

Steinhardt v 1158 Fifth Ave., Inc.
2020 NY Slip Op 30819(U)
March 18, 2020
Supreme Court, New York County
Docket Number: 161552/2019
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. BARBARA JAFFE</u>	PART	IAS MOTION 12EFM
	<i>Justice</i>		
	-----X	INDEX NO.	<u>161552/2019</u>
	MICHAEL STEINHARDT and JUDY STEINHARDT,	MOTION DATE	_____
	Plaintiffs,	MOTION SEQ. NO.	<u>001</u>
	- v -		

1158 FIFTH AVENUE, INCORPORATED,
HOWARD L. ZIMMERMAN ARCHITECTS PC,
BAY RESTORATION CORPORATION, DOUGLAS
ELLIMAN PROPERTY MANAGEMENT,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 2-9, 11-18, 20-26, 28-30, 32-35

were read on this motion for injunction/restraining order.

By order to show cause dated November 27, 2019, plaintiffs move pursuant to CPLR article 63 for a temporary restraining order and preliminary injunction enjoining and restraining defendants, their officers, etc., during the pendency of this action, from entering their apartment and drilling holes into their terrace in connection with the repair of the façade of the building at 1158 Fifth Avenue in Manhattan. (NYSCEF 2). Defendants oppose.

I. PROCEDURAL BACKGROUND

On November 27, 2019, the parties appeared and entered into a stipulation whereby defendant 1158 Fifth Avenue, Incorporated (1158) promised not to commence work on plaintiffs' terrace until, at the earliest, December 5, 2019, that it would not instruct the other defendants to commence their work on the terrace before that time, and that it would email defendants a copy of the motion papers at least a day before appearing for argument on their

application. (NYSCEF 10). On December 3, 2019, oral argument was adjourned to December 9, 2019 and 1158 agreed that it would not commence work on the terrace until, at the earliest, after oral argument on December 9, 2019, and would so instruct the other defendants. The parties agreed to meet with their respective experts on December 5, 2019 with the goal of settling the action. (NYSCEF 11).

On December 6, 2019, 1158 e-filed its affirmation in opposition to plaintiffs' application for a temporary restraining order. (NYSCEF 16).

On December 9, 2019, the parties agreed to reschedule oral argument for December 16, 2019, and 1158 renewed its promises not to commence the work. (NYSCEF 17).

On December 12, 2019, plaintiffs filed their complaint whereby they seek a permanent injunction restraining defendants from the same conduct they seek to enjoin in this application (NYSCEF 19), and by stipulation so ordered on December 13, 2019, the parties sought additional time to continue their negotiations, and 1158 renewed the aforementioned promises. Plaintiffs also agreed to an extension of time to February 28, 2020, for defendants 1158 and Douglas Elliman to respond to their complaint. Oral argument was scheduled for January 29, 2020. (NYSCEF 21).

By stipulation so ordered on January 24, 2020, plaintiffs agreed that defendants 1158, Douglas Elliman, and Howard L. Zimmerman Architects PC (HLZ) would have until March 31, 2020 to respond to their complaint. Given the ongoing settlement negotiations, oral argument was adjourned to March 4, 2020, "final." (NYSCEF 25). By stipulation dated February 11, 2020, Bay Restoration was given until February 21, 2020 to answer plaintiffs' complaint. (NYSCEF 26).

On February 21, 2020, defendant Bay Restoration filed its answer. (NYSCEF 27).

Oral argument of plaintiffs' application was held on March 4, 2020. (NYSCEF 35).

II. CONTENTIONS

A. Plaintiffs (NYSCEF 2-8, 28, 29)

In support of their application, plaintiffs offer the expert affidavit of their licensed architect, David H. Abelow, who has communicated with defendants concerning how best to repair the building's façade without irreparably damaging the contents of certain apartments there. Based on those communications, Abelow opines that defendants' plan to rip out many tiles from plaintiffs' terrace and drill into it some 12 to 20 holes into which they would insert steel pins to anchor needed scaffolding to the building will compromise the structural integrity of plaintiffs' apartment and seriously compromise the waterproof membrane lying beneath the tiles. As a result, plaintiffs' art collection will be irreparably damaged as it is in the living room below the terrace. According to what Abelow has "seen and been told," the steel pins must be able to hold 5,000 pounds. Moreover, given his familiarity with the terrace and knowledge of the building, the structural slab of the terrace is "extremely brittle" and thus, drilling it will inevitably result in a leak. He warns that the drilling of brittle concrete yields an "exit wound" or "blowout" that may cause a six-inch square of concrete to fall through the gypsum ceiling of plaintiffs' living room. (NYSCEF 2).

Abelow thus recommends that instead of drilling holes into plaintiffs' terrace, defendants anchor the steel pins and safety lines to a steel spandrel located just below the building's roof, above plaintiffs' penthouse. He warns of irreparable damages not only to plaintiffs' "significant art," but to architectural and interior treatments, textiles, and antique carpets which are of additional concern as he has "never been told" whether defendant Bay Restoration has insurance for the work. (*Id.*).

By supplemental affidavit, Abelow adds that pursuant to the parties' agreed-upon adjournment of plaintiffs' application, the parties agreed to testing to determine whether the drilling of holes into plaintiffs terrace would cause damage, and that on December 3, 2019, a tensile test was conducted on behalf of defendants HLZ and BRC conducted by an independent entity, Hilti, Inc. Abelow reports that the test resulted in a finding that the holes drilled into a flat horizontal surface, like a terrace, created a hazardous condition whereas holes drilled into a vertical wall did not. (NYSCEF 28, 29).

Plaintiffs also offer the expert affidavit of Mark Ellis, another licensed architect, who offers the same opinion articulated by Abelow, adding that a sidewalk shed around the building protects the public from any falling debris, in particular, terra cotta elements that could fall during the façade repairs. According to him, the building's plan is to secure the scaffolding by removing tiles from the floor of plaintiffs' terrace and drilling into it some 12 to 20 holes into which steel pins would be placed to support safety cables. He characterizes the plan as "a catastrophe" that will "surely cause structural damage to the terrace," leading to water damage and irreparable damage to the contents of plaintiffs' living space. He specifically explains that by drilling holes in plaintiffs' terrace, the waterproof membrane and structural slab forming the ceiling of plaintiffs' living space will be damaged and result in water damage to plaintiffs' art collection. Cracks in the slab will also result and cause "chronic infiltration problems." (NYSCEF 3).

Ellis offers the "very simple alternative" of anchoring the scaffolding to the steel frame that supports the building's penthouse roof which may be accessed by removing the covering bricks and drilling the steel or welding hooks thereon, and attaching the safety cables to it, which he moreover asserts is cheaper, easier, and safer than drilling holes in the terrace. (*Id.*).

Plaintiff Michael Steinhardt provides a list of some of the art he and his wife possess, and claims that they are “irreplaceable” and would be a “great loss, not just to [him] personally, but to the art world in general.” (NYSCEF 4).

Plaintiffs maintain that a temporary restraining order is needed to preserve the status quo and prevent the destruction of “priceless original art works.” While they agree that the façade restoration project must be done, the proposed drilling of holes into their terrace will cause permanent structural damage which will severely compromise the waterproof membrane. Works by Picasso and other prominent artists are at risk and per the affidavits of their experts, there exist safer, easier, cheaper, and better methods for anchoring the scaffolds. They also assert that they satisfy the requirements for obtaining a preliminary injunction, namely, a likelihood of success on the merits, resulting irreparable injury absent relief, and the equities, which balance in their favor, whereas a temporary restraining order may also be granted to avoid the immediate and irreparable damages to their apartment and its contents pending a hearing, to preserve the status quo, even absent a showing of a likelihood of success on the merits. Plaintiffs deny any need to prove the merits of their case on papers when they can establish the merits of their action at a hearing. They also observe that the denial of injunctive relief could render a final judgment ineffective.

In alleging that the equities balance in their favor, plaintiffs rely on the likely destruction of the structural integrity of their terrace and ensuing water damage to their paintings during the winter months, and observe that a delay in commencing the façade work will pose no safety issues given the presence of the sidewalk shed. (NYSCEF 7).

B. Defendants (NYSCEF 15, 16)

Defendants offer in support of their opposition to plaintiffs’ application the affidavit of

Jared Cole, a licensed architect who serves as the project manager for HLZ. He takes issue with the opinion of plaintiffs' expert Ellis and opines that the most sensible and cost-effective way of completing the repairs to the building façade is by anchoring the scaffolding to plaintiffs' terrace, which he calls a routine procedure that building contractors daily perform. According to Cole, to protect against water damage while anchors are in place, liquid-applied flashing is installed at all anchor penetrations, and upon completion of the project, a new waterproofing membrane is installed over the locations of all of the anchors, which procedures are "in line with industry standards and similar to what the terrace had before construction began."

Cole also states that plaintiffs' alternative proposal is not viable as the building's structural frame will not safely support scaffolding. Even so, it would require "extensive additional engineering" to implement it, adding costs beyond those incurred in anchoring scaffolding to the terrace. In any event, openings made through the exterior envelope of plaintiffs' apartment would necessarily require temporary waterproofing for the duration of the façade project. Thus, he concludes that there is no reason to deviate from the standard, routine practice of anchoring scaffolding to the terrace, absent any hidden conditions discovered that would render it unfeasible. (NYSCEF 16).

Defendants characterize plaintiffs' claim of irreparable harm as "far-fetched" given their ability to move to another location or place protective covering over their art. They rely on Cole's opinion minimizing the threat to plaintiffs' apartment from drilling and explain that the building's proposed method is commonplace and provides for protection from water damage, whereas the method proposed by plaintiffs is not safe, routine or cost-effective. (NYSCEF 15).

Defendants also argue that 1158's decision to utilize the method advocated by its architect is insulated from judicial review as it is undertaken in good faith and in the exercise of

honest judgment in the lawful and legitimate furtherance of its corporate purposes.

III. ORAL ARGUMENT (NYSCEF 35)

After plaintiffs' counsel had reiterated the arguments set forth in his papers, he observed that Bay Restoration had stated in its answer that absent a stipulation prescribing a particular kind of drilling on the terrace or similar activity in connection with the façade work, the injunction should be granted. He also set forth the test results as reported in Abelow's supplemental affidavit and added that should the scaffold give way if the steel pins do not hold, workers could be seriously injured.

After defense counsel reiterated his argument that plaintiffs had the option of moving their art work to avoid irreparable damage, he reported that following the testing done on the wall to see if it would support a "tie-back" anchoring scaffolding, 1158's plan was "now to do exactly what [plaintiffs'] expert suggested," although if with continued testing it is discovered that it cannot proceed with the tie-back, counsel proposed giving plaintiffs "several weeks advance notice" to enable them to return to court and renew their application. Adding an assurance that "[t]here is no danger right now that [1158] will go ahead with the original plan, that is not their chosen course of action now," and that 1158 will give plaintiffs notice if it were to revert to the original or some other plan, there will be no danger of irreparable damage. He also stated that based on the test results whereby six of seven fastenings had passed and one that had failed bearing the load for almost a minute, defendants' expert concluded that drilling was safe. Nonetheless, counsel reiterated 1158's position that there was no plan to drill and that it was working with plaintiffs' experts to test the wall with every intention of drilling into it as recommended by plaintiffs' expert. However, he added, if the circumstances change for any reason, defendants will afford plaintiffs "plenty of" advance notice.

In reply, plaintiffs' counsel observed that defendants had offered no affidavits from board members and asked that absent a stipulation that defendants would not drill, a decision on plaintiffs' application for injunctive relief be decided.

Then, by letter dated March 4, 2020, defense counsel corrected his misstatement at oral argument that seven tests had been conducted at the property to gauge anchor support and that six had passed. Rather, although the passing tests had been overseen by HLZ at six locations, two tests conducted by Hilti at another location had failed. Nonetheless, he added, the failed test did not change the opinion of 1158's experts that scaffold anchors could be drilled into plaintiffs' terrace, although it determined not to use that method.

In his response of the same date, plaintiffs' counsel observes that the two tests that had failed had been done on a terrace while the three passing tests had been performed on a wall, that tests performed by 1158, HLZ or Douglas Elliman are not part of the record, and that no defense expert affidavit concerning testing conducted by Hilti has been filed. In addition, the Hilti tests were conducted by Bay Restoration.

And, by letter of the same date, defense counsel maintains that plaintiffs' letter constitutes an improper sur-reply that is not responsive to his correction of the misstatement.

IV. ANALYSIS

“Preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant.” (*Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Grp., LLC*, 177 AD3d 924, 926 [2d Dept 2019]). The court, in exercising her discretion in determining whether such relief should be granted, must determine whether the movant has established: “(1) a likelihood of success on the merits, (2) irreparable

harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction.”
(*Id.*, at 927).

Here, given defendants’ unambiguous agreement, conveyed through counsel on the record at oral argument, not to drill the terrace without providing plaintiffs with adequate notice should they change their mind, plaintiffs cannot establish any of the predicate factors for the relief they seek. However, consonant with defendants’ reasonable offer, should defendants change their mind, plaintiffs may renew their application. It is expected that defendants will abide by the representations made on the record by their counsel at oral argument. Accordingly, it is hereby

ORDERED, that plaintiffs’ application for a temporary restraining order and preliminary injunction is denied without prejudice to renew; and it is further

ORDERED, that the parties appear for a status conference on May 13, 2020 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

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BARBARA JAFFE, J.S.C.

3/18/2020
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	