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

PRESENT: GISCHE HON. JUDITH J. GISCHE Justice

PART 10

INDEX NO. 602966/09

MOTION DATE

MOTION SEQ. NO. 2

MOTION CAL. NO.

10 TOWNS CORP

-v-

BARBARA HUBSHMAN

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

FILED
JUL 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: JULY 7 2010

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

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

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1010 Tenants Corp.,

Plaintiff (s),

-against-

Barbara Hubshman,

Defendant (s).

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DECISION/ORDER
Index No.: 602966-2009
Seq. No.: 002

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**
Def's OSC (prelim injunction) w/BH, DRS affids, BHW afirm, exhs	1
Pltf's x/m (discovery) w/RL affid, exhs	2
Def's reply w/BH affid, BHW affirm, exhs	3
Trans 2/19/10	4
Trans 4/13/10	5

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

This action is for a declaratory judgment and a permanent injunction. Plaintiff 1010 Tenants Corp., ("plaintiff" at times "the coop" or "lessor") is the owner of a residential building located at 1010 Fifth Avenue, New York, New York ("building"), defendant Barbara Hubshman ("Hubshman" sometimes "lessee") is the proprietary lessee of a coop apartment ("penthouse") in that building. Adjacent to her penthouse apartment is a roof terrace that is covered by a lush garden. The coop claims there are leaks in the roof membrane beneath the garden and that these leaks are not only affecting the unit directly below the penthouse, apartment 14F, but also affecting the structural integrity of the building.

The parties have an ongoing dispute about certain provisions of the proprietary lease that pertain to repairs to the terrace, which is part of the roof, and access to Hubshman's apartment to do repairs.

The court now has before it Hubshman's motion for a preliminary injunction, preventing the coop from forcibly entering her apartment to inspect the roof terrace. Hubshman also seeks summary judgment dismissing the coop's complaint in its entirety and severing her counterclaims so they continue, even if the complaint is dismissed. The coop opposes Hubshman's motion and has cross moved for permission to serve an amended complaint to address certain deficiencies in the original complaint; the coop also seeks discovery on an expedited basis.

When this action was commenced, the coop brought a motion for a preliminary injunction. It sought an order requiring Hubshman to allow access to her roof terrace so the coop could remove and replace the membrane that is on the terrace, beneath the garden. The court denied the coop's motion, finding that the coop had not satisfied the three prongs necessary for a preliminary injunction (Order, Gische J., 12/17/09). One aspect of the court's decision dealt with a condition precedent found in paragraph 7 of the proprietary lease. Paragraph 7 of the proprietary lease provides in relevant part as follows:

> "7. If the Lessor is required, by the terms of this lease, to perform any work on the portion of the roof appurtenant to a penthouse it shall submit to the Lessee its proposed contract for the performance of the same. Lessee shall have five (5) business after receipt of such contract within which to notify the Lessor in writing whether or not Lessee elects to perform such work, and if the lessee so elects, the Lessor shall pay to the Lessee, upon the completion of such work, the price for such work set forth

> in its proposed contract for the performance of the same, or such lesser sum as lessee expends for such work. If an emergency requires immediate repairs, then Lessor may immediately perform such work as is necessary to deal with the emergency and thereafter the foregoing provisions shall be applicable to the performance of any additional work in connection with the condition which gave rise to the emergency."

At that time, the coop sought access to remove the garden and replace the roof membrance. Now, however, the issue is slightly different. The coop seeks access to do an "inspection" of the terrace and by correspondence dated January 13, 2010, the coop provided Hubshman with the following notice:

> "We write in regard to the Board's continuing concern with the condition of the building's roof and, specifically, the condition of the roof membrane underlying the garden located on the terrace appurtenant to your penthouse. We intend to have our engineer inspect the roof and conduct probes to obtain additional information regarding the integrity of the roof membrane. We will begin to conduct this testing January 20th. The engineer and workers from Herbert Rose will need to have full access to the roof garden over the following weeks as the process begins with a visual inspection and the leads to carrying out the probes. The board is writing this letter to you as a courtesy since the proprietary lease of all of the corporation shareholders provides for the building and its contractors to have access to carry out repairs."

Hubshman wrote back (January 14, 2010) that there was no emergency, she was entitled to reasonable notice of when the board wanted to inspect the roof terrace and since this was more than just a visual inspection, but actually entailed the insertion of probes into the membrane, the coop had to comply with the requirements of paragraph 7 of the proprietary lease by providing her with a copy of the proposed contract for the inspection. The coop responded by demanding access on the basis

that it has the right to access any apartment to make or facilitate repairs (paragraph 25 of the proprietary lease) and that it does not need Hubshman's consent because it is for the greater good of shareholders. The coop also claims that, as the owner of the building, it has a non-delegable duty to make all structural repairs and, therefore, Hubshman has no right to deny the coop access to the terrace, despite the language in paragraph 7.

The parties disagree about whether plaintiff has any viable claims after the court's decision, that the coop had not shown a likelihood of success the merits because it never (admittedly) sent Hubshman a proposed contract for removal of the membrane on the roof terrace, and related work. Thus, Hubshman seeks summary judgment dismissing the complaint in its entirety, whereas now the coop seeks permission to serve an amended complaint. In the proposed amended complaint, the coop asserts revised claims which incorporate some aspects of the court's prior order and cover a range of potential issues.

