

**Loeb v 112 Greene St.Tenants Corp.**

2010 NY Slip Op 31515(U)

June 4, 2010

Supreme Court, New York County

Docket Number: 103145-2010

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Steve Loeb

INDEX NO.

103145/10

MOTION DATE

- v -

112 Greene Street

MOTION SEQ. NO.

001

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

**FILED**

JUN 09 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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.**

*with PC scheduled August 5, 2010.  
@ 9:30 am.*

Dated: 6/4/10

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: IAS PART 10**

-----X  
Steve Loeb,

Plaintiff (s),

**-against-**

112 Greene Street Tenants Corp., 112 Greene Street Partners, LLC, Mark McGauley, Brad D. Esson, Tami L. Esson, Jason R. Wright, Julia Hillscheimer, Hana A Nakamura and Mughan B. Nakamura,

Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 103145-2010  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische

**J.F.C.**  
**FILED**  
JUN 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

<b>Papers</b>	<b>Numbered</b>
Pltf's OSC w/SL, DH, JR affids, exhs . . . . .	1
Defs' x/m (partial 3211) w/MM, SZ affids, MHO affirm, exhs . . . . .	2
Additional exhs (2 vols, sep backs) (defs) . . . . .	3,4
Pltf's opp x/m and in further support w/SL, MK, TNM affids, exhs . . . . .	5
Defs' further affid w/MHO affirm, exhs . . . . .	6

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

**GISCHE J.:**

This action is for a declaratory judgment. Plaintiff Steve Loeb ("Loeb") owns a commercial cooperative unit in the building located at 112 Greene Street, New York, New York ("building"). Loeb has brought this motion for a preliminary injunction. The motion is opposed by the defendants who have cross moved for the pre-answer dismissal of certain causes of action on the basis that Loeb has failed to state the causes of action pled. Loeb opposes defendants' cross motion in all respects.

## Arguments Presented

The building is now owned by defendant 112 Greene Street Tenants Corporation ("coop"). The coop's predecessor in interest bought the building from the previous owner, Jeffrey Lew ("Lew"), who operated a recording studio in the basement. Lew sold the recording studio to Loeb and when Lew sold the building to the coop's predecessor, Lew retained exclusive use of the ground floor under a long, very favorable, lease. Loeb contends that before Lew sold the building, but after Loeb bought the studio, Lew reconfigured the lobby area in such a way that Loeb was allowed to use one side of the lobby so he could access his basement level studio while Lew used the other side. Each side of the lobby has a large display window facing the street. Loeb contends the window on the northern side of the building ("northern display window") is "his" and part of his basement unit which he purchased in 1986. Loeb, like the other individually named defendants, is a shareholder in the coop. His proprietary lease dated November 24, 1986 ("Loeb's proprietary lease") is for "the basement." One hundred (100) shares were allocated to that unit.

A year later, Loeb and the coop entered into an alteration agreement dated January 19, 1987 ("alteration agreement"). According to Loeb, the alteration agreement served a dual purpose: 1) it reconfigured the first floor lobby so that Loeb would have a separate, private entrance to his commercial space in the basement via stairs he paid to have built; and 2) it provided funds for the coop to apply for a much needed certificate of occupancy for the building. The work necessary to obtain the certificate of occupancy was completed immediately and paid for by Loeb (\$10,000). The coop

applied for and obtained a certificate of occupancy for the building in 1990. Loeb, did not, however, elect to do the rest of the construction provided for in the alteration agreement until 2002.

When Loeb elected to do the rest of the construction, the board refused to sign off on the necessary documents he had to file with the Department of Buildings ("DOB"). Loeb brought an action against the coop seeking a mandatory injunction (Steve Loeb v. Greene Street Tenants Corp. and Justice Properties, Inc., Index No. 10825-2002). The parties settled that case by entering into a stipulation of settlement dated September 16, 2002 ("settlement agreement"). Although settlement agreement provides that Loeb is required to indemnify and hold harmless the coop against any claims arising out his "interference with the business operations of and/or reduction of the building lobby adjacent to and used by the commercial ground floor store . . ." the settlement agreement does not otherwise address Loeb's use of the lobby or the northern window display.

The alteration agreement indicates that it is for the "basement unit" and the construction of stairs. It further provides that once the construction is completed, Loeb, his transferees and assignees shall be permitted to use the area designated as "Lounge on Scheme A as part of the basement unit . . . subject to . . . the cooperative [having] access at all time through the area denominated lounge on Scheme A to building systems and equipment. . ." The alteration agreement also discusses alarmed doors and "bars on the elevator at the basement level . . ."

