

**Valentini v 326 E. 30th St. Owners Inc.**

2010 NY Slip Op 33723(U)

December 27, 2010

Sup Ct, NY County

Docket Number: 103711/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

KIM VALENTINI,

INDEX NO. 103711/10

Plaintiff,

MOTION DATE

- against-

MOTION SEQ. NO. 001

326 EAST 30<sup>TH</sup> STREET OWNERS INC.,  
TAV CLAVIN, TOM BIRNE, CLAUDIA  
WHITEHEAD, CAROL WINER, SUSAN CLAVIN,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 2, were read on this motion by plaintiff for declaratory judgments and injunctive relief.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	

Cross-Motion: Yes  No

NEW YORK COUNTY CLERK'S OFFICE

Plaintiff Kim Valentini ("plaintiff") brings this action against defendants 326 East 30<sup>th</sup> Street Owners, Inc., Tav Clavin, Tom Birne, Claudia Whitehead, Carol Winer, and Susan Clavin ("defendants") for, *inter alia*, declaratory judgment, preliminary injunctive relief, breach of warranty of habitability, and property damage based on structural damage to the roof and adjacent area of her apartment. The parties have not begun discovery. Defendants have responded in opposition to the motion.

BACKGROUND

Plaintiff is the owner of apartment unit # four ("apartment") in 326 East 30<sup>th</sup> Street ("the building"), a cooperative building, and is a shareholder of the building ownership corporation. Plaintiff bought her apartment in 2003. Plaintiff's apartment comprises the fourth and fifth floors, the top floors of the building. In 2006, a fire broke out in an adjacent and/or adjoining building,

causing structural damage to the building. Repairs were done to the building after the fire, but no structural repairs or constructions were done on the roof. Plaintiff alleges that as a result of the damage to the building and roof from the fire, water flooded her apartment, causing damage like cracked walls and the buildup of mold and mildew. As a result of this damage, plaintiff sought other shelter at her own cost. Plaintiff claims she has requested that defendants, members of the Board of Directors of the building, repair the roof, or that she be granted written consent to have a general contractor repair the roof, but her requests have been unreasonably denied. (See plaintiff's aff'd ¶¶ 8-12).

Plaintiff commenced an action by summons and complaint against the defendants on March 22, 2010, for, *inter alia*, declaratory judgment, preliminary injunctive relief, breach of warranty of habitability, and property damage, and is seeking a judgment in the amount of approximately \$1,000,000. Plaintiff requested a judgment declaring and directing defendants to: (1) grant plaintiff written consent to conduct structural and other construction and repair to the roof of the premises at defendants' full cost; (2) sustain all costs of any and all structural repairs to the roof and adjacent area, pursuant to the By-Laws, Proprietary Lease and its amendments regarding apartment unit # four; (3) abstain from collecting any and all maintenance fees from plaintiff, until such time that the subject premises and defective roof existing there are properly structurally repaired. (See Complaint ¶¶ 65, First and Second Causes of Action).

In the complaint, plaintiff also requested *inter alia* that the defendants be preliminary and permanently enjoined from: (1) unreasonably, capriciously and arbitrarily refusing to grant plaintiff written consent to repair the structural defects of the roof and adjacent area; (2) withholding permission for the plaintiff and her general contractor to gain access to the roof and adjacent area, to conduct structural repairs and construction work; and (3) collecting any and all maintenance fees from the plaintiff until such time that the structural defects of the subject roof

and adjacent area at the premises are remedied. (Id.) In doing so, plaintiff relies upon provisions of the By-Laws and the Proprietary Lease ("the Lease") and its amendments.

Plaintiff now moves, prior to discovery, by order to show cause, dated May 5, 2010, seeking the same declaratory and injunctive relief as in the summons and complaint.

#### DISCUSSION

In support of her motion plaintiff submits, *inter alia*, plaintiff's affidavit, affirmation of counsel, affidavit of plaintiff's general contractor, the building By-Laws, and the complaint. In opposition, defendants submit, *inter alia*, affirmation of counsel, affidavit of Tav Clavin, affidavit of an engineer who inspected the apartment, the Proprietary Lease and its amendments, and a sample alteration agreement.

Plaintiff contends that defendants should sustain all costs of any structural repairs to the roof because pursuant to the amendments to the Lease, defendants are responsible for structural maintenance (see order to show cause, Exhibit B ¶ 4). Plaintiff is seeking to have a general contractor repair the roof, and alleges that the defendants have arbitrarily, unreasonably, and capriciously withheld consent in violation of Article 21 (a) of the Lease which states that in regards to alterations of the unit, "consent shall not be unreasonably withheld" (see affirmation in opposition, Exhibit D at 12). Plaintiff submits that she has shown a likelihood of success on the merits, has no remedy at law, and is irreparably harmed because she has not been able to live in her apartment, the value of her apartment has diminished, and her physical and mental health has been affected. Additionally, she contends the balance of equities are in her favor because she has been deprived of the use and enjoyment of her property.

