

**106 & 108 Charles LLC v Hohn**

2011 NY Slip Op 31641(U)

June 15, 2011

Supreme Court, New York County

Docket Number: 103775/11

Judge: Eileen A. Rakower

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

PRESENT: Rakower  
Justice

PART 15

106 or 108 CHARLES ST  
- v -  
GABRIELA HORN

INDEX NO. 103775/4  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

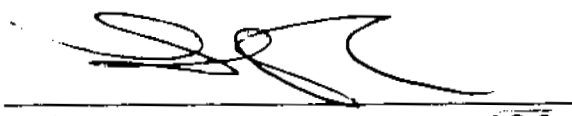
**FILED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

JUN 20 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6-16-11



**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
106 & 108 CHARLES LLC,

Index No.  
103775/11

Plaintiffs,

- against -

GABRIELA HOHN,

Defendant.

-----X  
HON. EILEEN A. RAKOWER

**FILED**  
JUN 20 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

**DECISION  
and ORDER**

Mot. Seq.  
001

Plaintiff is the owner of 106 Charles Street in New York County ("the Building"). Defendant is the rent stabilized tenant of Apartment 3 ("the Apartment") of the Building. Presently before the court is Plaintiff's motion for an order:

- (1) enjoining and restraining Defendant, her contractors, or any other persons from performing any construction work, alterations, renovation and demolition to the Apartment;
- (2) enjoining Defendant from using the Apartment as a psychologist's office, medical practice office or for any other use other than a residential apartment; and
- (3) directing Defendant to restore the Apartment to its original state.

Plaintiff submits the affidavit of property manager Terence Vogenberger, the affidavit of superintendent Carmen Cordova, and an attorney's affirmation. Plaintiff submits a copy of the written lease agreement between Defendant and Plaintiff's successor in interest. The lease provides, *inter alia*, as follows:

**10. CHANGES AND ALTERATIONS TO APARTMENT**

You cannot build in, add to, change or alter, the

Apartment in any way ... without getting Owner's written consent before You do anything...."

Both Vogenberger and Cordova state in their affidavits that, after observing "significant foot traffic to and from the subject apartment," they discovered that Defendant "had erected an illegal partition in her apartment and had transformed her residential apartment into a commercial office." Vogenberger and Cordova further state that they also discovered that Defendant advertised that she had a psychologist practice with her office at the Premises. Plaintiff annexes a printout from Defendant's website, which advertises her psychological practice and lists the subject Apartment as her address. Plaintiff also submits a copy of her business card, which also lists the Apartment as her address.

Defendant submits her affidavit and an attorney's affirmation in opposition to the motion. Defendant states that, in 2003, she caused a partition to be erected in the Apartment after receiving permission from Frank Vinticino, the prior landlord of the Building. Defendant further states that Plaintiff had an opportunity to observe the partition prior to purchasing the building in 2005, and that "Plaintiff's employees and contractors have been in the Apartment several times for inspections or repairs without complaint or objection." She also submits a September 10, 2007 Notice to Tenant of MCI form from DHCR, wherein DHCR state that "[t]he owner's application states that there are 2 rooms in your apartment." Defendant notes that the subject Apartment is a studio, and that in reporting that Defendant had two rooms, Plaintiff was clearly aware of the partition.

As for her business practice, Defendant states that she "specialize[s] in treating breast cancer patients and other cancer survivors, and conduct[s] [her] clinical hours and professional work activities at various sites in the community." Such sites include Beth Israel Medical Center, where she also lectures and develops seminars for cancer patients and survivors. She also developed a support program and provides services for breast cancer patients and survivors at Gilda's Club, Young Survivor's Coalition, and SHARE. Defendant annexes copies of fliers for all of these programs, which evidence her participation therein. Defendant states that she will occasionally have sessions for breast cancer patients and survivors at her home in the Apartment. She explains that she does this because "some patients are reluctant to return to Beth Israel Medical Center where they received treatment." She states that she does not use more than 25% of the floor area in the Apartment to treat her patients, and that she

does not have any employees. She claims that her use of the Apartment in her practice constitutes a permissible home occupation under New York City Zoning Resolution (“ZR”) 12-10.

It is well settled that “a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party” (*1234 Broadway LLC v. West Side SRO Law Project*, 2011 NY Slip Op 3980, \*4 [1st Dept. 2011]) (citations omitted). It is equally axiomatic that “the purpose of a preliminary injunction is to maintain the status quo pending a hearing on the merits,” and not to “determine the parties’ ultimate rights” (*360 W. 11<sup>th</sup> LLC v. ACG Credit Co. II, LLC*, 2007 NY Slip Op 9939 [1st Dept. 2007]).

Here, on the record before the court, Plaintiff has not demonstrated its entitlement to a preliminary injunction. As to likelihood of ultimate success on the merits, Defendant states in her affidavit that she obtained the permission of the prior landlord to erect the partition in 2003 - two years prior to Plaintiff’s purchase of the premises. She further states that Plaintiff’s employees and contractors have been in the subject Apartment pursuant to a pre-closing inspection, and on several subsequent occasions for inspections and repairs, never raising any objection to the wall. The First Department has held that a landlord waives its right to enforce a lease provision prohibiting alterations without its prior written consent where the landlord consented to the alterations (*see Haberman v. Hawkins*, 170 A.D.2d 377 [1st Dept. 1991]) (*see also Restoration Realty Corp. v. Robero*, 87 A.D.2d 301, 305 [1st Dept. 1982] (“[S]ince [landlord company’s president] and his predecessors were unquestionably aware of the extensive renovations being performed on the premises, plaintiff cannot now complain about defendant’s neglecting to procure a building permit for the alterations or her not receiving the advance written permission of the former landlord. The acceptance of rent throughout this period and the failure by the owners to take any action constitutes a clear waiver.”)). Further, “a contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement” (*Madison Ave. Leasehold, LLC v. Madison Bentley Assoc., LLC*, 2006 NY Slip Op 1747, \*4 [1st Dept. 2006]) (citation omitted).

Nor has Plaintiff demonstrated irreparable injury. The partition has been in Defendant’s Apartment since 2003, and there are no records of any violations with

respect to the subject Apartment. Nor does the court find that a balancing of the equities favors Plaintiff. Indeed, inasmuch as there is no evidence that Defendant is engaging in any ongoing construction or alteration in the Apartment, Plaintiff's maintenance of the partition in the Apartment has been the *status quo* for approximately eight years (*see Newmann v. Mapama Corp.*, 96 A.D.2d 793, 794 [1st Dept. 1983]) ("In view of the sharply disputed factual issues as to whether or not such changes, alterations and additions as tenant may have made were done with the consent, express or implied, of this landlord and its predecessor, and in the absence of any showing of imminent danger or irreparable harm, it was error to alter the *status quo* by the grant of the injunction.").

With respect to Plaintiff's use of the Apartment as a psychologist's office, ZR 12-10 provides:

Home Occupation

(a) A "home occupation" is an accessory use which:

(1) is clearly incidental to or secondary to the residential use of a dwelling unit or rooming unit;

(2) is carried on within a dwelling unit, rooming unit, or accessory building by one or more occupants of such dwelling unit or rooming unit, except that, in connection with the practice of a profession, one person not residing in such dwelling unit or rooming unit may be employed; and

(3) occupies not more than 25 percent of the total floor area of such dwelling unit or rooming unit and in no event more than 500 square feet of floor area.

(c) Home occupations include, but are not limited to:

fine arts studios

professional offices

teaching of not more than four pupils simultaneously, or, in the case of musical instruction, of not more than a single pupil at a time.

“Section 12-10 of the zoning resolution permits the practice of certain ‘home occupations’ in a residential apartment, among which are included medicine, dentistry and *psychology*, which would not alter the otherwise residential nature of the apartment” (*Abright v. Shapiro*, 92 A.D.2d 452, 453 [1st Dept. 1983]) (emphasis added).

Defendant states in her affidavit that she resides in the Apartment (this is undisputed by Plaintiff), that she does not have any employees, and that she does not use more than 25% of the floor area in her Apartment to treat her patients. Plaintiff does not submit any evidence that Defendant is using the Apartment in a manner that is not permitted by the ZR, or is otherwise unlawful.

Wherefore it is hereby

ORDERED that Plaintiff’s motion for a preliminary injunction is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: June 15, 2011

  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
JUN 20 2011  
NEW YORK  
COUNTY CLERK'S OFFICE