Loeb contends that once the alteration was completed, the northern display

window was enclosed within the separate lobby entrance to his basement unit, and that this evidence proves the defendants "knew," conveyed or otherwise confirmed the northern display window was "his." Loeb claims further that he has had open, obvious, hostile, unfettered and unhampered use of that window for 33 years and therefore, has a claim for adverse possession. He also argues that when Lew leased "his" area of the first floor (while Lew still owned it), Lew let his tenant ("CFM") put up signs in the southern display window. According to Loeb, CFM tried to put up signs in the northern display window also, but Loeb notified CFM that was "his" window and CFM stopped doing so.

The coop argues that when it bought the first floor from Lew, it also assumed CFM's lease. The lease, dated March 31, 1992 ("CFM's lease") states that "13. Tenant [CFM] has the right to utilize the two windows on either side of the building entrance for advertising and signage . . . d) . . . and Tenant assumes final responsibility . . ." Thus, according to the coop, not only was the assignment of the lease approved by the shareholders –including Loeb– Loeb has always known that the northern window was part of the ground floor, not the basement unit, and that he had no right to put anything in the window. Though the coop acknowledges that Loeb did put displays in the window, it contends the house rules have always required that a lessee first obtain permission from the coop before doing so and that it did not waive any rights. The coop argues that Lobe only has 100 shares and that they are for the basement unit. The alteration agreement did not transfer "ownership" of the northern display window to Loeb, no further shares were allocated to the basement unit, and the schematics

attached to the alteration agreement show that the "lounge" area that Loeb has access to is in the basement, not at ground level. Thus, the coop argues that Loeb has not shown a likelihood of success on the merits.

The coop argues that any damages Loeb may sustain as a result of his no longer being able to use the northern display window is compensable through monetary damages. The basement is presently occupied by Loeb's tenant, fueling the coop's claim that Loeb is not personally affected by not having access to the window, his tenant is.

The coop also argues that Loeb had two choices when making the alterations. One option would have been a direct entrance from the street; the other was an entrance through the lobby (i.e. common area). According to the coop, having chosen the second option, Loeb "gave up" any colorable right to the window. Furthermore, the coop argues that the settlement agreement was yet another chance for Loeb to identify and preserve his (alleged) rights to the northern display window, but he did not do so.

The defendants argue that plaintiff's 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> causes of action should be dismissed and they have cross moved for that relief. The 4<sup>th</sup> cause of action ("oppressive conduct and breach of fiduciary duty") is asserted against the individually named defendants, as is the 5<sup>th</sup> cause of action ("prima facie tort"). The 6<sup>th</sup> cause of action ("unjust enrichment") is asserted against all the defendants. Defendants argue that the named individuals only acted in their respective capacities as directors, and there are no facts stating that they engaged in independent tortious conduct. The defendants contend the tort claim is not supported by facts and plaintiff cannot elevate

a breach of contract claim to a tort. The defendants argue further that since there is a *proprietary lease (contract)*, there is no basis for plaintiff's unjust enrichment claim because it seeks relief in quasi contract.

The facts that plaintiff provides in support of those causes of action are that the coop enacted a house rule in February 2010 forbidding the erection or placement of signage in front of the building or in the ground floor windows without prior board approval. Violations of this house rule are subject to \$500 per day penalties. Following the enactment of that house rule, Loeb was notified that "the north window belongs to the Coop. Please remove all displays from the north window within the next 24 hours. Otherwise you will be subject to the fines spelled out in the new house rules. The displays that your tenant has in the north window are interfering with our marketing effort for the ground floor space..." The shareholders also approved an amendment of the proprietary lease (paragraph 28) providing that "all expenses incurred by the Lessor or any of its officers, directors or shareholders, including but not limited to attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent."

Loeb also seeks the disqualification of Margaret D. Baisley, Esq. ("Attorney Baisley") as counsel for any of the defendants. He also seeks an order that the individually named defendants be separately represented from 112 Greene Street Partners, LLC, the owner of the ground floor commercial unit. Loeb's argument is that Attorney Baisley was involved in other litigation between the parties and is a potential witness. Furthermore, according to Loeb, the individuals have divergent interests from

the coop and, therefore, for that reason, need a separate lawyer.

