

Schottenstein v Windsor Tov, LLC

2010 NY Slip Op 30788(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 600661/07

Judge: Emily Jane Goodman

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9-8-10

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

SARAH SCHOTTENSTEIN

INDEX NO. 600661/07

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

- v -

WINDSOR TOV, LLC, ETAL

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

is decided

is decided

FILED
APR 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/8/10


EMILY JANE GOODMAN 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: IAS PART 17

-----x
SARAH SCHOTTENSTEIN,

Plaintiff,

Index No. 600661/07

-against-

WINDSOR TOV, LLC et al,

Defendants. NEW YORK-x
COUNTY CLERK'S OFFICE

FILED

APR 08 2010

-----x
Emily Jane Goodman, J.S.C.:

In this action, a condominium owner alleges that after she moved in to her unit, she discovered various defects in her apartment, which were in violation of representations made by Defendants, and in violation of obligations in the Offering Plan. Among those alleged defects was a serious mold condition, caused by leaks and a flood.

In this motion, plaintiff moves for a preliminary injunction staying her obligation to pay past or current common charges for the unit and enjoining Defendants from enforcing a notice of lien. Justice Stallman, by a Decision and Order, dated June 15, 2009 (the June 15 decision), already directed that a judgment be entered in favor of Defendants for common charge arrears, late fees and interest, and further required Plaintiff to continue to pay common charges pendente lite. This motion appears to be made in response

to the statement in the June 15 decision, that the decision was based in part on the belief that Plaintiff did not allege that the damage to the unit was caused by a casualty, which is defined in Section 5.6 E of the By Laws of the Condominium.

The motion is denied and the TRO is dissolved.

The party seeking a preliminary injunction must demonstrate a probability of ultimate success on the merits, irreparable injury in the event that injunctive relief is denied, and a balancing of the equities in its favor (see Wall Street Garage Parking Corp v New York Stock Exchange, Inc, 10 AD3d 223, 226 [1st Dept 2004]; Sterling Fifth Associates v Carpentille Corp, Inc, 5 AD3d 328 [1st Dept 2004]). Generally, a preliminary injunction is not warranted in cases where the movant cannot "demonstrate that its potential damages are not compensable in money and capable of calculation and, thus, that it will suffer irreparable harm absent the requested injunction" (see Credit Index, LLC v Riskwise Intern LLC, 282 AD2d 246 [1st Dept 2001]; White Bay Enterprises, Ltd v Newsday, Inc, 258 AD2d 520, 521 [2d Dept 1999]).

Plaintiff has not demonstrated a probability of success on the merits-that the loss here is a Casualty Loss, which would entitle Plaintiff to an abatement for the period of the loss. Defendants note that Section 6.2 (D) of the By Laws requires a unit owner to

pay common charges, and Justice Stallman already determined that those charges should be paid in the June 15 decision. Further, Defendants argue that the Casualty Loss provision would only apply to a building loss and does not include a loss limited to "within the four walls" of the unit. The definition of Casualty Loss in Section 5.6 A of the By Laws provides that such a loss occurs "[i]n the event that either (i) the Building or any part thereof are damaged or destroyed by fire or other casualty ("Casualty Loss")...the net insurance proceeds payable under the insurance policies maintained by the Condominium Board pursuant to the terms of Section 5.5 hereof...shall be payable either to the Condominium Board...or to the Insurance Trustee." Defendants point to the definition of the term "Building," which refers to the building as a whole, "in which the 103 Residential Units and 5 Commercial Units will be located." Defendants reason that as the definition of Casualty Loss does not include the word "Unit," and because the term "Unit" is separately defined from the term "Building" in Article I Section 1.2 of the By Laws, a Casualty Loss arises only when the loss occurs to the Building or any part of the Building (but not to an individual apartment). Plaintiff does not respond to this point. The Court need not decide whether a Casualty Loss could apply to an individual apartment, because in any event,

[* 5]

Plaintiff has not demonstrated that it is undisputed that a mold condition exists, and nature of the mold condition and the period of time that the condition existed. Defendants maintain that after June or July, 2008, the unit was in perfect condition and cites to a visual inspection made by HPD on 9/11/09, which found no mold in the unit, and to Defendants' own expert report. Defendants also allege that Plaintiff has denied access for repairs but this purported denial of access was already addressed in the June 15 decision, where Justice Stallman noted that the Plaintiff provided access on many occasions and faulted Defendant Windsor Tov for waiting "at least a year and a half to schedule an inspection of the unit, knowing well that the alleged defects could have been hazardous to plaintiff's health."

In reply, Plaintiff submits a 9/25/09 inspection report of RTP Environment Associates, Inc. Defendants object to the Court's consideration of that report, as it was submitted for the first time on reply. Defendants also claim that the report, which finds a mold condition, is wrong and flawed because the sample area was too small, and the areas where mold was visible are areas where all apartments have mold. Defendants are correct in that the report cannot be considered for purposes of this motion. Even if the report was considered, Defendants (rightly or wrongly) dispute the

conclusions in the report. Although the report is not considered for purposes of this motion, Defendants should consider the report, and act accordingly. As ~~the~~ ^{insufficient} likelihood of success has been demonstrated, the Court need not address irreparable injury or the balance of the equities.

Accordingly, it is ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that the temporary restraining order is dissolved.

This Constitutes the Decision and Order of the Court.

DATED: March 8, 2010

ENTER:



J. S. C.
EMILY JANE GOODMAN

FILED
APR 08 2010
NEW YORK
COUNTY CLERK'S OFFICE