Discussion

The proposed amended complaint

Leave to amend and supplement pleadings should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise. CPLR § 3025 (b); Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590 (1st Dept.,1990). This is true, particularly when the denial of the motion would create a greater prejudice than would be granting it. Murray v. City of New York, 43 NY2d 400 (1977). Leave, however, may not be granted where the amended pleading fails to state a cause of action. Stroock & Stroock & Lavan v. Beltramini, supra.

The proposed amended complaint will be allowed by the court, except as specifically set forth below. Defendant has shown no prejudice and the amendment seeks to bring the complaint in line with the requirements of paragraph 7, the coop's arguments that paragraph 25 trumps paragraph 7, and that even if did not perfectly comply with the requirements of either paragraph, an emergency existed that allow(s)(ed) the coop to make necessary repairs to protect the shareholders. Accepting all of plaintiff's facts as true, they support the proposed amended complaint, with one exception.

The coop seeks to assert a "trespass" cause of action. A trespass is an intentional entry onto the land of another without justification or permission (Woodhull v. Riverhead, 46 AD3d 802 [2nd Dept 2007]). The material elements of a trespass cause of action are: 1) intent or recklessness, 2) entry by a person or thing upon land, and 3) in the actual or constructive possession of another (Long Island Gynecological Services, P.C. v. Murphy, 298 A.D.2d 504 [2nd Dept 2002)]. The coop's facts, as presented in any of the papers before the court, do not support a claim for trespass and it will not be allowed as it has no merit (Stroock & Stroock & Lavan v. Beltramini, supra.).

Summary Judgment

Having granted the coop's cross motion to serve an amended complaint, Hubshman's motion for summary judgment is premature as there can be no summary judgment until issue has been joined (CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 AD2d 508 [1st Dept. 1982]).

Expedited discovery

The coop argues that expedited discovery is necessary The request is for "very limited" discovery with respect to the present condition of the roof garden, as compared to its conditions when Hubshman became a proprietary lessee. The coop believes that Hubshman has added foliage and trees to the roof, in violation of paragraph 7. To date, the coop has made no written demand for documents from the defendant and to the extent that the coop seeks a visual inspection, that request is subsumed within the overarching dispute of whether the coop should have immediate access to Hubshman's roof terrace, i.e. her motion for preliminary injunction, addressed directly below. A preliminary conference was already held and deadlines were set in that preliminary conference order for discovery demands. The coop has not persuaded the court that the deadlines already set for discovery now need to be changed.

Preliminary Injunction

The coop has already visually inspected the defendant's roof top terrace and this was an issue raised in Hubshman's prior motion for a preliminary injunction. Furthermore, in the proposed amended complaint (¶¶ 29, 32, 36), the coop acknowledges that it has had a number of persons visibly inspect and observe the conditions of the penthouse apartment terrace. Reference is also made in the July 8, 2009 letter from the architect to the coop that flood testing had been conducted of a patched area on the terrace. What the coop now wants to do is actually bore holes into the roof terrace membrane to insert probes that will apparently detect moisture. According to Hubshman's own engineer, regardless of whether this testing is done in

the winter or in warmer weather, the penetration of the membrane could, itself, jeopardize the membrane, effectively creating a condition where there is none.

Paragraph 25 of the proprietary lease gives the lessor and its agents and workers permission to "visit, examine, or enter [an] apartment . . .at any reasonable hour of the day upon notice, or at any time and without notice in case of [an] emergency to make or facilitate repairs in any part of the building . . ." Paragraph 7 reserves certain rights to Hubshman as the lessee of an apartment with an appurtenant roof terrace. The two provisions are not inconsistent or discordant, but easily harmonized.

Pursuant to paragraph 7, if the lessor is required, by the terms of this lease, to perform any work on the portion of the roof appurtenant to a penthouse it must provide the lessee with its proposed contract for the work to be performed. The lessee then has five (5) business after receiving the contract to decide whether s/he elects to hire his or her own person to perform such work. The coop's argument, that this makes Hubshman, as they phrase it, the "roof czar," is misplaced. The lessor is still ultimately responsible for making sure the building is maintained in a reasonably safe condition and code compliant as these are nondelegable duties of ownership. However, contractually, the coop has allowed Hubshman -- a shareholder in the corporation that owns the building – to have an active role in deciding who performs "any work" done on the roof terrace appurtenant to the penthouse, a procedure that must be followed, unless there is an "emergency" that requires "immediate repairs." Therefore, in order to perform the invasive testing – "work" -- that the coop claims is needed on the roof terrace, the board must comply with the requirements of paragraph 7.

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 [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 AD2d 309 [1st Dept 1990]).

Hubshman has shown a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in her favor. The board must comply with the requirements of paragraph 7, which is to provide her with a proposed contract for the invasive testing they seek to perform. Therefore, defendant's motion for a preliminary injunction is granted and will remain in place until such time as the coop provides Hubshman with a proposed contract for the testing it wants to do of the roof terrace. Given the contentious nature of this case, that proposal shall be served on Hubshman's attorneys as well as Hubshman herself.

Conclusion

Defendant Hubshman's motion for a preliminary injunction is granted in the manner provided herein. Hubshman's motion for summary judgment and severance of the counterclaim is, however, denied as premature.

Plaintiff's cross motion for permission to serve an amended complaint is granted, except for the trespass claim. An amended complaint as allowed by the court and in conformance with this order shall be served within ten (10) days hereof. Defendant shall answer and plaintiff may reply within the time limitations set forth in the CPLR. Plaintiff's cross motion for expedited discovery is denied at this time.

Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
July 7, 2010

So Ordered:

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