Barbizon (2007) Group Ltd. v Barbizon/63 Condominium
2016 NY Slip Op 31973(U)
October 17, 2016
Supreme Court, New York County
Docket Number: 155217/2016
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

BARBIZON (2007) GROUP LTD. and BARBIZON (2014) GROUP ADVISORS, LTD., Plaintiffs, -against- BARBIZON/63 CONDOMINIUM, and BARBIZON HOTEL ASSOCIATES, L.P., Defendants.	INDEX NO.	155217/2016
	MOTION DATE	09/07/2016
	MOTION SEQ. NO.	001
	MOTION CAL. NO.	

The following papers, numbered 1 to 14 were read on this motion for a preliminary and permanent injunction.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits	6 - 7; 8 - 11
Replying Affidavits	12 - 14

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiffs' motion for a preliminary and permanent injunction is denied.

Plaintiffs Barbizon (2007) Group LTD. (herein "Barbizon 2007") and Barbizon (2014) Group Advisors, LTD. (herein "Barbizon 2014") (collectively herein "Plaintiffs") own two condominium units, Unit PH1 and 17C (collectively herein "the Units"), at 140 East 63rd Street, New York, New York (herein "the building"). Barbizon 2007 purchased unit PH1 in 2007, and Barbizon 2014 purchased unit 17C, which is directly below unit PH1, in 2014 in order to combine the units and create a duplex. Plaintiffs' principal uses unit PH1 as a residence.

Plaintiffs commenced this action by Summons and Complaint on June 21, 2016 against Defendants Barbizon/63 Condominium (herein "the Condominium") and Barbizon Hotel Associates, L.P. (herein "the Sponsor") (collectively herein "Defendants"), asserting causes of action for Breach of Contract, Fraud in the Inducement, Preliminary and Permanent Injunctions, and a Declaratory Judgment for the Condominium's failure to sign Plaintiffs' application for work permits needed to combine the Units.

The Complaint alleges that Barbizon 2014 purchased Unit 17C in October 2014, in reliance on Defendants' indication to Plaintiffs that they would be able to combine the units. On March 16, 2015, Plaintiffs' architect submitted the drawings, work description, and responses to initial feedback from the Building's architect (herein "the work permit application" or "application"), to the building's property management company for approval by the Condominium. Plaintiffs' claim after numerous communications with Sponsor, the Condominium, and the building's property management company, that it was not until May 12, 2016 that they learned the Defendants had entered into a moratorium agreement preventing any alterations requiring building permits until the building obtained its permanent certificate of occupancy.

Plaintiffs moved on June 28, 2016, by Order to Show Cause pursuant to CPLR §§6301, and 6311-13, for: (1) (a) a preliminary injunction enjoining the Defendants from enforcing any moratorium agreements prohibiting work permit applications, (b) directing the Condominium to cooperate with Plaintiffs in executing their work permit application, (c) directing the Condominium to approve and execute Plaintiffs' work permit application, and; (2) for expedited discovery of the moratorium agreement, any current alterations being made to any Sponsor owned units, any communications regarding Plaintiffs' work permit application, and any representations made to Plaintiffs regarding combing the Units.

In an Order dated June 28, 2016, and pending the hearing of Plaintiff's motion for a preliminary injunction, this Court ordered the Defendants to provide Plaintiffs with any moratorium agreements or affidavits precluding alterations in the building, and providing Plaintiffs' with access to Sponsor Unit PH4 for inspection and photographing to document the current status of the alterations being made therein.

Plaintiffs allege that the moratorium agreement came as a surprise, especially since they had received verbal approval of their application from Mr. Russ Heigel (the building's property manager) in early 2016. Plaintiffs contend that at the same time Mr. Heigel verbally approved the application, he did explain that the work could not commence as the building was in the process of obtaining the certificate of occupancy, but assured them that no other work was being done, or would be permitted to commence, in order to insure that there would be no further delays in obtaining the certificate of occupancy.

Plaintiffs contend that a review of the New York City Department of Building's (herein "DOB") website shows that there are five active DOB violations, and a New York City Environmental Control Board (herein "ECB") violation against the building. Plaintiffs also contend that the Sponsor obtained four building permits for a gut renovation of its Unit PH4 in March of 2016, after the moratorium agreement was entered into, that extends until March of 2017. Plaintiffs argue that with these open violations and work permits, the building cannot obtain a certificate of occupancy,

further delaying Plaintiffs' application and their ability to proceed to combine their Units.

Plaintiffs argue that Defendants have exceeded their authority, as limited in the By-Laws, by entering into this moratorium agreement that restricts Unit alterations in the building for an indefinite period of time. Plaintiffs contend that any restriction on their use of their Unit has to be set forth in the By-Laws, as required by Real Property Law 339-v[1][l], that Section 5.2(A) sets forth such unit alteration restrictions, and that this section does not give Defendants the power to enter into such a moratorium agreement. Plaintiffs argue that since the By-Laws do not give Defendants this power, such a multi-year ban required amendments to the By-Laws, and that the By-Laws have not been amended to implement such a restriction. Therefore, Plaintiffs contend that the Defendants exceeded their authority in entering into this moratorium agreement.

Plaintiffs also argue that the Condominium has breached the By-Laws, in violation of Section 5.2(A), in unreasonably withholding its approval of Plaintiff's application. Plaintiff contends that Section 5.2(A) requires Plaintiffs to obtain prior written approval before making alterations, and requires the Condominium to cooperate in executing a Unit owners application to obtain the proper permits for alterations. Plaintiffs argue that they did what was required of them by submitting their permit application, and that the Condominium violated their duties under the By-Laws by refusing to approve it.

Plaintiffs also contend that entering into this moratorium agreement was done in bad faith because Defendants knew a permanent certificate of occupancy could not be obtained for years due to the open violations and work permits. Plaintiffs claim that they have been irreparably damaged by the Condominium's refusal to approve their application for the work permits because they have continued to pay the monthly common charges, and have been deprived of the full use and enjoyment of both Units, with no end of the moratorium on Unit alterations in sight.

Defendants oppose the motion arguing that the Plaintiffs are unable to satisfy their burden to warrant an injunction because they cannot establish a likelihood of success on the Merits as they did not breach Section 5.2(A), nor did they misrepresent facts or fraudulently induce the Plaintiffs to rely on misrepresentations in order to have Plaintiffs purchase Unit 17C. Defendants also contend that Plaintiffs cannot establish an imminent and irreparable injury because a delay in their ability to use both apartments as a duplex does not constitute irreparable harm, and does not in any way deprive them of their possessory interest, or in their use and enjoyment of either of their Units. Defendants also argue that a balancing of the equities does not tip in Plaintiffs' favor because allowing the Plaintiffs to receive a work permit will indefinitely delay the Sponsor's obligation to obtain a certificate of occupancy for the building.

Defendants contend that the Condominium acted within its authority under the By-Laws in entering into the moratorium agreement, that the open violations have been cured or steps are being taken to cure them, that the current alterations taking place in the Sponsor's Unit are scheduled to be completed in October of 2016-thereby closing the open work permits, and that a final site survey will be done and the building's application for a certificate of occupancy submitted to the DOB once some final outstanding work (the completion of which was out of Defendants' control) is also completed in October of 2016. Defendants contend that once the certificate of occupancy is obtained, the moratorium will be lifted and the Plaintiffs' will be able to proceed with their alterations.

Defendants contend that the moratorium agreement (Sponsor's Aff. In Opp. Exh. B) was no secret to Plaintiffs because notice of the agreement was given to Unit Owners on February 28th 2015, which was before Plaintiffs submitted their initial plans for review in March of 2015. (Id. at Exh. E). Defendants also contend that the status of the certificate of occupancy, and the potential need for a moratorium were discussed in the 28th and 30th amendments to the Offering Plan, which were approved by the Office of the Attorney General. (Id. at Exhs. C and D).

Defendants argue that Plaintiffs mistakenly rely on only Section 5.2(A), and that Section 5.2(I) states that no alterations by Unit owners will be allowed if it will result in delays to the building being issued a certificate of occupancy. Defendants contend that they entered into the moratorium agreement in order to enforce this provision. Defendants argue that they were well within their power in implementing the moratorium agreement because not only are they authorized to undertake actions that are in the best interests of the Condominium Association under the Business Judgment Rule, Section 5.2(I) grants the power to prohibit the alterations, without the need for a specific moratorium agreement. Defendants also argue that Plaintiffs are mistaken on their argument that the moratorium agreement violates Real Property Law 339-v(1)(I), as this provision governs restrictions and requirements on the use and maintenance of a unit, not alterations, and that the moratorium agreement does not address use or maintenance.

Further, Defendants contend that the open work permits for Sponsor's Unit and the alterations being conducted therein, are expressly authorized by Article 13 of the Declaration of the Offering Plan (Id. at Exh. A), and Section 5.2(B) of the By-Laws (Condominium Aff. In Opp. Exh. D), and that any work in the Sponsor's Unit will not further delay the ability to obtain a certificate of occupancy. Defendants contend that the Sponsor Unit work was being done and will be completed in time (by October 2016) with other work being done on the outside of the building which was delayed due to circumstances beyond Defendants' control.

The Condominium further contends that the Plaintiffs only submitted their plans for review in March of 2015, and that Plaintiffs did not actually submit a signed Alteration Package for approval until February 26, 2016. (Condominium Aff. In Opp.

Exh. C). According to the Condominium, the Plaintiffs were advised prior to this submission that the application could be reviewed but that nothing would be signed off until the permanent certificate of occupancy for the building was issued by DOB. (Id. at Exh. G).

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]).

"A party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (1234 Broadway LLC v. West Side SRO Law Project, Goddard Riverside Community Ctr., 86 AD3d 18, 23, 924 N.Y.S.2d 35, 39 [1st Dept., 2011]).

Under the business judgment rule which applies to cooperatives and condominiums (Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807 [1990]), absent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting in 'good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. (Auerbach v. Bennett, 47 N.Y.2d 619, 419 N.Y.S.2d 920 [1979]). Thus, without a showing of a breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though 'the results show that what [the directors] did was unwise or inexpedient. (Pollitz v. Wabash R.R. Co., 207 N.Y. 113, 100 N.E. 721 [1912]). Inquiry into claims of fraud and self-dealing is permitted only where a factual basis exists to support such a claim. (Simpson v. Berkley Owner's Corp., 213 A.D.2d 207, 623 N.Y.S.2d 583 [1995]). (Jones v. Surrey Co-op. Apartments, Inc., 263 A.D.2d 33, 700 N.Y.S.2d 118 [1st Dept. 1999]).

The Plaintiffs have not established a clear right to a preliminary injunction in their favor. Plaintiffs have not provided any proof that the Defendants are discriminating against them by not approving their application, nor have they offered any proof of self-dealing or misconduct. Therefore, the Plaintiffs have not established a likelihood of success on the merits. The Defendants have not denied plaintiffs' application for work permits to combine their two Units, the process has only been delayed in order for the open permits and violations to be closed in order for the building to obtain its certificate of occupancy. Further, Plaintiffs have been unable to show irreparable injury. Plaintiffs argue in their reply that Plaintiffs' principle is 75 years old, and this indefinite delay will result in irreparable harm to him. However, Plaintiffs' principle is not without remedy. Any damages incurred, if any, can be remedied by monetary relief. Further, the Plaintiff is not being denied the full use and enjoyment of his Units, only the combination of the two for now.

That Plaintiffs are not at present able to combine the two units does not warrant the drastic remedy of a preliminary injunction. Plaintiffs' have not met their burden on all the prongs enumerated by CPLR §6301.

ACCORDINGLY, it is ORDERED that Plaintiffs' Barbizon (2007) Group LTD. and Barbizon (2014) Group Advisors, LTD.'s motion for a preliminary and permanent injunction is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: October 17, 2016

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE