

Matter of Nielsen v 35-21 79th St. Tenants Corp.

2011 NY Slip Op 30073(U)

January 13, 2011

Supreme Court, Queens County

Docket Number: 24931/10

Judge: Allan B. Weiss

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

	X	INDEX NO. 24931/10
In the Matter of the Petition of OTTO NIELSEN and other shareholders similarly situated of 35-21 79 th St. Tenants Corp.,		MOTION SEQ. NO. 1
Petitioner,		BY: WEISS, J.
- against -		DATED: 1/13/11
35-21 79 th St. Tenants Corp.		
Respondent.		
	X	

In this matter brought as a special proceeding, petitioner seeks a preliminary injunction enjoining respondent from implementing and enforcing a new sublet policy pending the determination of the proceeding.

The court will first address a threshold issue. The proper procedural vehicle for the declaratory and injunctive relief and money damages sought by petitioner in this matter is an action, not a special proceeding. (CPLR 103.) This defect in form is not fatal, however, since the court is authorized by CPLR 103 to convert the special proceeding to an action. (*See, Esformes v Brinn*, 52 AD3d 459 [2008].) Accordingly, the petition filed and served herein is deemed a complaint in an action and the case shall continue as an action.

The parties herein shall be referred to as plaintiff and defendant rather than petitioner and

respondent. Defendant shall serve an answer to the complaint within 20 days of service of a copy of the order to be entered hereon with notice of entry. The caption shall be amended to reflect the conversion of the special proceeding to an action and the change in the parties' titles. The instant application for a preliminary injunction is deemed to have been properly made as a motion in an action.

Plaintiff Otto Nielsen is the proprietary lessee and owner of the shares allocated to three apartments in the building owned by defendant 35-21 79th St. Tenants Corp. (Tenants Corp.), a cooperative corporation. Currently, two of Nielsen's units are each sublet for a term of two years, with one sublease that commenced on November 1, 2009 scheduled to expire on October 31, 2011, and the other sublease running from February 1, 2010 until January 31, 2012. Plaintiff states in his affidavit, and defendant has not refuted, that he obtained approval from defendant for these subleases for apartments 2A and 1P under Tenants Corp.'s then existing sublet policy.

The instant action arises out of a new sublease policy instituted by defendant. The policy was passed by the board of directors of Tenants Corp. on May 30, 2010, effective June 1, 2010. Among other conditions imposed, the new policy contains limitations on the term of each sublet, restricts the right to sublet within a five year period, requires the payment of sublet fees and/or surcharges, and imposes penalties for failing to comply with the rules. By notice dated June 9, 2010, defendant advised the shareholders that, pursuant to the adopted policy, a new sublease application and new board approval would be required for

all existing sublets. Plaintiff instituted this action and seeks preliminary injunctive relief, contending that the new sublet policy constitutes an amendment to Tenants Corp.'s by-laws and proprietary lease and was promulgated without the authorization of the shareholders that is required for an amendment to either document. Plaintiff also asserts that the enforcement of the new sublet policy with regard to existing subleases is in contravention of the prior approval he received from defendant and interferes with his contractual relations with his subtenants.

To prevail on an application for a preliminary injunction, the moving party has the burden of demonstrating a likelihood of success on the merits, irreparable injury in the absence of a preliminary injunction, and a balancing of the equities in movant's favor. (*See, Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Copart of Conn., Inc. v Long Is. Auto Realty, LLC*, 42 AD3d 420 [2007].) To the extent plaintiff attacks the validity of defendant's adoption of a new sublet policy by vote of the board of directors, plaintiff has not shown a likelihood of success on the merits. The new policy does not represent a change in the form of the proprietary lease or an amendment to the by-laws. Rather, the policy was promulgated pursuant to the broad authority given to the board of directors under paragraph 15 of the proprietary lease and article V, section 5 of the by-laws regarding the imposition of conditions and fees on any consent to subletting. Insofar as is pertinent here, paragraph 15 of the proprietary lease provides that a lessee shall not sublet the apartment or renew or extend a previously authorized sublease without the consent

of the board of directors. Paragraph 15 further states that any consent “may be subject to such conditions as the [d]irectors . . . may impose. There shall be no limitation on the right of the [d]irectors . . . to grant or withhold consent, for any reason or for no reason, to a subletting.” This language, read together with the cited by-law’s authorization for the board to fix certain fees “and such other conditions as it may determine” in connection with a sublet of a proprietary lease, supports defendant’s right to promulgate its new sublease policy. (*See, Jones v Southgate Owners Corp.*, 289 AD2d 73 [2001]; *McCabe v Hoffman*, 138 AD2d 287 [1998]; *Zuckerman v 33072 Owners Corp.*, 97 AD2d 736 [1983].) Plaintiff’s reliance on *DeSoignies v Cornasek House Tenants’ Corp.* (21 AD3d 715 [2005]) and the cases cited therein is misplaced inasmuch as the subletting provision in the proprietary lease quoted in that case did not include a term affording the board of directors the authority to subject any consent to sublet to such conditions as the directors may impose. Thus, plaintiff is not entitled to a preliminary injunction restraining and enjoining defendant from implementing and enforcing the new sublet policy in its entirety.

Plaintiff, however, has made the necessary showing to entitle him to more limited injunctive relief with regard to the two existing subleases. (*See Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2009].) The only proof presented on the issue indicates plaintiff entered into these subleases with the consent of the board prior to the adoption of the new policy. Plaintiff contracted with the sublessees in reliance upon the policy then in effect and the new policy could interfere with these agreements. The purpose of a

preliminary injunction is to maintain the status quo. (*See, Masjid Usman, Inc.*, 68 AD3d at 942; *Weinreb Mgt., LLC. v KBD Mgt., Inc.*, 22 AD3d 571 [2005]; *Rattner & Assocs. v Sears, Roebuck & Co.*, 294 AD2d 346 [2002].) The status quo here would be disturbed if plaintiff's current subleases were subjected to the conditions imposed by the new policy.

Accordingly, the motion is granted only to the extent that, pending the determination of this action, defendant is enjoined from implementing and/or enforcing the sublease policy adopted by its board of directors on May 30, 2010 against plaintiff's existing sublets of apartments 2A and 1P. The foregoing relief is conditioned upon plaintiff providing an undertaking in accordance with CPLR 6312, in an amount to be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof and recommendations as to the amount of the undertaking.

Settle order.

Dated:

J.S.C.