### **Applicable Law**

The party seeking a preliminary injunction 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 its favor (see CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 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 [1<sup>st</sup> 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 AD2d 309 [1<sup>st</sup> 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 AD3d 255 [1<sup>st</sup> Dept 2009]).

### **Discussion**

All the arguments offered by plaintiff in support of his motion for a preliminary injunction ask the court to look beyond the four corners of the operative documents in this case and infuse them with unwritten meanings. Under the proprietary lease, Loeb obtained the shares appurtenant to the "basement unit," unit he owns. He has never,

however, purchased any additional shares or acquired any space on the ground floor.

The alteration agreement did not confer more shares on Loeb, nor did the coop cede any right to the northern display window in that agreement. The agreement merely allows Loeb access to his basement unit in certain way. The "lounge area" that Loeb claims belongs to him is in the basement, not the lobby. The alteration agreement makes this clear because the lounge is near stairs marked "up" and, in any event, the lounge area is shown to be near the elevator and other machinery located in the basement.

Arguments by Loeb, that he acquired rights to northern display window through adverse possession, are not supported by the facts. Although Loeb did not remove a sign in the window for the recording studio, the placement of mannequins in the northern window display only recently began when Loeb leased the basement unit in June 2009 to his present tenant, the "Garment Room." There is correspondence tending to show that as long as go as September 2003, if not November 2004, Loeb knew that the coop disputed his claims that the northern display window was a part of his leasehold. Claims of adverse require the possessor to establish that the character of the possession is hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years tenant (Brand v Prince, 35 NY2d 634, 636 [1974]). At this time, there are insufficient facts in the record to show that Loeb is likely to succeed on a claim for adverse possession.

Since Loeb has not satisfied the first prong of the test for preliminary injunctive relief (likelihood of success on the merits), he is not entitled to the relief sought, as a

matter of law (Doe v. Axelrod, 73 N.Y.2d 748 [1988]). Even were the court to find that Loeb has shown a likelihood of success on the merits, he has not established either of the remaining elements.

"Irreparable injury" requires a showing of substantial prejudice. Arguments by Loeb that his tenant will be deprived of the use of the northern display window does not meet that standard. Loeb contends that he has already had to reduce his tenant's rent because the tenant can no longer use the display window. This is part of his damages claim which is compensable through money damages.

Nor do the equities balance in Loeb's favor. In opposition to Loeb's motion, the coop has made an initial showing that the northern window display is valuable when coupled with the lobby/ground floor commercial space. Together, the space can be rented out for almost \$600,000 a year and the entire coop would benefit. Presently, only Loeb is deriving rental income from the northern display window. The coop has made a preliminary showing that it has acted within the scope of its authority, and in good faith. Therefore, the balance of the equities is in favor of the coop (Trump Plaza Owners, Inc. v. Weitzner, 47 A.D.3d 525 [1 Dept. 2008]).

Having failed to satisfy the threshold requirements for a preliminary injunction, plaintiff's motion for that relief must be, and hereby is, denied.

### **Cross motion to dismiss**

Defendants' cross motion is for the pre-answer dismissal of the claims against the individually named defendants who are shareholders and members of the coop board. They were named by Loeb who claims they have engaged in self-dealing and

have set unreasonably high fines that are targeted to destroying him financially since he is the one using the northern display window.

On a motion to dismiss, the court must consider whether, accepting all of the plaintiff's facts, they support the causes of action asserted (Rovello v. Orofino Realty Co., 40 NY2d 633, 634 [1976]). The court's attention is focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one (Rovello v. Orofino Realty Co., supra). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference (Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1<sup>st</sup> Dept. 1997]).

*4<sup>th</sup> and 5<sup>th</sup> causes of action*

Loeb's facts and argument presuppose that the decision to fine users placing any kind of signage in the ground level windows was made solely to harm him. However, decisions by board members made in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes may not be disturbed and do not expose those individuals to personal liability (Levandusky v. One Fifth Avenue Apartment Corp., 75 NY2d 530 [1990]; 40 West 67<sup>th</sup> Street v. Pullman, 100 NY2d 147 [2003]).

Here, the parties have a genuine dispute about who has the right to use and rent out the northern display window. The window is very valuable and can generate thousands of dollars worth of income to whoever has a right to rent it out. Although plaintiff is upset about the amendment to the house rules, not only has there always been a requirement that signs, etc., be first approved by the board, he has not laid forth any facts that the

amendments were not passed in the ordinary course of the coop's business or that they do not, in fact, protect some valuable right or interest the coop alleges it has. Plaintiff has not pled any facts supporting a claim that the individually named defendants breached their duty to him or acted tortiously. Therefore, the 4<sup>th</sup> and 5<sup>th</sup> tort based causes of action fail to state a claim and they are dismissed.

