City of New York v Tominovic
2020 NY Slip Op 30158(U)
January 17, 2020
Supreme Court, Queens County
Docket Number: 710662/19
Judge: Kevin J. Kerrigan
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MEMORANDUM
NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE KEVIN J. KERRIGAN PART 10
JUSTICE

The City of New York, X INDEX NO.710662/19

Plaintiffs,

MOTION SEQ. NO. 1

- against -

Elvis Tominovic, Romina Tominovic, Loreta Tominovic, Franko Tominovic, Sanja(a/k/a Sanya) Colic, Suzana Colic, Dragan Mavra, Neo Panayiotou, Ress Services Inc., 31-27 14 Street Realty LLC, 47-15 28 Avenue Realty LLC, 47-15 28 Avenue Realty LLC, Istra Jazz Inc., R&S Living Inc., and "John Doe" and "Jane Doe" et.al.,

MOTION DATE: 11/25/19

Defendants.
X

Plaintiff City of New York has moved for , inter alia, a preliminary injunction pursuant to Multiple Dwelling Law §306 prohibiting certain individuals and companies from permitting the use or occupancy of any of the dwelling units in specified buildings for less than thirty consecutive days.

I. The Plaintiff City's Allegations

The plaintiff city alleges the following:

Beginning in 2015 or earlier, the eight individual and five corporate defendants have advertised about and rented accommodations for illegal, short-term periods (less than thirty days). The defendants have conducted their illegal activities in 36 buildings, 25 of which are multiple dwellings. The defendants have created 28 separate Airbnb host accounts, have accepted over 20,000 illegal short-term rental reservations, and have generated over $5,000,000 in revenue.

From 2015 through 2019, the defendants advertised illegal short-term rentals through approximately 211 Airbnb listings, and these advertisements do not disclose the illegality of these transient accommodations nor their safety hazards. These advertisements make the accommodations seem desirable, and they do not disclose that

hundreds of reviews from guests complain about poor or hostile communication with the defendants, a lack of heat and hot water, uncleanliness, poor maintenance, and overcrowded and unsafe situations. The advertisements do not mention that the defendants have charged as much as $95 in cleaning fees.

Despite the city's enforcement efforts, the defendants' illegal short-term rental transactions through Airbnb have increased significantly over time. The New York City Department of Buildings (DOB) and the New York City Fire Department (FDNY) have issued dozens of violation notices and administrative orders, including DOB peremptory vacate orders on three of the buildings operated by the defendants. None of the twelve subject buildings used by the defendants for illegal short-term rentals have required safety features for short-term rentals such as fire alarms, automatic sprinklers, and two means of fire-proof egress on each floor. Despite 59 notices of violation and 11 illegal transient advertising summonses, the city has failed to put a stop to the defendants' illegal activity. Moreover, the illegal rentals have created problems for permanent residents, and since 2015 DOB has received approximately 31 citizen complaints of illegal transient use of twelve buildings operated by the defendants.

II. The Complaint

The first cause of action is for violation of the New York City Consumer Protection Law [Administrative Code of the City of New York §20-700 et seq]. The second cause of action is for violation of Multiple Dwelling Law §§4(8)(a) and 121. The third cause of action is for an injunction pursuant to General City Law §20(22). The fourth cause of action is for an injunction to prohibit a public nuisance.

III. Discussion

Multiple Dwelling Law § 4, "Definitions, " provides in relevant part: "8. a. A 'class A' multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. **** A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, 'permanent residence purposes' shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit. The following uses of a dwelling unit by the permanent occupants thereof shall not be deemed to be inconsistent with the occupancy of such dwelling unit for permanent residence purposes ***." (Emphasis added.) (*See, Terrilee 97th St. LLC v. New York City Envtl. Control Bd.*, 146 AD3d 716 [1st Dept. 2017]; *Helms Realty Corp. v. City of New York*, 397 F. Supp. 3d 379[S.D.N.Y. 201].)

New York City Administrative Code § 27-2004, "Definitions," in relevant part tracks Multiple Dwelling Law §4 and similarly provides: " 8. (a) A class A multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. ***A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this subparagraph, 'permanent residence purposes' shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more, ***." (Emphasis added."

Multiple Dwelling Law § 121, " Prohibiting advertising that promotes the use of dwelling units in a class A multiple dwelling for other than permanent residence purposes," provides in relevant part: "1. It shall be unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate subdivision eight of section four of this chapter defining a 'class A' multiple dwelling as a multiple dwelling that is occupied for permanent residence purposes." (*See, Helms Realty Corp. v. City of New York, supra.*)

Multiple Dwelling Law §306, " Judicial Procedure and Orders," provides in relevant part: "1. In case any multiple dwelling *** is constructed, altered, converted or maintained in violation of any provision of this chapter or of any order or notice of the department, or in case a nuisance exists in any such dwelling *** the department may institute any appropriate action or proceeding to prevent such unlawful construction, alteration, conversion or maintenance, to restrain, correct or abate such violation or nuisance, to prevent the occupation of said dwelling or structure or any part thereof, or to prevent any illegal act, conduct or business in or about such dwelling, structure or lot. 2. In any such action or proceeding the department may, by affidavit setting forth the facts, apply to the supreme court, *** for: a. An order granting the relief for which said action or proceeding is brought, or enjoining all persons from doing or permitting to be done any work in or about such dwelling, structure or lot or any part thereof, or from occupying or using the same for any purpose, until the entry of final judgment or order."

New York City Administrative Code § 20-703 provides in relevant part: "d. Whenever any person has engaged in any acts or practices which constitute violations of any provision of this subchapter [The Consumer Protection Law] or of any rule or regulation promulgated thereunder, the city may make application to the supreme court for an order enjoining such acts or practices and for an order granting a temporary or permanent injunction, restraining order, or other order enjoining such acts or practices."

The New York City Construction Code also permits the city to apply for a preliminary injunction : "[T]he city may apply for restraining orders, preliminary

injunctions or other provisional remedies, with or without notice; and no undertakings shall be required as a condition to the granting or issuing of any such order, injunction or remedy, or by reason thereof." (Administrative Code § 28-205.1.1.)

It may be seen from the foregoing that there is an ample statutory and regulatory basis for the preliminary injunction which the city seeks, and, indeed, this court already issued a temporary restraining order on June 21, 2019.

As a general rule, a party moving for a preliminary injunction must show a probability of success on the merits, irreparable injury if provisional relief is withheld, and a balance of the equities in his favor. (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; *Soundview Cinemas, Inc. v. AC I Soundview, LLC*, 149 AD3d 1121 [2nd Dept. 2017].) The city contends that a municipality is entitled to injunctive relief merely by making a prima facie showing that its laws are being violated, and there is some support in the case law for this assertion. (*See*, *Eggert v. LeFever*, 222 AD2d 1043, 1043 [4th Dept 1995] ["Because the record establishes that defendants violated the Town's zoning ordinance, plaintiffs are entitled to a preliminary injunction ***; they are not required to meet the three-prong test generally applicable to requests for injunctive relief"]; *City of New York v. Bilynn Realty Corp.*, 118 AD2d 511, 512 [1st Dept 1986] [" A municipality has authority to obtain temporary restraining orders strictly enforcing its zoning ordinances. The three pronged test for injunctive relief does not apply; no special damage or injury to the public need be alleged; and commission of the prohibited act is sufficient to sustain the injunction"].) In *Town of Poughkeepsie v. Hopper Plumbing & Heating Corp.* (45 Misc2d 23 [Sup. Ct. 1965]), the motion court, in granting a motion for a preliminary injunction enjoining an unlicensed plumber from work on school projects, stated : "It is not incumbent upon the plaintiff municipality to establish any special damage or injury to the public for equity to restrain violations or to compel compliance with an ordinance." While the Appellate Division, Second Department affirmed (*Town of Poughkeepsie v. Hopper Plumbing & Heating Corp.*, 23 AD2d 884, 885 [2nd Dept 1965]), it merely stated that " under all the circumstances disclosed by this record the Special Term did not improvidently exercise its discretion in granting the injunction pendente lite." It is by no means clear that in *Hopper* the Appellate Division dispensed with the traditional tripartite showing.

There are also Appellate Division, First Department cases which undermine the city's position. (*See, e.g.*, *City of New York v. 330 Cont'l LLC*, 60 AD3d 226, 230 [1st Dept 2009] [applying the tripartite test in denying the city's motion for a preliminary injunction brought in a case alleging a violation of the Zoning Resolution or the certificate of occupancy]; *City of New York v. Untitled LLC*, 51 AD3d 509, 511 [1st Dept 2008] "[the motion court's summary denial gave inadequate consideration to the

three-prong test for preliminary injunctive relief, which is applicable in cases under the Nuisance Abatement Law"].)

As far as is known to the court, *Inc. Vill. of Plandome Manor v. Ioannou*, (54 AD3d 364 [2nd Dept 2008]) is the most recent Appellate Division Second Department case on point. *In Ioannou*, the village brought an action pursuant to Village Law § 7–714, to, among other things, permanently enjoin the defendant from constructing any structure for which no permit was issued. The appellate court stated: "When a village seeks injunctive relief pursuant to Village Law § 7–714, it may obtain a preliminary injunction without satisfying the traditional three-pronged test for preliminary injunctive relief. The village must demonstrate only a likelihood of success on the merits and that the equities are balanced in its favor; it need not demonstrate irreparable harm." (*Inc. Vill. of Plandome Manor v. Ioannou*, *supra*, 365.)

This court will, of course, follow *Ioannou*.

In regard to the likelihood of success on the merits , the plaintiff city met this requirement by making a prima facie showing that it can prove at least one of its causes of action. (*See, McNeil v. Mohammed*, *McNeil v. Mohammed,* 32 AD3d 829, [2nd Dept 2006]; *Trimboli v. Irwin*, 18 AD3d 866 [2nd Dept 2005]; *Four Times Square Associates, L.L.C. v. Cigna Investments, Inc.*, 306 AD2d 4 [1st Dept 2003].) The city accomplished this through the lengthy, detailed supporting affidavit of Vladimir Pugach, an Assistant Chief Building Inspector for DOB presently assigned to the Mayor's Office of Special Enforcement, and also through the numerous documents connected to his affidavit. (Other affidavits from other city officials with attached documents also support this motion.) The city made a sufficient evidentiary showing that the defendants are violating the Multiple Dwelling Law and the Administrative Code by illegally advertising permanent residential units within the subject buildings for short term rentals and then illegally renting those units on a short term basis. The court notes that where human safety is a factor,"[t]he proof required for a finding of the likelihood of success on the merits is reduced." (*Doe v. Dinkins,* 192 AD2d 270, 275 [1st Dept 1993].) Although the defendants attempted to raise issues of fact, such issues do not in themselves preclude the issuance of a preliminary injunction. (See, CPLR 6312[c]; *1650 Realty Assocs., LLC v. Golden Touch Mgmt., Inc.*, 101 AD3d 1016 [2nd Dept 2012];*Arcamone-Makinano v. Britton Prop., Inc.*, 83 AD3d 623 [2nd Dept 2011]; ; *Stockley v. Gorelik,* 24 AD3d 535 [2nd Dept 2005].)

While the city was not required to demonstrate irreparable injury (*see*, *Inc. Vill. of Plandome Manor v. Ioannou*, *supra*) , the court notes that " irreparable injury is presumed from the continuing existence of an unremedied public nuisance ." (*City of New York v. 330 Cont'l LLC*, 60 AD3d 226, 230 [1st Dept 2009].) In any event, the city

demonstrated that the defendants are engaged in conduct that endangers the lives, health, safety, and well-being of others. The plaintiff city demonstrated an immediate threat to the physical safety of others -- injuries which potentially could be irreparable.(*See, Cent. Park Sightseeing LLC v. New Yorkers for Clean, Livable & Safe Streets, Inc.*, 157 AD3d 28 [1st Dept 2017];*People by Abrams v. Anderson*, 137 AD2d 259 [4th Dept 1988].)

The balance of the equities lies in the city's favor because of the need to protect human safety.

The court finds that the city is entitled to the preliminary injunction that it seeks. There are cases similar to the one at bar where the same finding has been made. (See, e.g., *The City of New York v Baldeo*, (2019 WL 993135 [Sup. Ct., 2019]; *The City of New York v Pavlenok*, 2019 WL 2902159[Sup. Ct. 2019]; *City of New York v. Smart Apartments LLC*, 39 Misc.3d 221 [Sup. Ct. 2013].)

Pursuant to CPLR 2512, a municipality is exempt from giving an undertaking. (*See, Town of Putnam Valley v. Cabot*, 50 AD3d 775 [2nd Dept 2008]; *Bonded Concrete, Inc. v. Town of Saugerties*, 42 AD3d 852 [3rd Dept 2007].)

Accordingly, the motion is granted.

Settle order.

Dated: January 17, 2020

Kevin J. Kerrigan, J.S.C.

FILED
JAN 27 2020
COUNTY CLERK
QUEENS COUNTY