Defendants, in opposition contend, *inter alia*, that they have not unreasonably or capriciously withheld consent for plaintiff to conduct repairs to the roof. They maintain that they have not granted written consent because plaintiff has failed to fill out an alteration agreement

and grant proper assurances about the construction in accordance with Article 21 (a) of the Lease, which allows the Lessor to impose rules and regulations with regards to alterations. Defendants assert that they should not be directed to pay for the costs of the repairs because there are issues of fact as to the cause of the leaks in plaintiff's apartment, an issue which relates directly to who is liable for costs under the Lease, and which cannot be determined without further discovery. Specifically, defendants point to a report from an engineer that inspected the premises on February 25, 2009, and found that unfinished construction initiated by the plaintiff was causing the water leakage (see Affirmation in Opposition, Exhibit B, ¶ 5 and ¶ 6). Defendants also assert that pursuant to the Lease, plaintiff is required to pay maintenance fees, despite any offsets or claims she has against the defendants.

#### A. Preliminary Injunction

A party seeking a preliminary injunction must demonstrate 1) a probability of success on the merits; 2) danger of irreparable injury; and 3) a balance of equities in its favor (*see Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 [2005]; *Jones v Park Front Apartments, LLC*, 73 AD3d 612 [1st Dept 2010]). Plaintiff has not met this standard.

Plaintiff has failed to show irreparable harm to be granted a preliminary injunction. If plaintiff prevails in the action, monetary compensation for the damage to the property, as well as for any costs incurred due to loss of possession of her property are ascertainable. Under New York law, "monetary harm which can be compensated by damages does not constitute irreparable injury" (*J.O.M. Corp. v Department of Health*, 173 AD2d 153, 154 [1st Dept 1991]).

Plaintiff has also failed to demonstrate a likelihood of success on her claims. Plaintiff has not met her burden of proof to show that the defendants have arbitrarily and capriciously withheld consent for repairs. Article 21 (a) of the Lease allows the defendants to impose restrictions to alterations conducted by the plaintiff. Defendants have provided

legitimate reasons for requiring an alteration agreement from building occupants, like plaintiff, prior to consenting to construction or alterations of any units, which requests, among other things, insurance, additional insured status, a licensed contractor, and proper permits for work to be performed (see affirmation in opposition, Exhibit A, ¶ 16). This is a standard procedure for construction in the building, and is also a procedure that plaintiff herself has followed for past repairs, though plaintiff refuses to do so now. Defendants are entitled to receive reasonable consideration, contemplation or assurances before granting written consent to plaintiff to begin repairs, and doing so is not unreasonable, arbitrary, or capricious.

Additionally, the balance of the equities do not weigh in favor of granting preliminary injunction in favor for the plaintiff, particularly regarding plaintiff not paying maintenance fees pending the outcome of the case. Withholding of maintenance fees for 34% of the building has a severe financial impact on the continued viability of the building because the maintenance fees are used to pay the mortgage and taxes.

Lastly, failing to prevail on the preliminary injunction and declaratory judgment, pursuant to the Lease plaintiff is required to pay all maintenance fees, despite any offset or claim against the Lessor that may arise (see Affirmation in Opposition, ¶ 26). Accordingly, plaintiff's motion for a preliminary injunction from paying her maintenance fees pending repairs is denied<sup>1</sup>.

#### B. Declaratory Judgment

Pursuant to CPLR § 3001, if there's a justiciable controversy, the court may render a declaratory judgment which has the effect of a final judgment as to the rights and legal relationship of the parties (see CPLR § 3001).

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<sup>1</sup>This court granted plaintiff's motion (motion sequence 002) brought by order to show cause seeking to consolidate this action with a summary non payment proceeding in Civil Court, New York County, commenced by the defendants, entitled *326 East 30<sup>th</sup> Street Owners, Inc. v Kim Valentini*, under Index No. L & T 65645/10.

The Court finds that the motion for declaratory relief directing defendants to sustain all costs for repairs must be stayed pending a determination of liability. As per the amendments to the Lease, the plaintiff is required to conduct regular maintenance of the apartment and the defendants are required to conduct structural maintenance, however, the plaintiff shall borne the cost of repairs if any damage to the structure is caused by the plaintiff (see order to show cause, Exhibit B ¶¶ 4). There are questions of fact pertaining to the source of the leak and the cause of damage to plaintiff's apartment, and there has been no discovery, which is necessary for resolving the controversy.

The Court also finds that the defendants are not unreasonably withholding consent to plaintiff to conduct structural repairs to the roof. Article 21 (a) of the Lease allows the defendants to impose restrictions to alterations conducted by the plaintiff. Defendants have provided legitimate reasons for requiring an alteration agreement from building occupants and are not arbitrarily requiring assurances from the plaintiff before work is commenced.

The declaratory judgment ordering defendants to abstain from collecting maintenance must also be denied because plaintiff is required to pay maintenance under the Lease, even if she has a claim against the defendants.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for preliminary injunction is denied; and it is further,

ORDERED that plaintiff's motion for a declaratory judgment is denied except that defendants motion directing defendants to sustain all costs of any and all structural repairs to the roof and adjacent area is stayed pending further discovery and the resolution of the case; and it is further,

ORDERED that plaintiff's motion for permanent injunction is stayed pending further discovery; and it is further,

ORDERED that the parties are directed to appear at a preliminary conference on March 2, 2011, at 11:00 a.m., in Part 7, at 80 Centre Street; and it is further,

ORDERED that defendants shall serve a copy of this Order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Enter:

*Paul Wooten*  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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