| **Richstone v Board of Mgrs. of Leighton House Condominium** |
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| 2015 NY Slip Op 31073(U) |
| June 22, 2015 |
| Supreme Court, New York County |
| Docket Number: 153126/2014 |
| Judge: Manuel J. Mendez |
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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
*Justice*

NATALIE RICHSTONE and GEOFFREY RICHSTONE,

Plaintiffs,

-against-

THE BOARD OF MANAGERS OF LEIGHTON HOUSE CONDOMINIUM,

Defendant.

INDEX NO. 153126/2014
MOTION DATE 06-10-2015
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on this motion for leave to reargue.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-3, 4-6 |
| Answering Affidavits — Exhibits ____cross motion ____ | 7-10 |
| Replying Affidavits ____ | 11 |

**Cross-Motion: X Yes ☐ No**

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

Upon a reading of the foregoing cited papers, it is Ordered that defendant's motion for leave to reargue is granted, upon reargument, the complaint is dismissed and summary judgment as to the declaratory relief and costs and attorneys's fees in favor of defendant is granted, plaintiffs' cross-motion for leave to reargue is denied.

Plaintiffs own apartment PH-2B (herein "Premises") located at 360 East 88th Street New York, New York (herein "Building"). Defendants are the Board of Managers of the Building (herein "Board"). The Board requested entry into the Apartment and the adjoining wooden terrace in order to install rigging equipment on the wooden terrace in order to perform water tests and repairs on the Building's roof. Plaintiffs allege they granted the Board access to the wooden terrace to install rigging up until March 31, 2014. The rigging remained past the agreed upon date.

Plaintiffs commenced this action by summons and Complaint and asserted causes of action for breach of contract, trespass, and nuisance seeking $10,000 per month for access to the terrace. The Board answered the complaint and asserted counter claims seeking a declaration that plaintiffs violated the Board's Bi-Laws by erecting the wooden terrace, and seeks an Order directing plaintiffs to remove the wooden terrace.

Plaintiffs moved to enjoin the Board from entering the wooden terrace from April 1, 2015 through October 31, 2015 unless there is an emergency situation; to declare that the building's on-going leaks do not constitute an emergency situation; and to dismiss the Board's counterclaims as moot, or alternatively permitting plaintiffs to amend their reply to assert additional affirmative defenses.

The Board cross-moved (1) to dismiss the Complaint based upon documentary evidence; (2) for summary judgment dismissing the Complaint; (3) for an Order enjoining plaintiffs from denying the Board access to the terrace; (4) for summary judgment as to the Board's counterclaims; and (5) referring the remainder of this action to a special referee to determine the amount of reasonable attorneys fees that plaintiffs must pay the Board.

In an Order dated April 7, 2015, this Court denied plaintiffs' injunctive relief; granted defendant's cross-motion to the extent of dismissing the causes of action for breach of contract and nuisance but denied dismissal of the trespass claim; enjoining plaintiffs from denying defendant access to the wooden terrace and adjoining area; and denied the portion of the cross-motion seeking attorneys' fees.

Defendant now moves for leave to reargue this Court's April 7, 2015 Order and seeks an Order directing plaintiffs to remove the wooden deck, granting summary judgment in favor of defendant and awarding legal fees, and dismissing plaintiff's cause of action for trespass.

Plaintiffs cross-move for leave to reargue dismissal of the plaintiffs' breach of contract claim.

CPLR § 2221(d) states that a motion for leave to Reargue (1) shall be identified specifically as such, (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and (3) shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry.

The decision whether to entertain reargument is committed to the sound discretion of the court (Rostant v. Swersky, 79 A.D.3d 456, 912 N.Y.S.2d 200 [1st Dept., 2010]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided (V.Veereswamy Realty v. Yenom Corp., 71 A.D. 3d 874, 895 N.Y.S.2d 860 [2nd. Dept. 2010]), but to point out controlling principles of law or fact that the court may have overlooked ( Simon v. Mehryahi, 16 A.D. 3d 664, 792 N.Y.S.2d 543 [2nd. Dept. 2005]). A motion to reargue is not based on new proof, rather, it seeks to convince the court that it was wrong and ought to change its mind (Siegel, New York Practice 5th Edition, §254).

Reargument is granted based upon this Court's misapprehension of certain facts, specifically, that this Court relied on an Amended Answer dated September 15, 2014 and e-filed as Docket No. 39, and not a subsequent corrected Amended Answer that was improperly labeled as an "Answer" that was dated September 15, 2014 and e-filed as Docket No. 43. The "Answer" under Doc. No. 43 asserts counterclaims for declaratory relief and for reasonable attorneys' fees and costs incurred by defendant in enjoining, abating, or remedying any violation of defendant's By-Laws.

Upon reargument, the portion of defendant's underlying motion for declaratory relief and costs and attorneys' fees is granted. This Court found that plaintiffs had not obtained the proper Department of Building permits for the wooden terrace and that they failed to obtain written requests to, and approval from, the Board to make additions, alterations or improvements. However, in reliance on plaintiffs' attorney affirmation, which stated in relevant part that:

> "34. This deck has been destroyed by Defendant's contractor, who, inter alia, sawed through the support beams, when installing the rigging on the terrace. See the accompanying Richstone Affidavit at ,PP 8.
> 35. As a result of this damage, Plaintiffs and their homeowner insurer have agreed that the deck cannot be repaired. Therefore, the existing deck must be removed and a new deck will be installed after Defendant's work is complete.
> 36. Accordingly, the counterclaims concerning the removal of the existing deck and attorneys' fees pertaining thereto are moot and should be dismissed,"

this Court did not direct plaintiffs to remove the wooden deck (see David Etkind Affirmation, Mot. Sec. 002, Doc. No. 50). After this Court issued the April 7, 2015 Order, plaintiffs have refused to remove the wooden deck, which is still erected. Plaintiffs are in violation of the By-Laws, specifically of Article VI, Section 13 and Article IX, Section 4.

