Hewitt Wiener Trust (collectively "plaintiffs") for a declaration that they have the right to allow an employee, Karen Nielson ("Nielson") to occupy the cooperative apartment ("8A") that the plaintiffs own in the building located at 720 Park Avenue, New York, New York.

Defendant 720 Park Avenue Corporation is the owner of the building ("defendant" or "720 Park").

Plaintiffs have served the summons and complaint together with this motion which is for a preliminary injunction. They seek an injunction against the defendant preventing Nielson from living in or occupying apartment 8A. Defendant opposes the motion. Issue

001

had not been joined when this motion was submitted for decision.

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

Malcolm Weiner, individually ("Weiner") purchased the shares appurtenant to apartment 8A in 1987, thereby becoming the proprietary lessee thereof. In 1999, Weiner assigned his ownership and interest to the defendant trust, the current title holder. Thereafter, on August 9, 1999, Malcolm Weiner, as trustee ("trustee") of the Malcolm Hewitt Weiner Trust, entered into an Occupancy Agreement with 720 Park ("occupancy agreement"). As per the occupancy agreement, the trustee agreed to the following:

"The Trustee hereby agrees with the Corporation that notwithstanding any provision of the Lease or any other document, he will not sublet or permit occupancy of the Apartment by any parties other than MALCOLM HEWITT WIENER and his immediate family (i.e. spouse, children and parents) residing with him. Any violation of this Agreement shall be considered a default by the Trustee, as lessee, under the provisions of this Lease. The occupant

of the Apartment and Trustee shall be subject at all times to the Lease (including the house rules) and the by-laws of the Corporation (the "By-laws").

[* * *]

"The Trustee recognizes that the Corporation is relying upon the foregoing representation in permitting a transfer of Shares of the Lease to the Trustee and that the Corporation would not otherwise consent to such transfer."

As per the Assignment of Proprietary dated February 2, 2001, Weiner assigned the proprietary lease for apartment 8A to the trustee. This was with the written consent of 720 Park, as evidenced by the Consent executed by the president of the board on June 21, 2001 (the "consent").

This motion is supported by Mrs. Weiner's sworn affidavit. Mrs. Weiner states that she and Weiner have several residences in addition to apartment 8A. According to Mrs. Weiner, 8A has a separate area she refers to as "staff quarters." There are other apartments in this building that also have staff quarters and these areas are usually occupied by care providers and other employees who work for the families they live with.

Mrs. Weiner states that Nielson is employed by her husband. Among Nielson's duties are "overseeing the maintenance of the Apartment, assistance with functions we may host in the Apartment from time to time, assisting with our living and work in the Apartment, and the care of the art and antiques which we maintain therein."

According to Mrs. Weiner, she "arranged" for Karen Nielson and Nielson's husband to start living in apartment 8A sometime in the Spring of 2009. In May 2009, 720 Park requested written notification about Nielson's occupancy. Mrs. Weiner sent 720 Park a letter stating the following: "my assistant, Karen Nielson and her husband, Jordan Ziegler, will be staying at our apartment located at 720 Park Avenue. We own unit 8A and I give

permission for them to stay from May 28, 2009 until May 29, 2010." The trustee has been notified by 720 Park that the proposed occupancy by Nielson and her husband violates the terms of the proprietary lease between the trust and 720 Park, as well as the occupancy agreement. In correspondence to the trustee dated June 11, 2009, 720 Park references Article I, paragraph SIXTH of the proprietary lease which provides, in relevant part, as follows:

"That the Lessee shall not occupy or use the premises hereby demised, or permit the same or any part thereof to be occupied or used, for any purpose other than as a private residence for the Lessee and family of the Lessee or for such other persons as may be approved by a written consent in the same manner as required under subdivision Fourteenth of this Article for a consent to the subletting of such apartment..."

The notice also references the occupancy agreement, and the definition of "family" contained in that document ("[the trustee] will not sublet or permit occupancy of the Apartment by any parties other than MALCOLM HEWITT WIENER and his immediate family [i.e. spouse, children and parents] residing with him").

Under the proprietary lease, 720 Park has empowered the board to establish such house rules as "[the board] may deem necessary for the management and control of the said building . . . and the Lessee shall obey all such rules and see that they are faithfully obeyed by the family, guests, employees and undertenants of the Lessee . . ."

Plaintiffs argue that references in the house rules to "guests" and "employees" occupying or living in an apartment in the building prove that an employee can live in the staff quarters of one of the apartments, without any limitation as to time, and that there is no requirement that the employee live in the apartment with his or her employer (i.e. the lessee). The house rules define a Lessee as follows:

[* 6]

"1. Definition. (a) As used in these House Rules, the term "Lessee" shall be deemed to include members of Lessee's family, Lessee's guests and employees. Should an apartment be sublet, the term shall also include the undertenant, members of the undertenant's family, and the undertenant's guests and employees."

The house rules also place limitations on how long a "guest" can stay in an apartment if the lessee is not living there. Paragraph 18 (a) of the house rules provides in relevant part as follows:

"18. Guests. [* * *] If any apartment is to be occupied or used by any member of lessee's family normally not in residence or by anyone other than Lessee's family residing in the apartment, then written instructions regarding such use of the apartment shall be given to the managing agent who will then advise the Resident Manager. In no event may any guests be permitted to occupy an apartment for more than one (1) month while Lessee is absent."