*6<sup>th</sup> cause of action*

The 6<sup>th</sup> cause of action is for unjust enrichment because the defendants have "taken" his window and have obtained a short term tenant for the space he used to lease to the basement tenant. The principle of unjust enrichment applies to a situation where someone has received the money or goods of another which is inequitable or against good conscience for him or her to retain (Miller v. Schloss, 218 NY 400, 407 [1916]). The remedy for unjust enrichment is restitution, which is essentially returning the money or property unjustly conferred. It is equitable relief based in quasi contract. Here, however, Loeb's claim is that it is clear from the alteration agreement that the northern display window is part of the basement unit because it was enclosed within the alcove he uses to access the basement unit. Since there is a contract, the terms of which are in dispute, there is no need for plaintiff to rely on principles of unjust enrichment to establish his claim. Therefore, defendants' cross motion to dismiss the 6<sup>th</sup> cause of action is granted and that claim is also dismissed.

**Disqualification of defendant's counsel**

Having dismissed the claims against the individual defendants, plaintiff's motion for the disqualification of Attorney Baisley is narrowed. Thus, the court only has to decide whether she has to be disqualified as the attorney for the remaining defendants

who are the coop and the LLC. The court also has to decide whether the LLC and coop should seek separate counsel from each other.

The "advocate witness rule" (DR 5-102 et seq) requires that a lawyer's professional judgment be exercised for his client's benefit, free from "compromising influences and loyalties . . ." (S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 444 [1987]). Disqualification of an attorney or a law firm "may be required only when it is likely that the testimony to be given by the witness is necessary. . ." (S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 445-446).

An attorney witness "ought" to be called "only when it is likely that the testimony to be given by the witness is necessary." Talvy v. American Red Cross in Greater New York, 205 AD2d at 152 (*citing* S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp. 69 N.Y.2d 437 (1987)). Testimony may be relevant and even highly useful but still not strictly "necessary." A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (S&S Hotel Ventures v. 777 S.H. Corp., *supra* at 446).

If there is the possibility an attorney may be called to testify by the other side on a significant issue, disqualification of that attorney is required only if it is apparent that his testimony will be so adverse to the factual assertions or account of events offered on behalf of his own client (Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D.2d 64, 75 [1<sup>st</sup> Dept 2002] *citing* Broadwhite Assocs. v. Truong, 237 A.D.2d 162, 162-163 [1<sup>st</sup> Dept 1997]; S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 446 [1987]).

Just because Attorney Baisley has relevant knowledge or was involved in the transaction at issue does not make her testimony necessary (Talvy v. American Red Cross in Greater New York, *supra* at 152 *citing* S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 445). Furthermore, plaintiff has not made a preliminary showing that her testimony will be substantially adverse to the facts plaintiffs sets forth in the complaint and the statements she has made in her attorney affirmation. Therefore, the motion to disqualify Attorney Baisley is denied at this time without prejudice.

Although the disciplinary rules require that a lawyer's professional judgment be exercised for his client's benefit, free from "compromising influences and loyalties . . ." (DR 5-102 *et seq*; S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 444), a party has the right to be represented by an attorney of his or her own choosing.

Loeb argues that the coop and LLC should not be represented by the same lawyer because their interests are adverse. This is not a decision for Loeb or the court to make. It is up to the defendants if they want to be represented by the same lawyer. Therefore, this branch of plaintiff's motion to disqualify Attorney Baisley for any of these reasons is denied.

### **Conclusion**

Loeb's motion for a preliminary injunction is denied for the reasons stated. His motion for the disqualification of Attorney Baisley is denied as well. The defendants' cross motion is granted; the claims against the individual defendants (4<sup>th</sup> and 5<sup>th</sup>) are severed and dismissed. The 6<sup>th</sup> cause of action against all the defendants is severed

and dismissed as well.

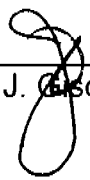
The remaining defendants shall answer the complaint no later than 10 days after being served with notice of entry. Plaintiff's reply, if any, shall be according to the CPLR. A preliminary conference is scheduled for **AUGUST 5, 2010** in part 10. No further notices will be sent.

Any relief that has not been expressly addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 4, 2010

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JUN 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE