

**ESX Servs. LLC v Board of Mgrs. of the Essex  
House Condo.**

2019 NY Slip Op 30881(U)

March 19, 2019

Supreme Court, New York County

Docket Number: 654144/15

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

ESX SERVICES LLC

INDEX NO. 654144/15

- v -

MOT. DATE

MOT. SEQ. NO. 001, 002 and 003

THE BOARD OF MANAGERS OF THE ESSEX HOUSE CONDO. Et al.

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This case involves a dispute between two neighboring unit owners regarding the view of Central Park from one of those units. Plaintiff contends that the Board of Managers of the Essex House Condominium (the "Condo") improperly permitted the other unit owner, 160 Central Park South # 150704 LLC ("160 CPS") to build a structure on its terrace that obstructed plaintiff's Central Park views.

The relevant facts are not in dispute. In 2008, plaintiff purchased adjacent units # 1607 and # 1608 on the sixteenth floor (collectively "plaintiff's apartment") of the Condo. In 2012, 160 CPS purchased units # 1504 and # 1507 on the fifteenth floor (collectively "160 CPS' apartment") directly below plaintiff's units.

Sometime in 2013/2014, 160 CPS submitted a request to the Condo seeking permission to renovate its apartment, including the demolition and reconstruction of the greenhouse on the terrace. 160 CPS explains that its experts determined that the existing structure needed to be replaced because it was cracked, leaking, and falling apart.

Dated: 3/19/19

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [X] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

In May 2014, the Condo's Board approved the alteration project on unanimous consent. Thereafter, 160 CPS completed construction of the new structure on the same footprint as the old structure. In or around December 2014, plaintiff realized that the new structure obstructed the view of Central Park from two of the five windows in their unit and complained to the Board that 160 CPS built a structure that was larger and different in shape than the original. Plaintiff commenced this action one year after the completion of the structure and their initial complaint to the Board.

Plaintiff asserts that it was improper for 160 CPS to build a structure which obstructed its views without plaintiff's consent and that the new greenhouse has diminished the market value of its apartment by approximately \$415,000. In its complaint, plaintiff has asserted the following causes of action: [1] violation of RPL § 339-k against 160 CPS; [2] violation of RPL § 339-j against 160 CPS; [3] a permanent injunction requiring 160 CPS to replace the teahouse; and [4] breach of fiduciary duty against the Condo.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court will first consider the Condo's motion. It argues that the breach of fiduciary duty claim fails because such a claim does not lie against a condominium board. In any event, the Condo maintains that the fourth cause of action should be dismissed because the Condo's Board complied with procedure governing provisions concerning alterations by unit owners and that such decision is protected by the business judgment rule. Otherwise, the Condo contends that plaintiff is not "entitled to an unobstructed view absent an express easement."

The Condo's motion must be granted. The Condo has certainly demonstrated *prima facie* entitlement to judgment as a matter of law in its favor. First, it is well settled that "a corporation does not owe fiduciary duties to its members of shareholders" (*Peacock v. Herald Square Loft Corp.*, 67 AD3d 442 [1st Dept 2009]). In any event, plaintiff's claims against the Condo are conclusory and insufficient to establish that it did not follow all applicable procedures and rules when it granted 160 CPS permission to build the new greenhouse structure. (*Id.*) Since plaintiff has failed to raise a triable issue off act, the Condo's motion is granted in its entirety and plaintiff's motion as to the fourth cause of action is denied. The court now turns to 160 CPS' motion.

160 CPS argues that it did not violate Real Property Law (RPL) § 339-k or RPL § 339-j, and Plaintiff is not entitled to the drastic relief of a "mandatory injunction" compelling 160 CPS to demolish and remove an architectural work that was completed nearly three (3) years ago and that it had the absolute right to erect on its own terrace, with the Board's consent, according to the Condominium's By-Laws.

With regards to the new greenhouse, 160 CPS disputes plaintiff's claim that the new greenhouse is taller than the prior structure. 160 has submitted in support of the motion the sworn affidavit of Dale McDonald, who enjoys exclusive use of 160 CPS' apartment and "led a team of professionals to design and build" the new greenhouse, the sworn affidavit of Darius Toraby, the architect who, *inter alia*, prepared the plans for the demolition/reconstruction of the greenhouse, as well as the sworn deposition testimony of Patricia Needham, the Condo Board's current president. 160 CPS has also provided to the

court copies of the plans for the new greenhouse prepared by Toraby. 160 CPS admits, however, that the old and new greenhouse structures differ in terms of the "shape or slope of the roof."

160 CPS has also provided to the court copies of photographs taken by Toraby during the demolition and construction phases of the greenhouse project. 160 CPS contends that these photographs "conclusively demonstrate that the replacement structure was erected on existing concrete curbs that were placed over the existing structural slabs and structure, and that the structure was erected along the lines of waterproofing markings of the prior structure." In his affidavit, Toraby confirmed that based upon measurements he took, "...the connection points between the replacement structure and the terrace wall are exactly the same as the lines before."

Otherwise, 160 CPS characterizes plaintiff's principals as out-of-possession landowners who have never resided in the apartment and urges the court to reject their speculative claims regarding the old and new greenhouse structures. 160 CPS also argues that plaintiff's claims of diminution of value are specious since plaintiff rents the apartment out for \$15,500/month in 2017 as compared to \$10,000/month in 2010. Next, 160 CPS asserts, based upon plaintiff's principal's deposition testimony, that only two out of five windows in the apartment have views of Central Park affected by the greenhouse and to the extent those views were affected, the affects were *de minimus*. Finally, 160 CPS contends that plaintiff's claims are unavailing because they engaged in inordinate delay and that absent a written easement, plaintiff has no right to a Central Park view.

RPL § 339-j, entitled "Compliance with by-laws and rules and regulations", states in relevant part:

Each unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief or both maintainable by the board of managers on behalf of the unit owners or, in a proper case, by an aggrieved unit owner....

RPL § 339-k, entitled "Certain work prohibited", provides:

No unit owner shall do any work which would jeopardize the soundness or safety of the property, reduce the value thereof or impair any easement or hereditament, nor may any unit owner add any material structure or excavate any additional basement or cellar, without in every such case the consent of all the unit owners affected being first obtained.

Plaintiff argues that it is entitled to summary judgment on the first cause of action because there is no dispute that its consent to 160 CPS' demolition/construction of the greenhouse was not obtained and that it was affected by said construction. These arguments are unavailing as they are entirely speculative and wholly unsubstantiated on this record. Indeed, assuming *arguendo* that plaintiff could even show that the new greenhouse was taller than the old structure, plaintiff's claims fail as a matter of law. Generally, an adjoining landowner does not have an easement for light or air absent an express agreement (*Chatsworth Realty 344 LLC v. Hudson Waterfront Company A, LLC*, 309 AD2d 567 [1st Dept 2003]; *cf. 402 West 38th St. Corp. v. 485-497 Ninth Avenue Partners, LLC*, 16 Misc3d 1131[A] [2007]). Based on the forgoing, plaintiff cannot claim any damages for an alleged partial obstructed view of Central Park from any of the windows in the apartment. Accordingly, 160 CPS' motion must be granted and the balance of plaintiff's complaint dismissed and the balance of plaintiff's motion is denied.

In light of this result, the court declines to address 160 CPS' remaining arguments as to summary judgment in its favor as moot. Further, that portion of 160 CPS' motion for attorneys' fees is denied. Absent statutory authorization or a contractual agreement providing for recovery of attorneys' fees, such an award is not generally appropriate. 160 CPS has not demonstrated any basis for such relief. Accordingly, that portion of its motion is denied.

**CONCLUSION**

In accordance herewith, it is hereby

**ORDERED** that the Condo's motion for summary judgment (motion sequence number 001) is granted in its entirety; and it is further

**ORDERED** that 160 CPS' motion (motion sequence number 002) is granted to the extent that it is entitled to summary judgment against plaintiff dismissing plaintiff's claims against it, only; and it is further

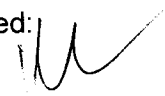
**ORDERED** that the balance of 160 CPS' motion is denied and plaintiff's motion (motion sequence number 003) is also denied; and it is further

**ORDERED** that plaintiff's complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/19/19  
New York, New York

So Ordered:   
Hon. Lynn R. Kotler, J.S.C.