Plaintiffs argue that Nielson is not a guest, but an "employee," therefore, paragraph 18 (a) does not apply to the facts of this case, and she is not limited to living there for one month only. Plaintiffs also argue that there are many families who have employees living in their apartments, and the ability to have this arrangement is one of the reasons plaintiffs bought the apartment in the first place.

720 Park argues that the proprietary lease and the occupancy agreement each limit who can occupy apartment 8A. According to 720 Park, even if Nielson works for Weiner, her job is to manage his art collection which is housed at several locations, not just the apartment. Therefore, defendants argues, Nielson does not have to live in apartment 8A to do her job, and she is often traveling about to the couple's other homes. 720 Park argues that there is absolutely no reason for Nielson's husband to live in the apartment because he is not an employee of the Weiners.

Although 720 Park acknowledges that some families have employees living with

them in their apartments, those employees provide domestic services like childcare and housekeeping which requires that they be readily available at all hours of the day.

Defendant argues that not just any employee can live in an apartment, but the board has a policy of restricting occupancy to domestic employees only, as an accommodation to families who need access to care providers, etc.

Discussion

As a general rule of law, the relationship between the shareholder/lessees of a cooperative corporation and the corporation is determined by the certificate of incorporation, the corporation's bylaws and the proprietary lease under which a particular apartment is occupied. Fe Bland v. Two Trees Management, Co., 66 NY2d 556, 563 (1985). Plaintiffs' proprietary lease and the occupancy agreement each restrict who can live in and/or occupy apartment 8A. As per the proprietary lease, the apartment is limited to a "private residence for the Lessee and family of the Lessee." As per the occupancy agreement, the apartment can only be occupied by Weiner and his immediate family who live with him.

The corporation has empowered its board to enact (and enforce) house rules regulating the conduct of its shareholders, their family members, guests and employees. Thus, while the house rules apply to "lessees," as broadly defined in the house rules, this broad language is to make sure that *all* persons living in the apartment adhere to those rules of conduct. Assuming that plaintiffs have established that the house rules defines "lessees" more broadly than the proprietary lease, this does not confer any status on Nielson. Under the proprietary lease, absent written consent, only the lessee/shareholder and his or her family can occupy the apartment they have leased. Since Nielson is not family, and she is a guest, and the issue is whether the Weiners can let her live in the

[* 8]

apartment without first obtaining defendant's approval.

The board has allowed some domestic help to live in the apartments of their employers who are shareholders/lessees. The justification is that these individuals provide day-to-day services to the families who employ them and living in the same apartment allows these employees (theoretically) to be available around the clock to take care of children, make meals, etc. 720 Park has proved that its practice of restricting which employees can live in an apartment is within the scope of its authority. see, 40 West 67th Street v. Pullman, 100 NY2d 147 (2003). They have also presented persuasive arguments that the limitations it has placed on which employees can live in an apartment further a legitimate corporate purpose which is to insure the safety of the building's occupants and control the quality of life at the building.

Given the terms of the proprietary lease and the occupancy agreement, plaintiffs have not shown the likelihood of ultimate success on the merits. Nor have plaintiffs shown that a preliminary injunction is needed to maintain the status quo. see, Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). Once Mrs. Weiner notified defendant that she had arranged for Nielson to start living in the apartment, defendant immediately notified plaintiffs that they could not do so under the terms of the proprietary lease. These events took place in under a month.

Plaintiffs have not shown that they will suffer irreparable harm unless the relief is granted and the balance of the equities are not in their favor. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1st dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860 (1990). Plaintiffs have found Nielson somewhere else to live, and no argument is made that plaintiff is suffering any hardship because Nielson cannot live in apartment 8A. The equities do not balance in plaintiffs' favor because the proprietary lease does not

expressly allow any employee to live in a lessee's apartment, without first getting written approval. Plaintiffs did not seek prior approval before arranging for Nielson to stay in the apartment.

Having failed to prove that they are entitled to a preliminary injunction enjoining the defendants from prohibiting Karen Nielson (and her husband) from living in apartment 8A pendente lite, plaintiffs' motion for an order enjoining defendant from taking that action is denied. Although plaintiffs have also moved for an order staying 720 Park from issuing any notice or taking any action to evict Karen Nielson, or to terminate the proprietary lease, Mrs. Weiner has admittedly made other arrangements for Nielson. Therefore, since the situation that prompted the issuance of the default notice has been abated, this branch of plaintiffs' motion is presently academic. It is denied for that reason, without prejudice.

This case is hereby scheduled for a preliminary conference on **October 1, 2009 at 9:30 a.m. in Part 10.**

Conclusion

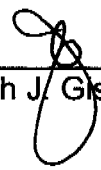
Plaintiffs' motion for a preliminary injunction is denied for the reasons stated. This case is hereby scheduled for a preliminary conference on **October 1, 2009 at 9:30 a.m. in Part 10**

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: New York, New York
August 31, 2009

So Ordered:



Hon. Judith J. Gische, JSC

