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

PRESENT: GISCHE PART 10

HON. JUDITH J. GISCHE Justice

J.S.C.

SECORD, LAUREN, ETAL.

INDEX NO. 103138/10

MOTION DATE

-v-

MOTION SEQ. NO. 01

205/78 OWNERS CORP, ETAL.

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
MAY 26 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAY 25 2010

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

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------x

LAUREN SECORD and MARILYN SECORD,

Plaintiffs,

-against-

205/78 OWNERS CORP., GOODSTEIN MANAGEMENT, INC., PAT MCENANEY, CHERYL CASTELLANO, MARIANNE FALCO,

Defendants.

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DECISION/ORDER
Index No.: 103138/10
Seq. No.: 001

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**
Pltfs' OSC (prelim injunction) w/LES affid, LP affirm, summons w/notice (sep), exhs	1, 2
Defs' opp w/CC affid, EAS affirm, exhs	3, 4
Pltfs' reply w/LP affirm, exhs	5

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

This action is for monetary damages involving a condominium apartment. Plaintiffs, Lauren Secord and Marilyn Secord, are the proprietary lessees of two apartments ("5K" and "6G") in a condominium/coop, located at 205 East 78th Street, New York, New York (the "Building"). Defendants, 205/78 Owners Corp. (the "Coop"), owns the building. Goodstein Management Inc. is the corporation's managing agent (the "Management Company"). Pat Mcenaney ("Mcenaney"), Cheryl Castellano ("Castellano"), and Marianne Falco ("Falco") are employees of the managing agent. The

Coop, managing agent, and employees are hereinafter collectively referred to as the "defendants."

Plaintiffs initiated this action by serving defendants a summons with notice on March 9, 2010. The notice states that plaintiffs are seeking monetary damages for: (1) breach of contract; (2) tortious interference with contractual relations for Apartments 5K and 6G; and (3) actual constructive eviction from Apartment 5K.

Presently before the court is plaintiffs' motion brought by order to show cause, seeking a preliminary injunction: (1) enjoining defendants from interfering with alterations to Apartment 5K, as approved on June 22, 2009; (2) allowing plaintiffs to perform work to Apartments 5K and 6G that does not require approval; (3) unhindered access for plaintiffs' contractors and workers to enter Apartments 5K and 6G during business hours; (4) compelling defendants to schedule one or more water shutdowns for Apartment 5K and other apartments in the Building; and (5) enjoining defendants from compelling plaintiffs to replace a pressure reducing valve and intermediate valve in Apartment 5K.

Defendants oppose the preliminary injunction on the basis that *inter alia* there is no prerequisite claim for a permanent injunction; there is no irreparable injury, as the summons with notice only seeks monetary damages; and there is no likelihood of success on the merits, since plaintiffs violated the provisions, rules, policies, and business decisions made by the Coop.

The court's decision and order is as follows:

Arguments Presented

It is undisputed that plaintiffs are the lessees of 5K and 6G, pursuant to Proprietary Leases (the "Leases") dated November 5, 2008 and July 9, 1999, for each apartment, respectively. Under the Leases, the Coop retains control over how the building is run and plaintiffs agreed to abide by all rules as set forth.

The Leases state, in relevant part, that:[1]

> 21. (a) The Lessee . . . , shall not, without first obtaining the written consent of the Lessor, which shall not be unreasonably withheld, make in the Apartment . . . any alteration . . . of or addition to the water, gas, . . . electrical conduits, wiring or outlets, plumbing fixtures . . . The performance by Lessee of any work in the Apartment shall be in accordance with any applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof. The Lessee shall not in any case install any appliances which will overload the existing wires or equipment in the Residential Unit or the Building . . .
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> 25. The Lessor and the Managers . . . and their agents and their authorized workmen shall be permitted to visit, examine, or enter the Apartment . . . at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs . . . or to cure any default by the Lessee . . .

The Coop provided plaintiffs with an Alteration Agreement (the "Agreement") in response to their request to make certain alterations in their apartments. The Agreement set forth the terms and conditions that must be met when a lessee wants to make alterations. The Agreement requires that lessees/shareholders, "before commencing any work with regard to the Alterations," provide the managing agent of the

[1] The two Leases appear to contain identical language and neither party states otherwise.

Building with: a written narrative specifying the terms of the work; a complete set of the plans; specifications and general requirements for the Alterations signed and sealed by a registered architect or engineer; a complete copy of plaintiffs' agreement with the contractor; written consent from the Corporation; the Corporation's written approval of all contractors and subcontractors to be hired in connection with the work; and an indemnification agreement.

According to the Agreement, the Corporation and its agents "shall have access to the Premises to observe and inspect the Work from time to time and to exercise any and all of the Corporation's rights hereunder." The Agreement provides further that its terms and conditions do not relieve the lessee of "any obligations under the Lease, the Corporation's By-Laws or its House Rules."

The Coop sent a notice to all shareholders, dated March 24, 2000, regarding Apartment Alteration and Cosmetic Work (the "Notice"). The Notice distinguishes "alterations" from "cosmetic work," stating that alterations require approval, as specified under the Alteration Agreement, but that if the work is only cosmetic, then the shareholder must notify the building superintendent in writing, identifying the workers who will be coming into the building to do work for the shareholder.

Plaintiffs contend that on January 30, 2009, they personally delivered a proposed Alteration Agreement and scope of work to Falco, with the requisite $150.00 review fee, made payable to Goodstein Management, and an additional $2,500.00, made payable to the Coop, for an alteration security deposit. After doing so, plaintiffs started performing "cosmetic work" in Apartments 5K and 6G, as that term is defined by the Alteration Agreement and Notice.

Such work entailed stripping old paint surrounding the doors and windows, installation of kitchen cabinets, refinishing the flooring, and performing plastering work. This work was done by workers plaintiffs hired who were permitted by the plaintiffs to enter their apartments to do the work.

Lauren Secord states that when the workers arrived, the superintendent "interrogated" them, "threatened two cabinet deliverymen with arrest," and "screamed" at them when they attempted to perform the work they were hired to do in plaintiffs' apartments.

According to plaintiffs, they received alteration approval for 5K on June 22, 2009, in the form of an e-mail from Castellano to Lauren Secord and Falco. Plaintiffs state that the superintendent also posted a notice on the fifth floor notifying the fifth floor residents that alterations were being performed in 5K. Plaintiffs state that after receiving approval, they began demolition and kitchen plumbing work in 5K but the Coop refused to schedule a water shutdown for 5K and nearby apartments to allow for the kitchen plumbing work to proceed.

Plaintiffs deny they have any responsibility to replace the pressure reducing valve and intermediate valve, as requested by defendants, and that replacement of that valve should not be a condition of the work being allowed to proceed because it is a new requirement not contained in the Alteration Agreement, the Notice, or in any other Coop document. Plaintiffs state that they retained J. Caiazzo Plumbing & Heating Corp., a

licensed Master Plumber, to inspect 5K. Caiazzo told them replacement of the pressure reducing valves would actually increase the risk of water pipe clogging and leaking.[2]

Plaintiffs argue that they are entitled to a preliminary injunction and temporary restraining order because 5K remains uninhabitable. Plaintiffs contend that although Lauren Secord currently occupies 5K, she needs to move to 6G because 5K is too small. Lauren Secord was injured in an automobile accident and claims she cannot open and close the sofa bed without help and is in constant pain.

Defendants provide the sworn affidavit of Castellano who states plaintiffs have refused access to their apartments, as required under the Agreement and Leases, and, therefore, it is unclear whether plaintiffs have exceeded the scope of work that they applied for. Defendants also argue that plaintiffs sent their contractors to 6G to perform work that was never presented to the Coop for approval and that plaintiffs did not provide a written proposed scope of work by a licensed contractor and insurance certificates, as required for cosmetic alterations. Thus, defendants contend plaintiffs are sneaking workers from the "cosmetic" project to do another project that was not approved.

The Coop states it needs to have one of their engineers inspect the plumbing to determine whether a pressure reducing valve and an intermediate valve must be replaced/installed as part of the plumbing work. Defendants contend that they have been refused access and therefore have been unable to review any plumbing work.

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[2]Leaving aside the matter that the statements of Caiazzo are hearsay, and therefore, not evidence in admissible form, the court does not reach this issue for reasons made clear below.

Defendants argue that they are entitled to review, approve, and inspect the work in 5K and 6G before plaintiffs are allowed to continue with any alterations.

Applicable Law

"A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment." CPLR § 6311 (1). There is no authority in law for the dismissal of an action on a motion for a preliminary injunction based upon failure to serve a complaint. Sommerset R.R. Corp. v. Graham, 89 A.D.2d 819, 819 (1982). Where an action is commenced by a summons with notice, the defendant may demand a complaint, if he chooses to do so. CPLR § 3012 (b). On a motion for a preliminary injunction, a complaint is not necessary since the requisite facts, including those which show a cause of action, can be proved by affidavit . Sommerset R.R. Corp. v. Graham, 89 A.D.2d 819 at 819, *supra*.

