

Nesci v Kings Grant Master Assn., Inc.

2016 NY Slip Op 33051(U)

April 28, 2016

Supreme Court, Putnam County

Docket Number: 326/2016

Judge: Paul I. Marx

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PUTNAM COUNTY
CLERK

2016 MAY -2 AM 11: 16

SUPREME COURT: STATE OF NEW YORK
COUNTY OF PUTNAM
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
JOSEPH E. NESCI

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 326/2016

KINGS GRANT MASTER ASSOCIATION, INC.
and MARIA GERMINI

Motion Date: April 15, 2016
Motion Sequence ## 1, 2

Defendants.
-----X

The following papers numbered 1 to 8 were read on: (1) plaintiff's motion seeking an order "enjoining the Defendants from interfering, blocking, [and] prohibiting the Plaintiff from using his deeded common areas for vehicle parking, or removing or booting any vehicle from the location known as King's Grant and or 1903 King's Way, Carmel, New York" (sequence #1) and (2) defendants' cross motion seeking an order "(a) pursuant to C.P.L.R. Rule 3211(a) 7, dismissing the Verified Complaint as against Defendant Maria Germini, on the ground that the pleading fails to state a cause of action against her"¹:

Order to Show Cause dated March 8, 2016/Affirmation In Support of Vincent P. Nesci, Esq. dated March 8, 2016/Complaint/Exhibits A-B	1-3
Notice of Cross Motion/Affirmation of Fred C. Quagliato, Esq., dated March 18, 2016/ Affidavit of Maria Germini dated March 18, 2016/Exhibits 1-8	4-6
Defendants' Memorandum of Law In Opposition To Plaintiff's Application and in Support of the Cross Motion To Dismiss The Complaint Against Defendant Maria Germini	7
Affirmation In Opposition of Vincent P. Nesci, Esq. dated April 13, 2016/ ² Exhibits A-B	8

¹ On the return date of the Order to Show Cause, plaintiff stipulated to withdraw the claims against Ms. Germini. A Judgment dismissing the action against her has been signed by the Court. Hence, the cross motion is moot.

² These papers, although denoted as "Affirmation In Opposition" are, in reality, Reply papers.

Upon reading the foregoing papers, it is ORDERED that the plaintiff's motion is denied and the temporary restraining order contained in the Order to Show Cause is vacated. Defendants' cross motion to dismiss the action as to Maria Germini is denied as moot.

BACKGROUND

Plaintiff, the owner of unit 1903 located within a condominium development known as King's Grant Master Association, Inc., ("Kings Grant" or "the Association"), seeks a preliminary injunction preventing the Board of Managers of King's Grant Condominium III ("the Board") from prohibiting, or otherwise interfering with, his use of the driveway and parking areas that form a portion of the common areas of the complex.³ He contends, generally, that any interference with his right to park constitutes an unlawful taking of his deeded property. Complaint ¶6, 9. In addition to an injunction, plaintiff seeks punitive damages. *Id.* ¶11.

King's Grant is a not for profit corporation formed pursuant to a declaration recorded and filed in Liber 861, page 237 of the Office of the Putnam County Clerk. The Association consists of 150 condominium units which are overseen by the Board. Maria Germini is the Assistant Treasurer of King's Grant. Affidavit of Maria Germini ¶4, Exhibit 2.

According to Ms. Germini, at a meeting of the Board, held on May 5, 2015, the Board passed a resolution which added a new section 7 to the existing Rules and Regulations.⁴ The new section provides:

Section 7.0. Non-Payment of Assessment and/or Common Charges:
A Unit Owner's parking privileges may be revoked if a notice to cure a default (that is a notice from the Association to a Unit Owner that alleges a default of the Declaration, By-laws or Rules and Regulations, and providing a period of time to cure the default)for Association assessments and/or Condominium common charges has been issued and the default remains outstanding after the cure period expires. This may include, without limitation, prohibiting the Unit Owner, occupants of the unit, and guests of the Unit Owner or occupant from parking on the premises, including any designated parking space or visitor's space.

³ The property is known as 1903 King's Way, Carmel, NY 10512.

⁴ Unfortunately, the Board did not attach a complete set of the Rules and Regulations to its opposition papers.

Section 7.2⁵ provided for the removal, or booting (without notice and at the expense of the vehicle's owner) of any vehicle parked in the common areas. Section 7.3 made the parking rules applicable to all members of the association. Exhibit 3.⁶

By Notice to Cure Default(s) dated January 8, 2016, defendants notified plaintiff of his default in payment of common charges and arrears in the amount of \$5,820.11. Plaintiff was advised that he had a ten day period in which he could cure the default. Exhibit 4. For reasons unknown, the Notice to Cure was, apparently, re-sent on January 22, 2016. Germini ¶13.

In the Notice to Cure, plaintiff was advised that during the period of his default, his voting rights and membership privileges were suspended pursuant to Sections 3 and 4 of Article IV of the By-Laws. Additionally, the Notice to Cure cautioned, "pursuant to Paragraph 25, Section 7 of the Rules and Regulations ...,your parking privileges may be revoked if the default remains outstanding after the cure period expires."⁷ Exhibit 4.

By letter, sent by both first class and certified mail, return receipt, dated March 2, 2016, plaintiff was notified by the Association that his parking privileges within the complex were revoked in accordance with Paragraph 25, Section 7 of the Rules and Regulations effective March 14, 2016. "This includes, without limitation, prohibiting you as the Unit Owner, occupants of the unit, and your guests or guests of any occupant from parking on the premises, including [in] any designated parking or visitor's space." Exhibit A to Order to Show Cause.⁸

Simultaneous with the filing of a complaint, plaintiff moved for a temporary injunction prohibiting the revocation of parking privileges on "his deeded common areas" pending hearing and determination of his motion for preliminary injunction. In support of the request, plaintiff's counsel

⁵ There is no section 7.1.

⁶ Plaintiff did not advise the Court of the existence of these provisions of the Rules and regulations in his application. Indeed, he did not provide a copy of any of the Rules and Regulations or of the By-Laws.

⁷ The moving papers did not refer to the Notices to Cure which were served on plaintiff.

⁸ Ms. Germini incorrectly states in her affidavit that plaintiff was advised of the suspension of his parking privileges on March 2, 2015. Germini Affidavit ¶ 19. The Notice itself is dated 2016.

asserted that the proposed course of action by the Association amounted to “seizing the Plaintiff’s property without any proceeding before this Court or any Court” in violation of plaintiff’s “ownership of certain common elements, including parking.” Affirmation of Vincent P. Nesci, Esq. dated March 8, 2016 ¶2, 5. On March 8, 2016, this Court signed the Order to Show Cause interposing the requested temporary injunction. Service on the Association’s counsel was directed to be made no later than March 10, 2016. Opposition papers were directed to be filed no later than March 22, 2016. Reply papers were to have been served by March 28, 2016. The Court required appearances by all parties on March 28, 2016.

On March 28, 2016, counsel for both parties appeared as directed. The Court was advised that in addition to opposing plaintiff’s motion, defendant had brought a cross motion to dismiss the action against Ms. Germini. After discussion, the action against Maria Germini was withdrawn by plaintiff as unnecessary. Plaintiff’s counsel requested additional time to serve and file reply papers which was granted to April 15, 2016. Those papers were timely filed.

DISCUSSION

Apparently, there is a long and tortuous history of litigation involving these parties, emanating from plaintiff’s repeated and continuing failure to pay the common charges associated with his unit which is, simultaneously, the subject of a foreclosure action also assigned to this Court. Defendant previously obtained a judgment against plaintiff arising from his failure to comply with a stipulation in which he agreed to pay unpaid common charges (and various fees and interest) for the period November 1, 2010 through September 22, 2011 in the amount of \$10,787.16. A Supplemental Judgment in the amount of \$21,840.45 plus \$200 in costs was entered for unpaid common charges for the period October 1, 2011 through February 2015. Exhibits 7, 8. Judgments were also taken against plaintiff’s wife in the amounts of \$13,274.99 and \$11,073.00 for past due assessments and charges. Hence, this action is simply the latest of the parties’ legal entanglements.

Plaintiff’s Motion for a Preliminary Injunction

As stated above, plaintiff moved for a preliminary injunction premised on the alleged seizure of his “deeded property interest” in the parking areas outside of his condominium. The motion was predicated on the affirmation of counsel who affirmed that the application was being made on “an emergency basis to prevent the defendants from seizing the Plaintiff’s property without any

proceeding before this Court or any Court” and the then, as yet unserved, complaint. Affirmation In Support of Vincent Nesci, Esq. dated March 8, 2016 ¶ 2. Notably, plaintiff did not assert that the Board lacked authority to promulgate a rule or regulation such as Rule 7.

Defendant’s Opposition and Cross Motion

Defendants opposed plaintiff’s application, and cross moved to dismiss the action against its Assistant Treasurer, Maria Germini.⁹ The Board denied plaintiff’s claim to any “deeded property interest” in the parking areas, because he owns an .01851 undivided interest in the common areas with all other unit owners. Thus, defendants contended, plaintiff had no independent ownership of the parking areas. The Board also argued that plaintiff was not entitled to a preliminary injunction because the Board’s adoption of Rule 7 was proper under the Business Judgment Rule, that plaintiff did not contend otherwise and plaintiff did not allege that defendants had engaged in fraud or self dealing. Nor did plaintiff claim that the Board had acted unconscionably, in bad faith, or engaged in misconduct or self dealing. Affirmation of Fred C. Quagliato, Esq. dated March 18, 2016 ¶¶ 18-28.

The Board urged that plaintiff had failed to satisfy any of the requirements that would entitle him to a preliminary injunction. The Board argued that it was unlikely that plaintiff would succeed on his application for an injunction, there was no irreparable harm and the equities did not tilt in his favor. *Id.* ¶¶ 29-39.

Although plaintiff had not challenged its authority to do so, defendants argued that the Board was empowered to adopt the rule. It contended that controlling precedent held that “the adoption and implementation of a parking rule by a condominium which revokes parking privileges for a unit owner’s failure to pay past due assessments is within the broad authority of the condominium board to collect common charges and to adopt and amend rules and regulations governing the operation and use of the condominium property.” Defendants’ Memorandum of Law in Opposition to Plaintiff’s Application and In Support of the Cross Motion to Dismiss the Complaint Against Defendant Maria Germini *4 citing *Skouras v Victoria Hall Condominiums*, 73 AD3d 902 [2nd Dept

⁹ As noted above, plaintiff agreed to withdraw the action against Ms. Germini, there being no allegations against her in her individual capacity.

2010]. This authority extended to adoption of rules which permitted enforcement of revocation or suspension of parking privileges based on unpaid common charges including “booting” vehicles. *Id.*

Defendants noted that plaintiff did not deny receipt of the notice to cure, did not deny that he was in arrears on payment of common charges and had not opposed adoption of the rule.

Finally, defendants argued further that plaintiff’s motion should be denied because it was not supported by an affidavit, rather it was predicated solely on an attorney’s affirmation. *Id.*

Plaintiff’s Reply

Plaintiff replied to defendant’s opposition and cross motion, asserting that an attorney’s affirmation is “probative and sufficient on a motion for summary judgment, regardless of the attorney’s personal knowledge.” Affirmation In Opposition of Vincent P. Nesci, Esq. dated April 13, 2016 ¶ 2.

Notably, although plaintiff did not assert that the Board lacked authority to adopt Rule 7 in his complaint or in any of the papers submitted in support of the Order To Show Cause, in his reply, plaintiff asserted, for the first time, that the Board lacked authority to adopt Rule 7. He contends that the *Skouras* case cited by defendants is inapplicable because “the Appellate Division expressly noted that the condominium bylaws granted the Board authority to adopt a rule revoking parking privileges based on a failure to pay maintenance charges or other assessments. Because no such grant of authority is contained in the bylaws in this case, the Board acted outside of its authority in attempting to impose such a revocation of parking privileges here. The proper approach for the Board to take in this case is to first amend the bylaws so as to grant the Board necessary authority. Unless and until the bylaws are so amended, the Board lacks the requisite authority to revoke parking privileges.” *Id.* ¶ 10. (Emphasis in original).

Plaintiff asserts that this Court should be guided by the holding of *Linda Tenants Corp. v Spanakos*, 43 Misc 3d 137(A), an Appellate Term case, which, he contends, holds that “where the proper legal authority by the Board to revoke parking privileges is not established, the *Skouras* decision ... does not apply and the unit owner will retain the legal right to park his vehicle.” *Id.*

Plaintiff now challenges whether Rule 7 was properly adopted because the minutes submitted by defendants are undated and “not properly authenticated” such that they are “not properly submitted as evidence.” Affirmation In Opposition of Vincent P. Nesci, Esq. dated April 13, 2016

¶ 12. Plaintiff submits that Ms. Germini's affidavit cannot serve to authenticate the minutes since she does not state that she was present at the meeting and the minutes do not note that she was present. He refers to the meeting as an "impromptu Board meeting" and contends that "any alleged parking regulations adopted at such a meeting should be disregarded by the court." *Id.*

Plaintiff repeats that "there is nothing in the Declaration of Condominium that allows the Defendant to seize a property right without legal process." *Id.* ¶13. He submits that under Section 6.0 of the Declaration, "Two (2) parking spaces per unit will be assigned. These assigned spaces will remain with the Unit upon the sale or rental of the Unit" and allows that the condominium can license a 3rd vehicle for a unit owner, if necessary. *Id.* ¶¶ 14, 17 (internal quotation marks omitted). He argues, however, that extending Rule 7.0 to non owners and visitors who may be ignorant of the Board's revocation of any individual owner's parking privileges may subject the Board to possible civil and criminal charges such that the rule "fails any intelligent business judgment rule." *Id.* ¶ 15.

Plaintiff asserts that defendants' remedies for unpaid common charges is limited to the filing of, and foreclosing on, a lien. ¶ 21.

Finally, plaintiff employs a nearly indecipherable and unintelligible hyperbole to argue that "Condo living was not designed to be living in a police state or prison." Plaintiff continues " If there are disputes because of overreaching by a condo board such as the underlying judgments of \$14,000 for missed payments and \$18,000 for legal (and we do not know if they were even paid), imposing late charges upon a judgment (alleged to be \$2,700 as of this date) or a current fall behind alleged to be \$5,000? (Without accounting for any reduction by payments or even the reasons for same – such as being a 911 responder and still suffering from the effects without promised governmental [sic] compensation.)¹⁰" ¶ 20.

¹⁰ The Court has not been provided with any proof that plaintiff is suffering from any ailments attributed to any role he may have played in the September 11, 2001 attacks as no affidavit from him or other proof of that claim has been provided. Even if such proof had been provided, 15 years later plaintiff's neighbors are not obligated to ignore his long overdue common charges, his contribution to our nation notwithstanding. Similarly, while plaintiff's counsel attacks the past charges and legal fees assessed which are the subject of judgments, no argument is made that plaintiff does not owe the current charges.

Applicable Law

CPLR § 6312 (a) provides, in pertinent part:

On a motion for a preliminary injunction the plaintiff shall show, *by affidavit* and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.(emphasis added).

The Court notes that, as defendants argued, plaintiff did not submit an affidavit in support of the application. Rather, the motion was supported solely by the affirmation of plaintiff's counsel and the complaint which was verified solely by counsel.¹¹ Plaintiff submits that an affirmation of his attorney is a sufficient predicate for a preliminary injunction. Assuming, without deciding, that the complaint suffices to support the application under CPLR § 105, the law is clear that in order to secure a temporary restraining order or preliminary injunction, a party must demonstrate: (1) the likelihood of success on the merits, (2) irreparable injury and (3) a balancing of the equities in favor of the moving party. *Foy v Umeki*, 10 AD3d 604 [2nd Dept 2004]. Plaintiff has failed to satisfy these requirements on his motion.

Likelihood of Success

An evaluation of the likelihood of plaintiff's success on the merits, by necessity, invokes an analysis of the gravamen of plaintiff's complaint – that the Board's threatened action of revoking his parking privileges amounts to an impermissible seizure of his “deeded property right”.¹² This engenders an evaluation of the correctness of the Board's authority to act as intended.

¹¹ Plaintiff's counsel advised the Court when the Order to Show Cause was submitted that he is also plaintiff's father.

¹² Defendants contend that plaintiff has no deeded property right to park, an assertion that is correct. However, as a unit owner, he has a right to use the common areas, including those designated for parking. The Court recognizes that plaintiff's statement is incorrect. His right to use is attendant to his ownership of his unit. The Court will not, therefore, quibble over plaintiff's mistaken description of the source of his parking privileges.

Although plaintiff did not contend that the Board lacked authority to adopt Rule 7 in either his moving papers or his complaint, describing the Board's intended action as a "seizure of property", the Board somehow divined that to be plaintiff's claim. As such, the Board defended its adoption of the Rule under the Business Judgment Rule. It asserts that at a meeting held on May 5, 2015, the Board properly adopted the resolution.¹³

The law is clear that a condominium association can impose reasonable restrictions on the use of common elements as a sanction for failing to pay common charges. *Skouras, supra*. Although plaintiff disagrees, *Skouras* is both applicable and controlling law and *Linda Tenants Corp* is inapposite.

In *Skouras*, a case with strikingly similar facts to the case at bar, the Appellate Division held that "absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium" 73 Ad3d at 903 (citing *Schoninger v Yardarm Beach Homeowners' Assn*, 134 AD2d 1, 10 [2nd Dept 1987]). Plaintiff has made no claims of fraud, self dealing, unconscionability or misconduct by the Board that would warrant the Court looking beyond the business judgment rule. Indeed, as noted, it was not until his reply papers that he challenged the adoption of the rule, at all.

While plaintiff states that *Skouras* is distinguishable because the bylaws in that case specifically granted the Board the right to revoke parking privileges while such grant is absent here, such is not the case. Ms. Germini attests that the Board adopted Rule 7 which specifically conferred that right on the Board. The Court finds that to be sufficient proof of the adoption of the rule for the purposes of this motion, the absence of the date on the resolution notwithstanding.

That the King's Grant Board had authority to collect common charges and to adopt bylaws to enable it to do so cannot seriously be contested. *See, e.g.* Declaration §§ 10,14 and ByLaws Article II, §§ 2(A),(C),(E) and (M).

¹³ The Court notes that the copy of the Board resolution attached to defendants' opposition papers is not dated. While such an omission might affect the Court's ability to grant summary judgment, the application before the Court at this time concerns plaintiff's entitlement to a preliminary injunction, implicating perforce, an analysis of the likelihood of success. The affidavit of Ms. Germini is, in this Court's opinion, sufficient to proffer the fact that the Rule was, in fact, adopted by the Board.

Plaintiff's reliance on *Linda Tenants Corp* is misplaced. First, *Linda Tenants* emanates from the Appellate Term and is not controlling on this Court since there is Appellate Division authority directly on point. Second, *Linda Tenants* involved a cooperative apartment seeking to terminate a proprietary leasehold for a specific parking space leased to the tenant as an incident of his proprietary lease, not a condominium where spaces were assigned but where all parties had indivisible rights to all of the common areas. Third, *Linda Tenants* involved a claim by the owner of the cooperative apartment that the adoption of the rule in question was undertaken in *retaliation* for various actions undertaken by the tenant, including complaints to the Attorney General and organizing shareholder opposition to the landlord's managing agent. No claims of retaliation were made here. The rule was undertaken to assist in collection of common charges. Under the circumstances presented there, the Court in *Linda Tenants* held that the landlord "neither alleged nor proved a reason for its decision to terminate tenant's parking-space lease, it cannot be determined whether landlord's actions were 'taken in good faith and in ... legitimate furtherance of corporate purposes' (*Matter of Levandusky*, 75 NY2d at 538), or whether they were arbitrary. In view of the landlord's failure to articulate any basis for the termination, the petition must be dismissed." 43 Misc 3d at 137-138.

Given that it is unlikely that plaintiff will prevail in the action for injunction, implementation of a preliminary injunction is improper.

Irreparable Injury

Second, even if plaintiff could show a likelihood of success on the merits, plaintiff has not demonstrated irreparable injury. Nowhere in the moving papers is it alleged that there are no places other than the parking lot of the condominium association where plaintiff can park. While it may be inconvenient to plaintiff to have to park away from where he lives, inconvenience alone is not irreparable injury. In this regard, the Court notes that the application submitted did not include any affidavit from plaintiff which supported any claim of irreparable injury.

The Favor of the Equities

Finally, the equities of this matter do not tilt in favor of plaintiff. It is a fact of communal living, such as in a condominium, that all parties have responsibilities as well as privileges. Those responsibilities include the obligation to share in the costs of the maintenance (and other expenses, like real estate taxes) of the common areas. These costs are shared through the assessment of

common charges, payable by the unit owners. It is these common charge assessments that allow a condominium to maintain the common areas for the benefit of all members.

In this case, it appears that plaintiff seeks to enforce his rights to use the common areas but eschews any obligation to pay for those privileges. He has failed to pay common charges for an extended period of time, resulting in prior judgments in favor of the association, without effect and arrears, as of February 2015 in the amount of \$5,820.11. Exhibit 4. Simply put, it is manifestly unfair to those unit owners who actually pay their common charges to carry all of the financial obligations for maintenance of the common areas for the benefit of those who do not. One cannot attend a movie theater without paying for a ticket. One cannot eat at a restaurant without paying a check. One cannot fuel one's car without buying the gasoline. One should not expect to exercise an owner's right to use common areas of a condominium without bearing one's fair share of the common charges applicable thereto.

Plaintiff's assertion that defendant's recovery is limited to foreclosing on its lien against the unit is rejected. The unit is in foreclosure from the first mortgage lender. As such, defendant's ability to actually collect the monies owed is dubious. Plaintiff's fellow association members should not be deprived of the ability to pursue whatever remedies they can to compel plaintiff to pay his fair share of common charges. Similarly, plaintiff's suggestion that the Board's pursuit of him for the unpaid charges by suspending his parking privileges until paid is akin to his living in a police state, is misguided and offensive. Defendant's board is acting in the best interest of the majority of the association's members and in furtherance of its duties by seeking payment.

Accordingly, the temporary restraining order issued as part of the Order to Show Cause is vacated and the motion denied.

The Court notes that defendants have moved to dismiss only as to Ms. Germini. As such, the Court cannot address plaintiff's request for a permanent injunction at this time.

The foregoing constitutes the Decision and Order of the Court.

The parties are directed to appear before the undersigned for a preliminary conference on May 12, 2016 at 9:30 a.m. Counsel shall meet and confer, in person or by telephone, in advance of the conference to discuss what further discovery may be required.

Dated: April 28, 2016
Carmel, New York

ENTER


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