Article VI, Section 13 of the By-Laws states, in relevant part:

> "...No Unit Owner shall make any structural addition, alteration or improvement in or to his Unit, or which affects the exterior of the Building or the value of other Units, without prior written consent thereto of the Board of Managers" (see Moving Papers, Exhibit B, Pg. 18).

Article IX, Section 4 of the By-Laws states, in relevant part:

> "All sums of money expended, and all costs and expenses incurred, by (1) the Board of Managers in connection with the abatement, enjoinment, removal, or cure of any violation, breach, or default committed by a Unit Owner pursuant to the terms of Section 1 or paragraph (a) of Section 2 .... shall be immediately payable by such Unit Owner to the Board of Managers ...
> (see Moving Papers, Exhibit B, 27; see also Article VI, Section 9, Pg. 15).

Plaintiffs have violated the By-Laws. The Board is entitled to costs and attorneys' fees associated in curing plaintiffs' breach of the By-Laws including attorneys' fees in this action. The Board is also entitled to remove the wooden terrace in the event Plaintiffs fail to remove the structure, at Plaintiffs' expense.

Upon reargument, the trespass claim is dismissed. "The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission, or a refusal to leave after permission has been granted but thereafter withdrawn" (Volunteer Fire Ass'n of Tappan, Inc. v. County of Rockland, 101 A.D.3d 853, 855, 956 N.Y.S.2d 102, 105 [2nd Dept., 2012]). The By-Laws require Plaintiffs to provide the Board access to the roof/terrace in order to perform necessary repairs to the building (see Moving Papers, Exhibit C).

The Board's decision to perform necessary repairs was made in good faith and entitled to deference under the business judgment rule (see Carroll v Radoniqi, 105 A.D.3d 493, 963 N.Y.S.2d 97 [2013]). The Board further submits an affidavit from the Building's manager (see Moving Papers, O'Keefe Affidavit) wherein he states that the Board received various complaints about water leaks from unit owners. The Board retained experts to inspect the roof, and provided Plaintiffs with adequate notice of their intent to install a sidewalk bridge in order to conduct the work. The documentary evidence utterly refutes Plaintiffs' factual allegations. Plaintiffs do no submit sufficient proof to rebut the Board's showing.

Plaintiffs' cross-motion for leave to reargue is denied. Plaintiffs do not state a sufficient basis for leave to reargue.

Plaintiffs move by Order to Show Cause under Motion Sequence 004 for an order enjoining the Board from accessing the Building's roof and removing the wooden terrace.

CPLR § 6301 grants this court the power to issue an order directing the defendant to perform an act for the benefit of plaintiff, or to refrain from performing an act which would be injurious to the plaintiff. A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates (1) a likelihood of success on the merits; (2) the prospect of irreparable injury and (3) a balance of equities tipping in the moving party's favor (Doe v. Axelrod, 73 N.Y. 2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988]).

This Court has ordered that Plaintiffs remove the wooden terrace. Plaintiffs are not entitle to injunctive relief in relation to the wooden terrace.

Accordingly, it is ORDERED, that Defendant's motion for leave to reargue portions of this Court's April 7, 2015 Order is granted, and it is further,

ORDERED, that upon reargument, the motion is granted, the Complaint is dismissed in its entirety, summary judgment in favor of Defendant as to Defendant's counterclaims is granted, and it is further,

ORDERED, DECLARED and ADJUDGED that Plaintiffs' erection of the wooden terrace without the Defendant's permission is a breach of the Leighton House Condominium By-Laws thereby entitling the Defendant to costs and legal fees associated in this action, and it is further,

ORDERED, that Plaintiffs shall remove the wooden terrace within thirty (30) days from service of a copy of this Order with Notice of Entry, in the event that Plaintiffs fail to timely remove the wooden terrace, Defendant is entitled to remove the wooden terrace upon providing Plaintiffs with written notice fifteen (15) days prior to removal of the wooden terrace, and removal of the wooden terrace shall be at Plaintiffs' expense, and it is further,

ORDERED, that within 10 days from the date of entry of this Order, Defendant serve a copy of this Order with Notice of Entry upon the Plaintiffs, and upon the General Clerk's Office (Room 119) and the Special Referee Clerk's Office (Room 119M), who upon the filing of a Note of Issue and payment of the appropriate fees, if any, shall assign this matter to a Special Referee for a hearing to determine the amount of reasonable costs and attorneys fees to be awarded Defendant, and upon a receipt of the report from the Special Referee, this Court shall make a final determination in this matter, and it is further,

ORDERED, that Plaintiffs' cross-motion for leave to reargue is denied, and it is further,

ORDERED, that Plaintiffs' motion by Order to Show Cause under Mot. Seq. 004 is denied, and it is further,

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

MANUEL J. MENDEZ

ENTER: J.S.C.

Dated: June 22, 2015

MANUEL J. MENDEZ
*J.S.C.*

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE