

Broxmeyer v United Capital Corp.

2009 NY Slip Op 32092(U)

September 1, 2009

Supreme Court, Nassau County

Docket Number: 10581/07

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 10
LORRAINE BROXMEYER, TERENCE
ECKSTEIN and VITALIY LYUTYK,

Plaintiffs,

INDEX NO. 10581/07

X X X

-against-

MOTION DATE: 7/1/09

SEQUENCE NO. 001

UNITED CAPITAL CORPORATION and
AFP NINE CORPORATION,

Defendants.

-----X

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Upon the foregoing papers, it is ordered that the motion by defendants for an order granting summary judgment pursuant to CPLR 3212 dismissing all claims against defendants is granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

In this sound abatement action, plaintiffs Broxmeyer and Lyutyk are owners and residents of apartments adjacent to six roof-top HVAC units of the adjacent commercial building (11 Grace Avenue, Great Neck Plaza, N.Y.) allegedly owned

and operated by defendant AFP Nine Corporation, a wholly owned subsidiary of defendant United Capital Corporation in the Village of Great Neck Plaza, N.Y. Plaintiff Terence Eckstein is the son of plaintiff Lorraine Broxmeyer and lives with his mother plaintiff Lorraine Broxmeyer in two apartments in the 12 Bond Street building in Great Neck Plaza. Plaintiff Vitaliy Lyutyk resides in 4 Maple Drive, Great Neck Plaza, N.Y., also adjacent to 11 Grace Avenue, defendants' building.

Plaintiffs' Verified Complaint seeks: "(i) a declaratory judgment declaring that the noise from the air conditioning units on the roof of 11 Grace Avenue, The Village of Great Neck Plaza, New York 11021 violates §145-5 of the Village Code, (ii) an injunction and damages based on private nuisance against Defendants AFP Nine Corporation and United Capital Corporation ("Defendants") for causing and failing to abate the noise, and (iii) damages based on negligence against Defendants for breaching their duty fo care to install and maintain the air conditioning unites so as not to cause excessive noise which harmed Plaintiffs and their property." Plaintiff Vitaliy Lyutyk purchased his apartment in 2001, Lorraine Broxmeyer purchased the penthouse apartment in 2004. The parties certified on December 18, 2008 that discovery was complete and the Note of Issue was filed on March 17, 2009.

The Complaint cites the Great Neck Plaza Village Code §142-2 provision that defines the prohibited level of "steady noise" as: "The operation of any machinery, equipment, pump, fan, exhaust fan, attic fan, air-conditioning apparatus or mechanical device in such a manner as to create any noise exceeding 35 decibels at the adjoining property line."

The proponent of a summary judgment motion "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" (*Alvarez v. Prospect Hosp.*,

68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

In support of this application, defendants contend that title to the real property at issue is solely in the name of defendant AFP Nine Corporation, a separate legal entity from defendant United Capital Corporation by way of an affidavit of Michael Lamoretti, Vice President of defendants United Capital and AFP. Lamoretti explains that upon taking title in 1998, six new HVAC units were installed by AFP, owner of the building, and during the eleven years of ownership the Village of Great Neck Plaza has not issued any fines, summons or violations with respect to the operation and maintenance of the six rooftop HVAC units.

Additionally, defendants argue that plaintiffs Lorraine Broxmeyer and Vitaliy Lyutyk took title to their residential units after the 1998 installation and plaintiffs have yet to articulate or quantify their damages. Lastly, defendants note that plaintiff, Terence Eckstein, son of plaintiff Lorraine Broxmeyer, is not a named owner of any residential unit in the Broxmeyer or Lyutyk buildings.

In opposition, plaintiffs argue that AFP Nine Vice President Lamoretti's sworn deposition testimony which indicates his ignorance and indifference to the Village noise code and the 1989 building's HVAC's system's mechanical specifications.

Plaintiffs concede that the Village has engaged in discussions on their behalf with defendants about the HVAC noise. Additionally, in 1999 the Village in response to residents complaints, hired Cerani & Assoc., Inc. to measure the noise generated by defendants' six HVAC rooftop units.

The Court cannot discern from the submitted papers how the Village reacted to the 1999 engineer's inspection. In 2005 Cerani measured the HVAC sound levels again and suggested that the building owner "construct a sound alternating barrier".

Defendants have met their burden of demonstrating that plaintiff Terence Eckstein's interest in this matter is ambiguous. His sworn testimony notes that: "Q. Where do you declare your legal residency, Mr. Eckstein? A. In the city. New York City. Q. Manhattan? A. Yes." Also the apartment unit he uses is not the penthouse but one on a lower floor and he had no knowledge of any diminution in the value of his mother's penthouse apartment due to the HVAC units in the defendants' building.

Likewise, discovery in this action is completed and there has been no demonstration by plaintiffs that United Capital is in privity with plaintiff on any issue in this case. Although plaintiffs argue that defendant United Capital is the alter ego of defendant AFP Nine there is no adequate demonstration of such commonality in funds and functions to make such a finding.

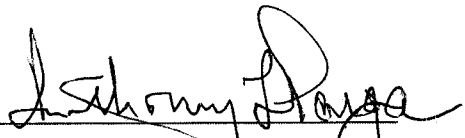
Plaintiffs seek an order piercing the corporate veil of defendant United Capital. However, they have not met their burden of showing that United Capital exercised complete domination "to commit a fraud or wrong against the plaintiff which resulted in injury" (*Damianos Realty Group v. Fracchia*, 2009 N.Y. Slip Op 5744 (2nd Dept., 7/7/09)).

With respect to the private nuisance cause of action, plaintiffs' expert Vito Cerani in 2005 concluded that: "Because the Village of Great Neck code has been interpreted to prohibit noise increases of 35DBA or greater, the noise levels we measured would not be prohibited by this standard. Regardless, reducing the noise transmission to 4 Maple Street can be achieved either by reducing the noise output

of the adjacent RTU (unit 2) or by constructing a noise barrier between the RTU and the apartment building. Because the unit contains several individual noise sources (condenser fans, compressors, and burners), reducing the noise output of the unit could be difficult, requiring significant modifications that could impact the performance and efficiency of the unit."

The recommendation of abatement devices does not compel the Court to find any questions of fact with respect to a nuisance declaratory judgment, an injunction or the award of damages (*Donnelly v. Nicotra*, 55 AD3d 868 (2nd Dept., 2008)).

Dated: September 1, 2009.



Anthony L. Parga, J. S. C.

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