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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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MASAHIDE KANAYAMA and WEBER 1005, LLC,

Plaintiffs,

- against -

KESY LLC, PROVENCE WELLNESS CENTER LLC and BOARD OF MANAGERS OF THE WEBER HOUSE CONDOMINIUM,

Defendants.

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Index Number: 152348/2014

Sequence Number: 002

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on plaintiff's motion to hold defendants in contempt:

	Papers Numbered:
Order to Show Cause - Affirmation - Exhibits	1
Defendant KESY LLC's Affirmation in Opposition - Exhibits	2
Defendant Provence Wellness Center LLC's Affirmation in Opposition - Exhibits	3

Upon the foregoing papers, the motion is denied.

Background

This is plaintiffs' second emergency application to stop "water incursions" into plaintiffs' fifth floor medical office space in the commercial condominium at 150 East 55th Street, New York, New York. The leaks are allegedly caused by faulty waste-and-water pipes located above plaintiff's ceiling and owned by the owner and the tenant of the sixth floor space, defendants KESY LLC ("KESY") and Provence Wellness Center LLC ("Provence"), respectively. The offending pipes are alleged to have been installed on plaintiffs' property (in their ceiling) without plaintiffs' consent, and to have been the cause of several leaks prior to February 2014. On March 17, 2014, plaintiff commenced this action to recover damages as a result of the water leaks and resulting mold damage. The complaint asserts causes of action for trespass (by defendants' water and waste pipes and by the water incursions) and nuisance (repeated water leaks) against KESY and Provence, property damage against all defendants, and breach of fiduciary duty and racial discrimination under 42 USC § 1981 against defendant Board of Managers of the Weber House Condominium ("Weber").

Simultaneously with the filing of the complaint, plaintiffs moved, by Order to Show Cause, for a preliminary injunction directing defendants to "abate the nuisance of leaking and floods" into

plaintiffs' fifth floor space. By Order dated April 4, 2014, this Court granted the first motion and directed defendants "by any reasonable means at their disposal, to stop liquid from leaking from their sixth floor premises into plaintiff's fifth floor office in the subject building." On April 9, 2014, plaintiffs served the April 4 Order, with notice of entry, upon defendants' attorneys.

In May of 2014, the case was removed to the U.S.D.C. for the S.D.N.Y. upon Provence's Notice of Removal based on the federal question presented by plaintiffs' § 1981 discrimination cause of action. In July of 2014, plaintiffs filed a motion to remand the case back to this Court. By Order dated March 30, 2015, Judge John F. Keenan granted plaintiffs' motion and remanded plaintiffs' state law claims back to this Court; the federal discrimination cause of action against Weber remains with Judge Keenan. According to the parties, other than motion practice in the Federal Court, not much happened during the nine and one half months between April 4, 2014, the date of this Court's Order, and January 20, 2015. The parties did not engage in any discovery. Defendants did not "pull[] any plumbing permits" to investigate and/or correct the alleged faulty sixth floor plumbing. Significantly, there were no water incursions or leaks into plaintiffs' fifth floor premises during this time.

The situation changed on January 20, 2015, when plaintiffs suffered a "major water incursion" into their fifth floor space. As a result of this event, plaintiffs immediately moved before Judge Keenan for an order "establish[ing] the continuing viability" of this Court's April 4, 2014 Order and to hold KESY and Provence in contempt of the April 4, 2014 Order. Plaintiffs requested, as the remedy for contempt, an order directing defendants to, inter alia, turn off the water service to the sixth floor, and keep it off "pending inspection and pressure tests of the plumbing" and completion of all repairs thereto by a New York State Licensed Professional Engineer. The motion appears to have been fully submitted before Judge Keenan on March 27, 2015 (the date of plaintiffs' reply papers). Three days later, on March 30, 2015, Judge Keenan issued an order remanding the State claims to this Court, and the instant motion soon followed.

