

Ithilien Realty Corp. v 180 Ludlow Dev. LLC
2010 NY Slip Op 34001(U)
July 30, 2010
Supreme Court, New York County
Docket Number: 117013/09
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ITHILIEEN REALTY CORP.,
Plaintiff,

- v -

180 LUDLOW DEVELOPMENT LLC, and
PRIME ASSET FUNDING, LLC,
Defendants.

Index No.: 117013/09
Motion Date: 06/22/10
Motion Seq. No.: 01
Motion Cal. No.: OSC

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The following papers, numbered 1 to ___ were read on this motion for preliminary injunction.

MOTION SUPPORT OFFICE
NEW YORK COUNTY CLERK

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

PAPERS NUMBERED	
1	
2	
3	

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant the preliminary injunction to stay/toll the cure period of defendants' October 20, 2008 Notice to Cure served pursuant to Article 8 of the parties' Zoning Lot Development and Easement Agreement dated November 14, 2007.

The court finds that the plaintiff will suffer irreparable harm if the defendant is permitted to permanently alter plaintiff's building by installing external ventilation shafts with connections into rent-stabilized premises in plaintiff's building along with blowers and fans to direct airflow that would

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):

be placed in and about plaintiff's premises.

Contrary to defendants' arguments, plaintiff has demonstrated likelihood of success on the merits based upon the terms of the parties' Agreement. Article 8 of the Agreement provides that the plaintiff shall cure any "violation," as defined in Article 1, Section (e), on its premises at its expense or the owner can do so after 15-days notice. However, this provision does not permit either side to unilaterally determine that there is a potential "violation" on plaintiff's property and there is no requirement in the Agreement that the plaintiff cure a condition that defendants can only surmise constitutes a violation. There is no allegation that any administrative agency has issued any determination that the cantilever as constructed violates the Zoning Resolution or any building code or other ordinance. This court concurs with plaintiff that the definition of "Violation" under the Agreement refers only to a violation issued by a governmental agency, since only that interpretation gives meaning to Article 8(a), which states that the Owner shall "cure, remove and discharge of record" such violation.

Moreover, the supposed "violation" on plaintiff's property is a direct result of the defendants' construction work on their own building and there is no requirement in the Agreement that the plaintiff cure a condition caused by defendants. There is no allegation that plaintiff's premises violated any building code

in its as-built condition and the violation is caused by the method and design of defendants' building.

Furthermore, Article 11 of the Agreement fails to support defendants' arguments as the "Compliance Work" therein defined is limited to six categories of easements granted by the plaintiff therein. The very terms of Article 11 tend to indicate that the parties did not contemplate, except as specifically enumerated therein, any permanent change to the plaintiff's building as 11 (b) provides in pertinent part that "[a]ll of the easement rights set forth in this Section 11 shall be exercised . . . (iii) so that on completion of any work, the area of any such work is restored to its former condition (insofar as possible)."

The work the defendants' seek to perform here would permanently alter the ventilation in the apartments in plaintiff's premise and place ventilation units within and on top of plaintiff's building. On its face the Agreement does not provide for such work on the terms argued by the defendants. Therefore the plaintiff at this stage of the litigation has established a likelihood of success on the merits of its claims.

The equities also weigh in favor of the plaintiff as the plaintiff's premise is an occupied residential dwelling and the defendants' premises are still under construction. Defendants present no evidence that the building is currently being marketed

or even near completion or that any application for a certificate of occupancy is pending.

As of the date of this Order, plaintiff and defendants have made supplemental submissions with respect to the setting of an undertaking, and upon such papers, the court sets the undertaking as ordered below.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is GRANTED on condition that plaintiff shall file an undertaking with the clerk of the court in the amount of _____ dollars and no cents (\$ _____) as security that, if it is finally determined that plaintiff is not entitled to an injunction, will pay to defendant all damages and costs which may be sustained by reason of the injunction; and it is further

ORDERED that the stay of the running of cure period contained in the Stipulation of January 29, 2010 entered into by the attorneys for the parties in connection with Order to Show Cause dated January 5, 2010 (Heitler, J.) pending the hearing of this matter shall continue until service and filing of a copy of this order with notice the entry and of the undertaking.

Dated: July 30, 2010

ENTER:

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NEW YORK

Debra A. James
J.S.C.
HON. DEBRA A. JAMES