

Vassi v Salem House Condominium Bd.

2010 NY Slip Op 31802(U)

July 9, 2010

Sup Ct, NY County

Docket Number: 103647/10

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK **PART 2**
Justice

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STEVE VASSI, PAT PHILLIPS-STRATTA, GEORGE VELLA and RAJARAM SUBRAMANIAN,
Plaintiff,
-against-

Index No. 103647/10
Motion Date 04/09/10
Motion Seq. No. 001
Motion Cal. No.

THE SALEM HOUSE CONDOMINIUM BOARD, T-MOBILE NORTHEAST, LLC, f/k/a OMNIPOINT COMMUNICATIONS, INC.,
Defendants.

-----X

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

NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

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Cross-Motion: [] Yes [] No

Plaintiffs are seeking a preliminary injunction preventing the defendant T-Mobile Northeast, LLC ("T-Mobile") from continuing to install wireless facilities on its rooftop. At the time that this Court issued a temporary restraining order, T-Mobile alleges that it had already expended \$270,000 in construction work and in obtaining all the necessary approvals.

The Court notes that a violation and Stop-Work Order was placed on the premises by the New York City Department of Buildings requiring that all work on the installation of

telecommunications facilities cease until the violation is removed. The Court has no current information as to whether the violation has been removed.

The plaintiffs state that the board negotiated and executed its lease with T-mobile without any notice to condominium owners and tenants. The situation was revealed to the shareholders and occupants at a meeting called by the board. Shortly thereafter, this lawsuit was instituted.

The plaintiffs claim that the board exceeded its authority when it granted a lease to T-Mobile on two primary grounds. First, it claims that the radio emissions that will emanate from the wireless facilities will be dangerous to life, health and safety. In support of this claim, they point to T-Mobile's construction drawings which require signs of caution because the "Radio frequency field at this site may exceed FCC rules for human exposure" and an additional sign that all personnel should have electromagnetic energy awareness training. "Assume all antennas are active ... Never operate antennas without shields during normal operation." Plaintiffs argue that by posting these signs, defendant admits that these facilities are dangerous and harmful.

Plaintiffs' second ground for the injunction is that these facilities interfere with the use and enjoyment of the rooftop by the unit owners who like to sit there and view the New York skyline, entertain, read a book and in general to sit there and relax.

Plaintiffs have annexed an undated and unsigned Declaration, which states at Article 10(a) “No person shall use or enjoy the general common elements except in accordance with the reasonable purposes for which they are intended and without encroaching on the rights of other persons to do so.” Article 7(b) (ii) includes the roof as a common element.

The defendant, T-Mobile, adamantly denies that the transmitters and their ancillary facilities will be dangerous. It points out that the warning signs are required to be posted by the rules and regulations of the Federal Communications Commission (“FCC”). Moreover, it contends that federal law preempts this Court from interfering with the installation and operation of telecommunications facilities. Plaintiffs’ remedy, contends the defendant, is to petition the FCC on the danger that the unit owners, their visitors and employees of the condo are allegedly exposed to. Moreover, they claim that any interference with the use and enjoyment of the roof is not substantial and because there is no danger to people on the roof, there is no basis for the preliminary injunction.

47USC§332(c)(1)(B)(IV) states:

No state or instrumentality thereof may regulate the placement, construction and modification of wireless facilities on the basis of the environmental effects of radio frequency emissions.

Aside from the statute, this Court has seen no basis to assume that the installation of these facilities will cause harm to the users of the roof. By putting in warnings required by the FCC, the defendant has not admitted, as plaintiffs contend, that this facility will cause

harm. Defendant is merely following the rules. Without additional proof of harm, this Court cannot state that proof of harm is clear and convincing.

But even if such harm were provable, injunctive relief would be denied. This Court is in good company in holding that 47 USC§332(c)(b)(IV) thoroughly preempts this Court from granting an injunction (*City of New York v FCC*, 486 US 57, 63-64 [1988]; *Perrin v Bayville Village Board*, 2009 WL 59908, 2009 NY Slip Op. 30460 (u), affd 70 AD3d 835,, 97 NY2d 131; *Cellular Telephone Co. v Town of Oyster Bay*, 166 F3d 490 494, f.n. 2 [2nd Cir 1999]).

This Court is of the opinion that an undated and unsigned Declaration cannot be authority for determining that the use of the roof by the defendant is an unauthorized use. Furthermore, the language used in the Declaration is too vague to stand up. It does not state with enough specificity what type of uses interfere with use and enjoyment. Is it a slight use which does not substantially interfere with plaintiffs' use and enjoyment or does it bar complete or near complete activities on the roof? Such restrictions on the use of land must be supported by clear and convincing evidence (*Perrin v Bayville*, 894 NYS2d 131, 133 (citations omitted); *Greek Peak v Grodner*, 75 NY2d 981, 982 [1990]). Moreover, the bylaws itself at Exhibit H to the Corbett affidavit in support of the motion states that the "board or the managing agent may curtail or relocate any portion of the common elements devoted to storage, recreation or service purposes in the building. The Declaration states that

its terms are enforceable but only to the extent that the bylaws states otherwise. Thus, even if the Declaration were enforceable, by the Declaration's own terms, the bylaws supersede it.

Accordingly, it is

ORDERED that this motion for a preliminary injunction restraining T-Mobile from resuming the installation of its wireless facilities is denied; and it is further

ORDERED that the temporary restraining order is vacated.

Dated: July 9, 2010

Enter:

Flay

Louis B. Flay, J.S.C.
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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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