Contrary to defendants argument, the fact that plaintiffs seek this preliminary injunction without first serving a complaint on defendants, is not a reason to deny their motion for injunctive relief. Plaintiffs provide the affidavit of Lauren Secord, which sets forth the requisite facts. *See* Sommerset R.R. Corp. v. Graham, 89 A.D.2d 819 at 819, *supra*. Additionally, defendants did not make a written demand for a complaint, pursuant to CPLR § 3012 (b). Therefore, the court will consider the merits of the motion for a preliminary injunction.

In order to obtain a preliminary injunction, plaintiffs must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in their favor (*see* CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 N.Y.2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 N.Y.2d 496 [1981]). Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court's discretion, even be issued where there are disputed facts (Terrell v. Terrell, 279 A.D.2d 301 [1st Dept. 2001]), generally a preliminary injunction will be denied unless the relief is necessitated and justified from the undisputed facts (O'Hara v. Corporate Audit Co., 161 A.D.2d 309 [1st Dept. 1990]).

In this context, "irreparable injury" means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite,* and if granted, tailored to fit the circumstances so as to preserve the *status quo* to the extent possible (generally, Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255 [1st Dept. 2009]).

Discussion

Plaintiffs have not demonstrated a likelihood of success on the merits. While it is undisputed that defendants signed off on plaintiffs' Alteration Agreement, a key element of the Agreement is that plaintiffs must allow defendants access to their apartments so that defendants can independently confirm the work being performed conforms with the

work that plaintiffs sought permission to have done. It is unrefuted that plaintiffs have not allowed, nor will they now permit, defendants' access to their apartments for an inspection. Since an inspection is an important condition of the Alteration Agreement, and that condition has not been satisfied, plaintiffs have not made a threshold showing of success on the merits.

Plaintiffs contend that defendants have refused to let their workers into the Building, even though the alteration work was approved. Those arguments are based on claims that plaintiffs either did, or did not have to, identify those workers. Plaintiffs present no proof they disclosed to defendants the names, identities, etc. of those workers or companies, as required under the Agreement.

Plaintiffs have not provided a signed copy of the Agreement and there is no evidence of what work they applied for. Whether plaintiffs' alterations have remained within the scope of the approved work is unknown and unproved. Plaintiffs provide no documentation or evidence tending to show that plaintiffs complied with the requirements of the Agreement, Leases, or Notice. The June 22, 2009 e-mail from Castellano is not helpful to the plaintiffs because it only states that plaintiffs' alterations are "approved" and does not specify the nature of the work actually authorized.

The Coop has the right to make decisions that are in the best interest of the Building as a whole. Decisions made by the board of managers of a residential condominium are reviewed according to the business judgment rule (Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530 [1990]). Accordingly, courts must defer to good faith decisions made by a board of managers. Id. "To trigger further judicial scrutiny, an aggrieved [lessee] must make a showing that the board acted (1)

outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith " (Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1, 8-9 [2006] [internal citations omitted]).

Here, plaintiffs have failed to make a showing of any of the three elements that would trigger judicial scrutiny of the defendants' actions. Rather, the evidence shows that the defendants have a right to enter the apartments to make an inspection of the work while being performed. This is for the safety of all tenants.

Plaintiffs have also failed to show irreparable harm unless the preliminary injunction is granted. Lauren Secord states that she needs to complete the alterations so that she can move from Apartment 5K to 6G because of her present medical condition. While the court is sympathetic to Lauren Secord's injuries, this is not continuing harm caused by the acts of defendants. *See* Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255 , *supra*. Defendants should not be forced to bend their rules and regulations when there is no proof that plaintiffs made any attempt to follow the rules themselves.

Plaintiffs have also not shown a balancing of equities in their favor because the present circumstances are "imperative, urgent, or [of] grave necessity" to warrant such relief (Sithe Energies, Inc. v. 335 Madison Ave., LLC, 45 AD3d 469, 470 [1st Dept. 2007]), or that the *status quo* would be disturbed without the granting of a preliminary injunction. Plaintiffs' inability to complete their alterations is outweighed by the Coop's right to establish and enforce rules for the orderly management of the Building. Plaintiffs' motion for a preliminary injunction against defendants is, therefore, denied.

Conclusion

The motion by plaintiffs, Lauren Secord and Marilyn Secord, for a preliminary injunction is hereby denied.

Since a **preliminary conference** has not yet been held in this case, it is hereby scheduled for **July 29, 2010 at 9:30 a.m. In Part 10, 60 Centre Street, Room 232.** No further notices will be sent.

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
May 25, 2010

So Ordered:

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