

**Von Arx v Board of Mgr. of Newton Tower
Condominium**

2014 NY Slip Op 33408(U)

December 12, 2014

Supreme Court, Queens County

Docket Number: 707046/2014

Judge: Rudolph E. Greco

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Short Form Order



NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE RUDOLPH E. GRECO, JR. IAS PART 32

Justice

-----X
EMMANUEL MARC VON ARX, individually and no
behalf of NEWTOWN TOWER CONDOMINIUM,

Index No.: 707046/2014

Plaintiffs,

Motion Dated: November 13, 2014

-against-

Seq. No. 1

Cal. No.:

THE BOARD OF MANAGERS OF NEWTON TOWER
CONDOMINIUM, LAMBROS HOULIARAS, MELISSA
MEDINA, STEPHEN BERNOUS, EMMANUEL
STAMATIS and XENOPHON XENOPHONTOS,

Defendants.
-----X

FILED
DEC 19 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 6 read on this application by plaintiff for a preliminary injunction pursuant to CPLR §6301.

Papers
Numbered

Order to Show Cause, Affirmation, Affidavits, Exhibits,
Memo of Law.....

1-6

Upon the foregoing papers, it is ordered that this unopposed application is determined as follows:

FACTUAL BACKGROUND

Plaintiff Emmanuel Marc Von Arx (Von Arx) is the owner of Unit 8A in Newtown Tower Condominium located at 25-25 Newtown Avenue, Astoria, New York ("the Unit"), and has been since November 2011. Shortly after purchase, in March 2011 Von Arx began experiencing chronic and persistent leaking in the unit that continues to date, and that has progressed in severity as to cause a gaping hole in his living room ceiling, as well as additional water damage to his walls, ceilings located elsewhere in the unit, and personal property and mold growth. Von Arx contends that the leaking is due to faulty repairs or poor workmanship on the terrace adjoining the unit located above his own. This unit is the penthouse and comprises the whole of the ninth floor. It is owned by defendant Lambros Houliaras ("Houliaras") who is President of the condominium board, ("the board"). Despite repeated complaints and requests to

repair Houliaras has denied access to the terrace instead claiming that he has performed repairs on his own that have obviously not been effective.

Von Arx additionally made numerous complaints to the board as whole whose members include the remaining defendants, Melissa Medina, Stephen Bernous, Emmanuel Stamatis and Xenophon Xenophontos, as well as to the condominium's managing agent First Management Corp. ("the managing agent"). Again, the complaints remained unaddressed save the managing agent sending impotent correspondence to Houliaras. Neither the board nor the managing agent took any further action to remedy the leaking in the four years since it has been ongoing, including failing to demand access to the terrace to inspect and repair which, is part of the board's obligation pursuant to the Declaration, Bylaws, and Rules and Regulations governing the condominium (discussed below). Additionally, plaintiff submitted an invoice to the managing agent seeking reimbursement for costs associated with repainting the unit due to one leak occurrence. His request has yet to be satisfied.

Plaintiff then retained counsel who addressed correspondence to the board reciting the years of leaks plaguing the unit and false promises of repair, as well as reminding them of their obligations under the condominium's governing documents. In response, counsel for the condominium advised that essentially Houliaras would fix the issue himself, once again denying access to the terrace. Unsurprisingly, Houliaras' latest solution was ineffective at preventing further leaks and the board continued to be inactive in addressing this issue. Plaintiff's counsel however, diligently continued his attempts to seek cooperative resolution from August 2013 through July 2014 to no avail. This action ensued shortly thereafter.

The Condominium's Governing Documents

The condominium is governed by the Declaration and Bylaws which were provided as exhibits to the instant application. As is relevant to this action, a terrace is defined under Article 7, subparagraph (c) of the Declaration as a "limited common element". It is the board's obligation, as set forth in the By-Laws at Article 5, section 5.1, subparagraphs (a) through (c), to maintain, repair and replace such limited common elements as a common expense, i.e. not at a cost to the individual unit owner. Relatedly, and by virtue of Article 5, section 5.7, subparagraph (a) of the By-Laws, unit owners must permit reasonable access to their unit and its appurtenant limited common elements for the purposes of performing such maintenance, repair or replacement. Should an owner refuse this permissive access, the board has the power under these very By-Laws at Article 11, section 11.1 to engage in self-help and summarily enter that unit to address a violation of the Declaration, By-Laws or Rules and Regulations, including the duties imposed at Article 5 to maintain and repair.

Provisions relative to the costs associated with a unit owner and/or board's violation of these governing documents are cited as well, (By-Laws, Article 5, section 5.1, subparagraph (e) and Article 11, section 11.4). In summary, it is the unit owner and/or board's obligation to bear the entire cost and expense of any repair or replacement of a limited common element necessitated by the negligence, misuse or abuse of such unit owner or the board. To that effect, plaintiff contends that Houliaras and/or the board are responsible for not only the cost to repair

the terrace, but also all damages existing as a result of the leaking within his unit.

DISCUSSION and APPLICABLE LAW

In light of the above, plaintiff made the instant application seeking a preliminary injunction to (i) compel the board, at its sole cost and expense, to hire an independent licensed professional, to be mutually agreed upon by the parties hereto, to inspect the terrace adjoining the penthouse unit to determine the repairs necessary to permanently fix the leaks emanating therefrom and effecting plaintiff's unit; (ii) to compel the board, at its sole cost and expense, to make all necessary repairs recommended by the independent licensed professional; (iii) to compel the owner of the penthouse unit, defendant Houliaras to permit access to the terrace for the purposes of conducting such inspection and repairs; (iv) to compel the board, at its sole cost and expense, to make all necessary repairs to plaintiff's unit resulting from the leaks including to remedy the mold condition present therein; and (v) to permit plaintiff, his counsel and/or his architect to be present for all inspections and to be consulted as to all tests and repairs to be performed.

The law is well settled that to be entitled to a preliminary injunction "the movant must demonstrate by clear and convincing evidence, (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of equities in movant's favor" (Amana Express Int'l. v Pier-Air Int'l., 211 AD2d 606 [2nd Dept. 1995]; *see also* CPLR §6301, City of Long Beach v Sterling Am. Capital, LLC, 40 AD3d 902 [2nd Dept. 2007], Moy v Umeki, 781 NYS2d 684, 686 [2nd Dept. 2004]). The question of whether movant has satisfied these elements, i.e. to grant or deny the relief requested, rests in the sound discretion of the trial courts, (*see* Doe v Axelrod, 73 NY2d 748, 750 [1988]; *see also* Masjid Usman, Inc. v Beech 140, LLC, 68 AD3d 942 [2nd Dept. 2009], Mesrcorp, Inc. v Romaine, 295 AD2d 431, 432 [2nd Dept. 2002]). It appears abundantly clear that plaintiff has satisfied these elements.

As to a likelihood of success, by virtue of the condominium's governing documents the board is obligated to maintain and repair the terrace as a common element and at a common expense, unit owners are obligated to provide access to their terraces in order to effectuate maintenance and necessary repair, and with respect to plaintiff's unit any damage resulting from negligence is borne by the party who engaged therein. In breach of these duties and responsibilities neither Houliaras nor the board did anything to remedy the leaks plaguing plaintiff's unit for approximately four years now. All parties have accepted that the leaks emanate from the terrace inasmuch as Houliaras and the board have referred to Houliaras' attempts to fix same. Additionally, plaintiff submitted the affidavit of Steve Zalben, a licensed, registered architect who examined the unit on no less than eight occasions concluding that the leaks are coming from the terrace. Although he expressed several causes of the leaks, all such causes related to the terrace area and its source of ingress and egress.

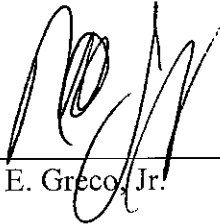
Plaintiff has also demonstrated irreparable injury to the extent that he has been living in a virtually uninhabitable unit for sometime now. The gaping hole in his ceiling and the mold growth present an encroachment of his right to use and enjoy his residence, and more seriously a

health risk. Moreover, the persistency and continuity of the leaks poses a threat to the unit and potentially the building's infrastructure. Finally, the equities most definitely fall on plaintiff's side when weighing the benefit to plaintiff of remedying this longstanding issue against the inconvenience Houliaras and the board will face in granting access to the terrace for inspection and repair; especially in light of the fact that they are simply being asked to do that which they are (and have been) obligated to do.

The Court notes that defendants were served with this application on October 21, 2014, more than three weeks prior to the November 13, 2014 return date. They failed to submit opposition on that date, and then on December 4, 2014 requested an extension of time to do so. However, they offered no explanation for their delay in responding or in requesting an extension three weeks after the return date, and their request was denied.

Plaintiff's application is granted in its entirety.

Dated: December 12, 2014



Rudolph E. Greco, Jr.
J.S.C.