

<b>Werther v Dubbeldam</b>
2013 NY Slip Op 32529(U)
October 1, 2013
Supreme Court, New York County
Docket Number: 650676/10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Stephen Weather

Plaintiff (s),

INDEX NO. 650676/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

*E*  
*10/4/10*  
*re*

Winkie Dubois Adam

Defendant(s)

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

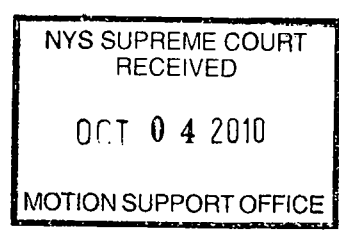
Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**



Dated: 10/1/10

[Signature]  
Hon. Judith J. Gische, J.S.C.

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):

Supreme Court of the State of New York  
County of New York: Part 10

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Stephen Werther and Hubert Realty  
Associates, Inc.,

Petitioners,

Decision/Order

-against-

Index# 650676/10  
Mot. Seq. # 001

Winka Dubbeldam and  
11 Hubert NYC, LLC

Respondents.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review  
of this (these) motion(s):

<b>PAPERS</b>	<b>NUMBERED</b>
OSC, petition, exhibits.....	1
Notice of Cross-motion.....	2
DJG affirm., exhibits.....	3
ZS affirm., exhibits.....	4

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Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

This is a petition brought pursuant to CPLR § 7502(a) and ( c) for a preliminary injunction in aid of arbitration. Petitioners seek to preliminarily enjoin defendant, pending arbitration, from constructing a roof-top terrace at the premises known as 11-13 Hubert Street, New York, New York ("premises"). Respondents have cross-moved to prevent petitioners from undertaking any construction or using any outdoor space "until such time as it can be determined that such construction and use is proper and within well-settled city, state or federal rules, regulations or codes" or in the alternative compelling petitioners to submit to an expedited emergency arbitration.

A temporary restraining order was granted on July 22, 2010.

001

For the reasons that follow the motion is granted as set forth herein and the cross-motion is denied.

On or about May 9, 2008 petitioners and respondents entered into an agreement to purchase the premises, with the ultimate objective of converting the building to condominium ownership. The agreement requires that any alterations or renovations, which one party may wish to be performed in his or her own unit, needs the prior written consent of the other. The agreement also requires that all disputes be submitted to binding arbitration.

Respondents desired to construct a terraces on the second and third floor roofs in her unit. For various reasons, petitioners objected. Petitioners claim that on June 17, 2010, without their approval, respondents began, in any event, to construct the terraces. Petitioners commenced an arbitration against respondents in the American Arbitration Association ("AAA"). Respondents do not deny any of these claims. Petitioners seek a preliminary injunction, in aid of their arbitration, preventing the construction of the terraces pending the arbitration.

Respondents will agree to the relief sought, but only if their cross-motion is granted. Otherwise they oppose the relief.

Respondents acknowledge the agreement and the requirement for binding arbitration. They claim, however, that the parties' disputes are larger than the terrace dispute raised by petitioners. They also demanded arbitration of the parties' disputes. The claim, rather generally in these papers, that petitioners are "preventing the premises from obtaining a final certificate of occupancy, a necessary prerequisite for conversion of the building to a condominium." They further claim that any "renovation

or new construction conducted by Mr. Werther has the potential to derail the condominium conversion process.”

CPLR 7503( c) permits the court to order a preliminary injunction in connection with an arbitrable controversy , but only on the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. In such event, CPLR articles 62 and 63, relating to preliminary injunctions, shall apply to the application.

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1<sup>st</sup> dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2<sup>nd</sup> dept. 2004). “Likelihood of success” need only be shown from the evidence presented; conclusive proof is not required. Thus, even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, supra at 605.

Petitioners have satisfied the requisite showing. They have not agreed to the construction of terraces, which is required under the parties' agreement before any construction occurs. They have expressed concerns about the legality and structural integrity of the terraces they are sought to be built. Respondents do not deny, that despite having no prior approval from petitioners, they are proceeding with work on the terraces. Petitioners have submitted this dispute to the arbitration process.

Respondents on the other hand seek a vague and overly broad preliminary injunction that is not targeted to any specific threatened conduct. They have not made the requisite showing for the serious relief they request in their cross-motion.

The alternative request that this court should direct petitioners to submit to "expedited emergency arbitration" is also denied. At oral argument it became apparent that not all disputes are subject to expedited treatment at the AAA. Issues about how the parties are to proceed before the AAA are best left to the AAA.

Any grant of a preliminary injunction requires the posting of an undertaking. The TRO was conditioned upon an undertaking in the amount of \$15,000. The court, therefore, finds that the preliminary injunction is conditioned upon the posting of an undertaking in the amount of \$25,000. The undertaking shall be posted within the next 30 days. The TRO shall continue in effect until the earlier of the posting of the undertaking for the preliminary injunction or the expiration of 30 days. If no undertaking is filed within 30 days then the TRO and the preliminary injunction shall lapse. If the undertaking is timely filed then the preliminary injunction shall continue until such time as the AAA determines the underlying issue about the terraces or further Court order.

In accordance herewith, it is hereby:

ORDERED that the motion for a preliminary injunction is granted to the extent that respondents are preliminary enjoined from constructing roof-top terraces at the premises known as 11-13 Hubert Street, New York, New York and it is further

ORDERED that the preliminary injunction is conditioned upon the posting of an undertaking in the amount of \$25,000 within 30 days of the date of this order and it is further

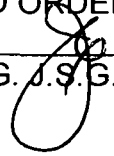
ORDERED that the temporary restraining order granted by this court on July 22, 2010 shall continue in full force and effect until the earlier of the posting of the undertaking for the preliminary injunction or the expiration of 30 days from this date of this order. If no undertaking is filed within 30 days then the temporary restraining order and the preliminary injunction shall lapse. If the undertaking is filed then the preliminary injunction shall continue until such time as the American Arbitration Association finally determines the underlying issue about the terraces or further Court order and it is further

ORDERED that any requested relief not otherwise requested herein is denied and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: New York, New York  
October 1, 2010

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.G.