Seaport S. Condominium v Albano
2019 NY Slip Op 32616(U)
September 3, 2019
Supreme Court, New York County
Docket Number: 650234/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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SEAPORT SOUTH CONDOMINIUM,

Plaintiff,

- v -

CHRISTOPHER ALBANO and MERYL NOWICK-ALBANO,

Defendants.

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INDEX NO. 650234/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for JUDGMENT - SUMMARY.

Motion by Plaintiff Seaport South Condominium ("Plaintiff" or "the Condo") for an order (1) granting it summary judgment, pursuant to CPLR 3212, on its first cause of action for a permanent injunction enjoining, prohibiting and restraining Defendants Christopher Albano's and Meryl Nowick-Albano's (collectively, "Defendants" or "the Albanos") purported wrongful use of Plaintiff's rooftop space in violation of a settlement agreement, dated June 15, 2011 (the "Settlement Agreement") and Plaintiff's by-laws and directing Defendants to cure all purported violations forthwith; and (2) setting the matter down for hearing or a reference with respect to plaintiff's claim for attorney fees, is denied for the reason stated herein.

BACKGROUND

Plaintiff is a condominium organized and existing under the laws of the State of New York, having been formed pursuant to a condominium declaration recorded with the New York City Register on October 13, 1983, and is located at 130 Water Street, New York, New York 10005. The complaint asserts that Defendants are the owners of the Unit 12D in the subject premises.[1]

The parties agree that on or about June 15, 2011, Defendants and the Board of Managers of the Seaport South Condominium ("the Board"), acting on behalf of Plaintiff executed the Settlement Agreement which resolved a dispute as to, whether Defendants, as owners of Unit 12D had a right to (i) exclusive use of a portion of the roof area as a limited common element ("LCE"), and if so, the size and nature of the dimensions of the LCE area; and (ii) to develop a terrace within the LCE area. (*See* Affirm in Supp., Ex. C [Settlement Agreement].) As part of

[1] Defendants admit that Christopher Albano is currently the owner of Unit 12D and admit that Meryl Nowick-Albano has owned Unit 12D.

Settlement Agreement, a diagram of the roof was annexed to the agreement, as Exhibit A, depicting the area that the parties agreed to be the LCE area for Unit 12D. As annexed to the Settlement Agreement, as Exhibit B, was a photograph of the then "current use" of the LCE area which was "approved by the [Board] subject to the Albanos' compliance with applicable rules, regulations and laws." (Settlement Agreement at 2.) The Settlement Agreement further stated:

> "The Albanos informed the BOM that they intend to seek approval to make certain improvements in connection with the Unit 12D LCE ("Unit 52D LCE Area Additional Improvements"), such as installation of a fence between the Unit 120 LCE Area and GCE Roof Area, additional electrical outlets and/or a water supply source and/or modification of the water supply to the Unit 12D LCE Area. The Albanos have been advised and understand that if they desire to make any Unit 12D LCE Area Additional Improvements, any Unit 12D LCE Area Additional Improvements are subject to the Albanos' executing the Condo's then current alteration agreement (the 'Alteration Agreement') and obtaining approval as required by and provided in the Alteration Agreement."

(Id.)

Pursuant to the Settlement Agreement, Defendants waived any claims of rights to any other portion of the roof for their exclusive use other than the LCE area and agreed to pay Plaintiff $45,000 "in full payment and final settlement of any amounts due from and/or imposed on the Albanos by the Condo related to the matters that are the subject of this Agreement and the resolution of those matters." (Id.) The Settlement Agreement also contains a "covenant not to sue" provision and an indemnification provision wherein if one party brings a claim against another "regarding any subject matter relating to this Settlement Agreement and not specifically permitted by this Settlement Agreement, the Suing Party shall indemnify and hold harmless the Non-Suing Party with regard to any damages incurred as a result of the Claim and shall further indemnify the Non-Suing Party for all costs of related to the Claim, including reasonable attorneys' fees at the usual and customary rates charged to paying clients." (Id. at 4.)

On the instant motion, Plaintiff argues in sum and substance that Defendants have violated the Settlement Agreement by using portions of the roof outside the defined LCE area and that are too close to common elements of the building's infrastructure. Plaintiff, submitting an affidavit from its managing agent's Director Hanly Braginsky, states that the items extending beyond the LCE area include potted plants, a low fence, 2x4 wood braces, an umbrella and a storage box. Plaintiff further asserts that Defendants have erected fencing in the LCE area without approval. In addition, Plaintiff argues that certain of Defendants' personal items are placed too closely to infrastructure related to the building's ventilation system and pose a risk of damage to the rooftop mechanical equipment or are interfering with the building's staff performing maintenance work on said equipment. Defendants submit pictures of the LCE area, dated November 22, 2016.

Plaintiff further argues that upon granting it summary judgment, this Court should set down its claim for attorney fees for a hearing or a reference, on the grounds that under the by-laws and the Settlement Agreement, it is entitled to attorney fees incurred in correcting Defendants' violation of the by-laws and the Settlement Agreement.

In opposition, Defendants, who submit an affidavit from Defendant Christopher Albano ("Christopher"), assert that they are not in violation of the Settlement Agreement because none of their personal items extend beyond the LCE area and because they have not made any alterations to the LCE area that require approval. Christopher points to an email exchange he had with an attorney representing Plaintiff, around the time that the Settlement Agreement was executed, for his position that he does not need Board approval to install a "plant barrier." (Christopher Aff. in Opp. ¶11, Ex. D [June 12, 2011 Email].) Christopher also asserts that in his most recent meeting with Mr. Braginsky around October 2018, Mr. Braginsky suggested that he move the plant barrier "a few inches so that it would be fully resting on my terrace deck tiles," and that he did "exactly what Mr. Braginsky suggested." (Christopher Aff. ¶ 14, Ex. G [October 10, 2018 Email with Attached Photos].) Christopher states that he then sent Mr. Braginsky an email "with photographic evidence that all items were placed within my limited common element space." (Id.) In addition, Defendants assert that their personal items are not only within the LCE area but also at an appropriate distance from the building infrastructure, and Defendants contend that Plaintiff is unable to provide any proof that the placement of their personal items has actually affected the building's ventilation, caused any damage or has the potential to cause damage to building property, or has interfered with Plaintiff's staff performing maintenance work on the roof. Defendants argue that pursuant to the Settlement Agreement's "covenant not to sue" and indemnification provision, Plaintiff must reimburse them for their reasonable fees and costs in the instant litigation.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Id.) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d at 562). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff . . . the court on a summary judgment motion must indulge all available inferences . . ." (*Torres v Jones*, 26 NY3d 742, 763 [2016]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

"To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege 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." (*In re Long Is. Power Auth. Hurricane Sandy Litig.*, 134 AD3d 1119, 1120 [2d Dept 2015].) "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction." (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 [2d Dept 2009].) "Injunctive relief is to be invoked only to give protection for the future[,] to prevent repeated violations, threatened or probable, of the plaintiffs' property rights." (Id. [internal quotation marks and emendation omitted].)

On the instant motion, Plaintiff has failed to make a prima facie showing eliminating all material issue of fact and establishing that it is entitled to a permanent injunction as a matter of law. Notably, the photograph submitted by Plaintiff, dated November 22, 2106 and which Plaintiff argues shows Defendants' offending use of the LCE area, is not significantly different from the photograph showing the "approved" use of the LCE area in Exhibit B to the Settlement Agreement. Furthermore, there are no clear markers in the photographs submitted by Plaintiff showing where the LCE ends. In addition, Plaintiff submits Braginsky's affidavit which conclusorily asserts that Defendants' personal items are too close to the building's infrastructure, but submits no actual evidence supporting a finding on this motion that the current placement creates a risk to resident safety or building property or is an impediment to the building staff performing maintenance work. Finally, Defendants submit evidence that they have moved certain items further within the LCE area at the request of Plaintiff, and Plaintiff does not address these assertions. For all these reasons, this Court denies the branch of the instant motion seeking summary judgment on the first cause of action for a permanent injunction, as there are issues of fact concerning whether Defendants are presently violating Plaintiff's rights with no adequate remedy at law, whether irreparable harm will result absent the injunction, and whether the equities balance in favor Plaintiff.

Given that Plaintiff's argument on the instant motion for attorney fees was contingent upon prevailing on the branch seeking summary judgment, the branch for attorney fees is similarly denied.

The Court has considered the parties other arguments and finds them unavailing.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Plaintiff Seaport South Condominium ("Plaintiff" or "the Condo") for an order (1) granting it summary judgment, pursuant to CPLR 3212, on its first cause of action for a permanent injunction enjoining, prohibiting and restraining Defendants Christopher Albano and Meryl Nowick purported wrongful use of Plaintiff's rooftop space in violation of a settlement agreement, dated June 15, and Plaintiff's by-laws and directing Defendants to cure all purported violations forthwith; and (2) setting the matter down for hearing or a reference with respect to plaintiff's claim for attorneys' fees, is denied; and it is further

ORDERED that counsel for Defendants Christopher Albano and Meryl Nowick shall file a copy of the instant decision and order on NYSCEF with notice of entry within twenty (20) days.

The foregoing constitutes the decision and order of this Court.

9/3/2019
DATE

ROBERT DAVID KALISH, J.S.C.
HON. ROBERT D. KALISH J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE