

**Pavarini McGovern, LLC v Artisan Lofts Dev.
Owner LLC**

2012 NY Slip Op 33881(U)

March 22, 2012

Supreme Court, New York County

Docket Number: 110289/11

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
PAVARINI MCGOVERN, LLC,

Plaintiff,

-against-

Index No. 110289/11

ARTISAN LOFTS DEVELOPMENT OWNER LLC,

Defendant.

-----X
CAROL R. EDMED, J.S.C.:

Plaintiff Pavarini McGovern. LLC (Pavarini) moves, pursuant to CPLR 6301, for a preliminary injunction: (1) requiring defendant Artisan Lofts Development Owner LLC (Artisan) to comply with the February 28, 2011 resolution of the dispute resolution board (DRB) established by the parties, which required Artisan to pay \$550,000 to Pavarini; (2) compelling continued recourse to the DRB for the remaining contractual disputes between the parties; and (3) granting attorney's fees to Pavarini. Artisan is the owner of a residential condominium building located at 157 Chambers Street in Manhattan. Pavarini was the construction manager for the building. The DRB's resolution arose out of an agreement that tied Artisan's obligation to make payments to Pavarini's reaching certain temporary certificate of occupancy milestones.

The Construction Management Agreement (CMA) between the parties established the DRB, consisting of one person, "to provide specialized expertise in technical areas and in administration of construction contracts to [the parties] in resolving disputes in a timely and equitable manner." CMA Exh. E § 1.3, attached to Frederick Aff. (9/6/11) as Exh. A. Section 4.3 of the CMA provides

that written resolutions of the DRB "shall be binding upon the Parties for the duration of the Project through completion and Final Payment," and that, after a "cooling off period" of 60 days "after completion of the Project and issuance of Final Payment, either Party may challenge the results of any DRB resolution through litigation."

Section 4.4 of the CMA provides that

[i]f either party fails to act in accordance with a DRB resolution, the Parties agree that such failure would cause irreparable harm to the other party, for which there would be no adequate remedy at law, and the resolution of the DRB shall be enforceable through injunctive relief. In the event such action is necessary, the prevailing party shall be entitled to reasonable attorneys' fees incurred in obtaining the injunctive relief.

In a resolution, dated August 10, 2011, the DRB stated that

the [Building] has been completed and occupied for many months, but final payment has not been made because of the pendency of disputes and other related reasons. [U]nder a literal reading of the contract documents there appears to be a practical impossibility of proceeding to court because a Resolution of the DRB is a condition precedent to litigation, but the parties cannot agree upon the conditions precedent to final payment, and litigation cannot be commenced until the issuance of final payment, but final payment cannot be made, notwithstanding the issuance of the prior DRB Resolution.

...
The DRB therefore recommends that pending disputes be taken to court and finally resolved ... without fulfilling the seemingly impossible conditions precedent, namely the making of final payment.

Frederick Aff. (9/6/11), Exh. F, at 2.

As an initial matter, the CMA provision, that the parties may enforce DRB resolutions by injunctive relief, does not require this court to grant preliminary relief prior to a final determination on the merits. See *Waxman Real Estate LLC v Sacks*, 32 Misc 3d

1241(A), 2011 Slip Op 51667(U) (Sup Ct, NY County 2011).

The complaint seeks a permanent injunction, and a declaratory judgment, that, together, would provide relief identical to the provisional relief that plaintiff seeks. The purpose of a preliminary injunction, however, is to preserve the status quo and to prevent any action that would render a final judgment ineffectual. *Perpignan v Persaud*, 91 AD3d 622 (2d Dept 2012).

Absent extraordinary circumstances, a mandatory preliminary injunction, such as plaintiff seeks, that would grant plaintiff the ultimate relief sought should not be granted. *Second On Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255 (1st Dept 2009); *St. Paul Fire and Marine Ins. Co. v York Claims Serv.*, 308 AD2d 347 (1st Dept 2003). A mandatory preliminary injunction is justified solely "where the granting of the relief is essential to maintain the status quo pending trial of the action" (*Pizer v Trade Union Serv., Inc.*, 276 App Div 1071, 1071 [1st Dept 1950]), and even a nonmandatory preliminary injunction that would give a plaintiff the ultimate relief sought should not be granted except in extraordinary circumstances. *Board of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d 822 (2d Dept 2010). Here, Pavarini's initial papers in support of its motion adduce no extraordinary circumstances warranting a grant of the motion. They rely solely upon the CMA provision that the failure by one party to comply with a DRB resolution constitutes irreparable harm to the other party. That does not suffice for the grant of a mandatory injunction that would give plaintiff all of the relief that it

seeks in its complaint. *New York Real Estate Inst., Inc. v Edelman* (42 AD3d 321 [1st Dept 2007]), upon which plaintiff relies, is not to the contrary. The preliminary injunction that the plaintiff in that action sought was not a mandatory injunction, and it would have given plaintiff only one element of the multi-pronged relief that plaintiff sought in its complaint. Moreover, the principal reason that the *Edelman* Court gave for its decision was the presumption that the breach of a noncompete agreement constitutes irreparable harm.

Pavarini's reply affirmations assert that Pavarini will suffer certain cash-flow ripple effects, such as an inability to pay trade contractors with existing claims, and difficulty in paying its own staff. Such "ripple effects" do not constitute extraordinary circumstances that could justify a grant of the preliminary injunction that plaintiff seeks.

Accordingly, it is hereby

ORDERED that the motion for a preliminary injunction is denied. And it is further

ORDERED that counsel for Pavarini shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendant.

Dated: March 22, 2012

ENTER:


J.S.C.

HON. CAROL EDMEAD