On April 24, 2015, plaintiffs submitted to this Court the contempt motion papers submitted to Judge Keenan. On that day, the Court signed plaintiffs' Order to Show Cause for an order "pursuant to CPLR 6301 directing that KESY and Provence are in contempt" of the April 4, 2014 Order, and directing defendants to turn off the water to the sixth floor pending completion of inspection to the plumbing serving the sixth floor by a licensed engineer, and any repairs thereto. In support of the motion, plaintiffs argue that the "major pipe rupture" on January 20, 2015 demonstrates that the sixth floor plumbing "has failed" and that such plumbing failure, coupled with the fact that defendants have not performed any plumbing inspections or work on the sixth floor since 2011, establishes that defendants are in contempt of this Court's April 4, 2014 Order directing them "to stop liquid from leaking" into the fifth floor. Plaintiffs argue that defendants "have not offered any technical or scientific explanation for the repeated leaks" and urge that the "interim relief" sought is "to punish the Defendants for failing to take reasonable steps to stop the repeated fluid incursions into the 5th floor." Plaintiffs submit, inter alia, the affidavit of Sabrina Kucevic, the manager of plaintiffs' medical practice, who witnessed the January 20, 2015 leak and concluded that the leaks were coming from the sixth floor plumbing, and various pictures showing water pooled on the floor of an examination room and water stains and mold on the walls and ceiling. Plaintiffs also submit the affidavit of Gene C. Eng, a licensed

professional engineer, who opined that the January 20, 2015 water incursion came from "piping serving the 6th floor that is located within the ceiling/floor between the 5th and 6th floor," and that the "plumbing system serving the Sixth Floor has failed." Plaintiffs show (in the reply papers before federal court, attached as an exhibit to the order to show cause) a second flooding episode on March 9, 2015 due to a "leaking toilet" on the sixth floor and for which the Department of Buildings ("DOB") issued a violation.

Defendants, represented by separate counsel, each deny that they violated the April 4, 2014 Order and argue that plaintiffs failed to demonstrate any such alleged violation. KESY argues that Mr. Eng's conclusion that ruptured pipes caused the January 20, 2015 is "unsupported" and "mere conjecture," particularly since Mr. Eng has not inspected the sixth floor plumbing, and Ms. Kucevic's opinion as to the cause of the leak is equally "speculative " and should be disregarded because she is not an engineer. Relying on records from the DOB, KESY points out that no violations were issued as a result of the January 20, 2015 leak (and prior leaks of October 15, 2013 and February 2014), and no findings were made that these leaks were caused by faulty pipes servicing the sixth floor. Similarly, Provence argues that plaintiffs' proof as to defendants' alleged violation is "speculative," and that, following an inspection by the DOB, the violation for the March 9, 2015 leak was dismissed. Provence also argues, based upon a February 24, 2015 report of the Chasin Group, that a leaking roof, and not the sixth floor plumbing, is the source of the water incursions into the fifth floor. Additionally, defendants argue that plaintiffs seek "extraordinary equitable relief" amounting an interruption of Provence's business for more than one week, and which is the ultimate relief sought in the complaint, without the benefit of any discovery or a finding of liability.

Discussion

Civil Contempt Under Judiciary Law §753(A)

Judiciary Law § 753(A) empowers the Court to "punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action ... pending in the court may be defeated, impaired, impeded, or prejudiced, in a case." Civil contempt is available where "a party to the action" is guilty of "disobedience to a lawful mandate of the court." See Judiciary Law § 753(A)(3). The aim of civil contempt is "the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right." McCormick v. Axelrod, 59 NY2d 574, 582-583 (1983).

In order for the court to find civil contempt there must be: (1) a lawful order of the court in effect, which "clearly express[es] an unequivocal mandate"; (2) the party sought to be held in contempt "must have had knowledge of the court's order"; (3) disobedience of the order; and (4) prejudice to the right of a party to the litigation. See McCormick v. Axelrod, supra 59 NY2d at 583; El-Dehdan v El-Dehdan, 114 AD3d 4, 16-17 (2013). "A motion for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence." See El-Dehdan v El-Dehdan, supra 114 AD3d at 10. Thus, civil contempt can not be "founded upon an inadvertent or mistaken failure to comply with a court order." El-Dehdan v El-Dehdan, supra 114 AD3d at 10.

Here, there is no doubt or dispute that the April 4, 2014 Order has been "in effect" at all times since April 4, 2014. There is also no doubt or dispute that defendants had knowledge of the Order since April 9, 2014, even though it was only served upon their attorneys. See McCormick v. Axelrod, supra 59 NY2d at 583 (party charged with contempt must have had knowledge of order "although it is not necessary that the order actually have been served upon the party"). Moreover, there is no dispute for the purposes of the present motion that plaintiffs have been injured by virtue of the January 20, March 9 and April 9 water leaks.

However, plaintiffs failed to meet their burden of establishing, by clear and convincing evidence, that defendants disobeyed the unequivocal, clear mandate of the April 4, 2014 Order in that KESY and Provence failed to take "reasonable means" to prevent the recent 2015 leaks. Contrary to plaintiffs' claim, the Order did not require plaintiffs to hire licensed mechanical and structural engineers to "pull permits" and investigate, repair and/or remediate the cause and potential causes of the leaks into the fifth floor. The Order simply directed defendants to "by any reasonable means at their disposal, to stop liquid from leaking from their sixth floor premises into plaintiff's fifth floor office." As of April 4, 2014, the leaks had, in fact, stopped, and it is undisputed that there were no further leaks until nine and one half months later, on January 20, 2015. It is further undisputed that, as of April 4, 2014, there were no open DOB violations that required repairs to the sixth floor plumbing. Thus, KESY and Provence were not on notice, between April 4, 2014 and January 20, 2015, that they needed to take any other or further "reasonable" actions to prevent leaks (which were not occurring); their inaction during this time was reasonable. Moreover, plaintiffs have not demonstrated, by clear and convincing proof, that the January 20, March 9 and April 9 water incursions were caused solely and exclusively by faulty water-and-waste pipes servicing only the sixth floor, as opposed to the roof; a question of fact is raised by the competing reports of the parties' engineering experts. Under these circumstances, KESY and Provence's inaction – in not engaging plumbing professionals to perform pressure and other testing of the sixth floor plumbing between April 4, 2014 and January 20, 2015 – does not amount to disobedience of a clear mandate of this Court warranting a finding of contempt. Compare McCormick v. Axelrod, supra (civil contempt found where nursing home transferred residents in violation of court order that expressed "clear mandate" staying all steps to involuntarily discharge residents pending appeal); Board of Mgrs. of South Star v Grishanova, 117 AD3d 442, 442-443 (1st Dep't 2014) (tenant held in contempt for violating TRO "which unequivocally prohibited her from having guests reside in her apartment for more than five days if she were not residing there"). In the absence of a finding that KESY and Provence disobeyed this Court's Order, it follows that their actions were not calculated to defeat, impair, impede or prejudice plaintiffs' rights or remedies herein.

Preliminary Injunction Under CPLR 6301

Plaintiffs' order to show cause seeks relief "pursuant to CPLR 6301." However, this appears to be a mistake, as plaintiffs' papers in support of the motion do not contain any arguments or cite any case-law in support of a preliminary injunction; plaintiff's papers only argue for contempt, citing federal case law on the issue.

Plaintiffs have not, on this motion, established entitlement to "fines" for contempt in the form of turning off the water to the sixth floor and keeping it off pending complete inspection and repairs

to the sixth floor plumbing (which, the Court notes, would amount to an interruption of defendants' business for more than one week), or an additional or further preliminary injunction. However, the April 4, 2014 Order is still in full force and effect, and defendants continue to be bound thereby. Moreover, defendants are all now on notice of additional leaks into plaintiffs' fifth floor premises and are strongly cautioned to abide by this Court's April 4, 2014 mandate to take "any reasonable means" to stop further leaking into plaintiffs' premises. Given the January 20, March 9 and April 9 water incursions, defendants can no longer assert that it is reasonable for them not to inspect, and repair if and where necessary, the sixth floor plumbing system. In this regard, the parties are directed to **conduct an inspection of the premises, including but not limited to the plumbing on the 6th floor, by August 14, 2015, in accordance with the Preliminary Conference Order dated April 22, 2015.**

Conclusion
Motion denied.

Dated: June 9, 2015

Arthur F. Engoron, J.S.C.