

**East 62nd St. Assn., Inc. v 163-165 E. 62nd St.
Assoc., LLC**

2016 NY Slip Op 30746(U)

April 14, 2016

Supreme Court, New York County

Docket Number: 159726/15

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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EAST 62ND STREET ASSOCIATION, INC.,

Plaintiff

Index No. 159726/15

v

DECISION and ORDER

163-165 EAST 62ND STREET ASSOCIATES, LLC,

Defendant.

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this declaratory judgment action, which seeks, among other things, to enforce a restrictive land-use covenant and prevent the defendants from erecting an apartment building, the plaintiff moves to preliminarily enjoin the defendants from further construction of the building. The motion must be denied since the plaintiff failed to establish a likelihood of success on the merits, irreparable harm absent the preliminary injunction, or a balance of equities weighing in its favor.

II. BACKGROUND

The defendant, a developer, filed plans with the New York City Department of Buildings (DOB) to renovate existing adjacent

four-story structures so as ultimately to erect a single six-story luxury condominium apartment building on East 62nd Street in Manhattan, spanning two building parcels and containing five dwelling units. The plaintiff, a neighborhood historic preservation association, thereafter commenced this action, asserting three causes of action. The first cause of action seeks a judgment declaring that a certain restrictive covenant, executed in 1869 by a predecessor-in-interest of the defendant and a predecessor-in-interest of the owners of neighboring parcels, prohibits the erection of the apartment building because the proposed structure is a "tenement house" within the meaning of L 1867, ch 908, and the erection of a tenement house is expressly barred by the terms of the covenant. The second cause of action seeks a permanent injunction prohibiting the defendant from erecting the apartment building and compelling it to restore the project site to the condition that it had been in on the date that the defendant purchased the two subject parcels. The third cause of action seeks a judgment declaring that the defendant's application to the DOB contained material, intentional misrepresentations with respect to, inter alia, facade alterations, the merger of the two building parcels, the increase in the number of dwelling units extant on the parcels, the increase in the number of stories, and the need for an amended certificate of occupancy. The plaintiff alleges that, as such,

the defendant's submissions to the DOB constituted false filings in violation of the DOB's Operational Policy and Procedure Notice Number 3 (May 6, 2003) and, hence, the New York City Building Code.

The plaintiff moves, by order to show cause, to preliminarily enjoin defendant from "further" altering or demolishing the buildings extant on the two building parcels, pending the disposition of the action. In that order to show cause, this court denied the plaintiff's request that the defendant be temporarily restrained from further altering or demolishing those buildings pending the determination of the present motion. Defendant opposes the motion.

III. DISCUSSION

To be entitled to a preliminary injunction, a movant must establish, by clear and convincing evidence, a likelihood of success on the merits of its cause or causes of action, irreparable harm absent the issuance of the preliminary injunction, and a balance of equities weighing in its favor. See Gliklad v Cherney, 97 AD3d 401, 402 (1st Dept 2012); Gilliland v Acquafredda Enters., LLC, 92 AD3d 19, 24 (1st Dept 2011); Spinale v 10 W. 66th St. Corp., 193 AD2d 431, 431 (1st Dept 1993).

(A) LIKELIHOOD OF SUCCESS-FIRST CAUSE OF ACTION
-VIOLATION OF RESTRICTIVE COVENANT

The first cause of action alleges that, as of 1869, state law defined the term "tenement house" to include "any house or building, or portion thereof, which is rented, leased, let or hired out, to be occupied, or is occupied as the home or residence of three families or more living independently of each other, and doing their cooking upon the premises, or by more than two families upon any floor, so living and cooking, but having a common right in the halls, stairways, yards, water-closets or privies, or some of them." L 1867, ch 908. It further alleges that a restrictive covenant, dated 1869, bound defendant's predecessors-in-interest to refrain from erecting a tenement house on the servient property, and that the plaintiff's members, who own parcels of property that constitute the dominant estate, may enforce the covenant. The plaintiff asserts that the defendant's proposed apartment building constitutes a tenement house prohibited by the covenant.

As the defendant correctly argues, the Court of Appeals, in Kitching v Brown (180 NY 414 [1905]), held that a modern apartment building does not fall within the ambit of the 1867 statutory definition of the term "tenement house," since the concept of the modern apartment building was virtually unknown when the relevant statute was enacted, and the purpose of any covenant restricting the erection of a tenement house was to

avoid the creation of unsafe or noxious conditions, conditions that would not arise were an apartment building, in the modern sense, erected on the servient property. The Court thus declined to enforce a restrictive covenant prohibiting the erection of a tenement house so as to prevent the owner of the servient property from erecting a modern apartment building, the very situation that obtains here. As the Court explained,

"the trend of authority, the rules of construction applicable to restrictive covenants, the context of the covenant at bar, and the meaning of the term 'tenement house' as explained by conditions existing when the covenant was made, and viewed through the perspective of subsequent developments, all combine to uphold the defendant's contention that her 'apartment house' does not fall within the restriction upon her title." Kitching v Brown, 180 NY at 429; cf. Marx v Brogan, 188 NY 431 (1907); Levy v Schreyer, 177 NY 293 (1904); Sonn v Heilberg, 38 App Div 515 (2nd Dept 1899).

Here, the defendant submitted evidence demonstrating that the interior of the proposed structure was configured so as to create one three-story triplex apartment, three single-story apartments, and one single-story apartment with a roof deck, hardly the type of dwelling units that would permit the project to be characterized as a tenement house or present tenement-like conditions.

In any event, even if the number of dwelling units would otherwise fall within the 1867 definition of the term tenement house, the defendants correctly note that the definition

describes a tenement house as a structure "which is rented, leased, let or hired out, to be occupied, or is occupied as the home or residence of three families or more," and that the units within the apartment complex are to be owned in fee by the purchasers. According to established rules of statutory construction, the phrase "which is rented, leased, let or hired out" is not a traditional proviso clause (cf. McKinney's Cons Laws of NY, Book 1, Statutes § 212) and, thus, modifies both the terms "to be occupied" and "is occupied." See generally Friedman v Connecticut Gen Life Ins. Co., 9 NY3d 105, 113-114 (2007). Accordingly, a structure that is occupied as the home or residence of three or more families that is owned by those families would not fall within the statutory definition of tenement house. Moreover, none of the other features of the proposed apartment building, including the removal of the facade of the existing building and the erection of a structure higher than those on the adjoining parcels, are prohibited by the subject covenant, and there are no allegations that the defendant intends to ignore other design and construction limitations and specifications that are in fact articulated in the covenant.

Accordingly, plaintiff has not established that it is likely to succeed on the first cause of action.

(B) LIKELIHOOD OF SUCCESS-THIRD CAUSE OF ACTION
-VIOLATION OF DOB GUIDELINES

Plaintiff has also not established a likelihood of success on the merits of the third cause of action, which seeks a judgment declaring that defendant violated published DOB guidelines, and hence the New York City Building Code, by making filings with that agency containing material, intentional misrepresentations. Even if the allegations were true, any judicial challenge to the filings---and any permit issued as a consequence thereof---is barred at this juncture by virtue of the DOB's primary jurisdiction over that controversy and the plaintiff's failure to exhaust its administrative remedies.

Contrary to the defendant's contention, the DOB does not have exclusive original jurisdiction over this particular controversy, but, instead, has primary jurisdiction over it.

"Pursuant to the doctrine of exclusive original jurisdiction, the Legislature, by enacting a statute establishing a highly technical regulatory scheme, is deemed to have entrusted adjudicatory functions requiring substantial technical or policy expertise to an administrative agency created and staffed for that purpose, thus divesting the courts of initial jurisdiction to consider a particular technical issue, and limiting the court's role to review pursuant to CPLR article 78." Matter of Rockaway One, LLC v Wiggins, 35 AD3d 36, 40-41 (2nd Dept 2006).

By way of contrast,

"[t]he doctrine of primary jurisdiction is intended to coordinate the relationship between courts and administrative agencies to the end that a divergence of opinion between them not render ineffective the

statutes with which both are concerned, and, to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency." Amoamah v Fried, 48 Misc 3d 64, 65 (App Term 2nd Dept, 2nd, 11th, & 13th Jud Dists 2015); see Capital Tel. Co. v Pattersonville Tel. Co., 56 NY2d 11, 22 (1982); Wong v Gouverneur Gardens Hous. Corp., 308 AD2d 301, 303 (1st Dept 2003).

Where the doctrine of primary jurisdiction is successfully invoked, a court may either stay prosecution of an action or hold in abeyance a disposition of the merits of the action pending the relevant agency's determination of the issue in dispute. See Shine v Duncan Petroleum Transp., Inc., 60 NY2d 22, 27 n (1983); Botwinick v Ogden, 59 NY2d 909, 910 (1983).

The DOB is the appropriate forum for the resolution of disputes as to whether a person or entity has failed to comply with the New York City Building Code (see Matter of Neighborhood in the Nineties, Inc. v City of New York, 82 AD3d 602, 603-604 [1st Dept 2011]), except in certain circumstances not applicable here. See Admin. Code of City of N.Y., § 28-205.1. Hence, the DOB has primary jurisdiction to determine plaintiff's allegations that defendant violated that code in connection with its filings. See generally Matter of Weissman v City of New York, 96 AD2d 454, 456 (1st Dept 1983). Moreover, since an adverse determination by the DOB involving a factual dispute may be administratively appealed to the New York City Board of Standards and Appeals

(BSA) (see Charter of City of N.Y. § 666.6[a]; Matter of Perlbinder Holdings, LLC v Srinivasan, ___ NY3d ___, 2016 NY Slip Op 02122, * 4 [2016]), an applicant seeking that determination must exhaust its administrative remedies via an appeal to the BSA. See Matter of Weissman v City of New York, 96 AD2d at 456; see also Matter of Wilkins v Babbar, 294 AD2d 186, 187 (1st Dept 2002); cf. Little Joseph Realty, Inc. v Town of Babylon, 41 NY2d 738, 744 (1977) (a plenary action is the proper vehicle for a claim alleging that a landowner violated a zoning ordinance).

This court cannot reach the merits of the third cause of action unless and until the plaintiff first applies to the DOB for a ruling on whether defendant's filings contained material misrepresentations, the DOB thereafter renders a determination on that application, and either party subsequently exhausts its administrative remedies by appealing any adverse DOB determination to the BSA. Hence, the plaintiff cannot show, at this juncture, a likelihood of success on the merits of that cause of action.

(C) LIKELIHOOD OF SUCCESS-SECOND CAUSE OF ACTION
-PERMANENT INJUNCTIVE RELIEF

Contrary to the defendant's contention, a cause of action for permanent injunctive relief is sufficiently pleaded where a plaintiff alleges "that there was a violation of a right presently occurring, or threatened and imminent, that he or she

has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor." Matter of Long Is. Power Auth. Hurricane Sandy Litig., 134 AD3d 1119, 1120 (2nd Dept 2015).

"Although it is permissible to plead a cause of action for a permanent injunction, . . . permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted'" Weinreb v 37 Apts. Corp., 97 AD3d 54, 59 (1st Dept 2012), quoting Corsello v Verizon N.Y., Inc., 77 AD3d 344, 368 (2nd Dept 2010), mod on other grounds 18 NY3d 777 (2012). Since the permanent injunction sought pursuant to the second cause of action is based on the substantive allegations set forth in the first and third causes of action, and the plaintiff has not shown a likelihood of success on the merits of the first and third causes of action, it has similarly failed to show a likelihood of success on the second cause of action.

(D) IRREPARABLE HARM AND BALANCE OF EQUITIES

Plaintiff's contention with respect to irreparable harm in the absence of a preliminary injunction must fail, since it is "premised on the erroneous belief that it is entitled to enforce" the restrictive covenant so as to prevent the erection of a luxury apartment building. Platinum Equity Advisors, LLC v SDI, Inc., 132 AD3d 420, 420-421 (1st Dept 2015). In any event, the

preliminary injunction sought by the plaintiff does not seek to prevent the complete demolition of an existing structure (cf. Matter of Allison v New York City Landmarks Preserv. Commn., 35 Misc 3d 500, 522-523 [Sup Ct, N.Y. County 2011]) but, rather, the renovation of existing structures and ultimate erection of a structure on the subject parcels that could be altered or removed should the plaintiff ultimately prevail in this litigation (see generally Matter of Parkview Assoc. v City of New York, 71 NY2d 274 [1988]; Town of N. Elba v Grimditch, 131 AD3d 150, 157 [3rd Dept 2015]). Thus, it cannot be said that the plaintiff would be irreparably harmed by the defendant's commencement of construction of an apartment building, or that the balancing of the equities necessarily favors the plaintiff over the defendant.

IV. CONCLUSION

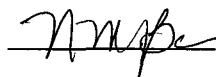
The motion for a preliminary injunction is denied.

Accordingly, it is

ORDERED that the plaintiff's motion for a preliminary injunction is denied.

This constitutes the Decision and Order of the court.

Dated: April 14, 2016

 s.s.c.

HON. NANCY M. BANNON