Board of Mgrs. of Carriage House Condominium v Healy
2020 NY Slip Op 31241(U)
May 8, 2020
Supreme Court, New York County
Docket Number: 150491/2019
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

Justice

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BOARD OF MANAGERS OF CARRIAGE HOUSE CONDOMINIUM,

Plaintiffs,

- v -

VALERIA HEALY, JOHN HEALY, WELLS FARGO BANK, N.A.,

Defendants.

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INDEX NO. 150491/2019

MOTION DATE 05/29/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Plaintiff Board of Managers of Carriage House Condominium ("plaintiff" or "the Board") moves, pursuant to CPLR 6301 and 6313(a), for a temporary restraining order and preliminary injunction, enforcing the Carriage House Condominium's ("the Condominium") By-laws and Declaration, and enjoining defendants Valeria Calafiore Healy ("Ms. Healy") and John A. Healy ("Mr. Healy") (collectively, "the Healys") from depriving the Board and individual unit owners, including, but not limited to Tina and David Soares ("Ms. Soares" and "Mr. Soares," respectively) (collectively, "the Soares"), of the Condominium access to the roof deck appurtenant to Unit 8 for maintenance and repair work on HVAC systems for different condominium units. The Healys cross-move, pursuant to CPLR 2215, 6314, and 3126, for an order (1) vacating the temporary restraining order issued on May 8, 2019; (2) striking the affirmation, affidavits, and exhibits filed by Elana Henderson, Esq. in support of the instant motion (NYSCEF Doc. Nos. 45-71) for an

alleged refusal to disclose material that ought to have been disclosed pursuant to the Healys' discovery request served on February 6, 2019, which plaintiff did not answer; (3) striking the affirmation of Elana Henderson, Esq. and all purported testimony Ms. Henderson presented to the Court verbally during her appearance on May 8, 2019, resulting in the issuance of the temporary restraining order; (4) and directing an evidentiary hearing. For the reasons stated herein, plaintiff's motion for a preliminary injunction is granted and the Healys' cross-motion is denied.

Factual and Procedural History

The Condominium is comprised of two adjoining buildings located at 211 and 213 East 2nd Street in Manhattan. The Healys are the owners of Unit 8 in the building located at 213 East 2nd Street (the "Building" or "Property"). Outside of and appurtenant to Unit 8 exists a roof deck wherein HVAC condensers[1] for six of the seven units for 213 East 2nd Street are located.[2]

According to the Condominium Declaration, the roof deck at issue is a "Limited Common Element" of the Condominium. Article 7 of the Condominium Declaration defines "Common Elements" as the following: "rooms, areas, corridors and other portions of the Building (other than the Units), and all Facilities therein, either currently or hereafter existing, for the common use of the Units or of the Unit owners or necessary for, or convenient to, the existence, maintenance, management, operation, or safety of the Property." NYSCEF Doc. No. 47, Art. 7(b). Article 7 of the Condominium also defines "Limited Common Elements" as "all portions of the Land and the

[1] A typical central air conditioning system is a two-part or split system that includes an outdoor unit, which consists of the condenser coil, compressor, electrical components and a fan ("condenser"), as well as inside components, which consists of the air handler or evaporator coil, located within the home. In order to properly and effectively service HVAC systems, access to the condenser is necessary.

[2] The seventh unit owner spent over $53,000 to move his HVAC condenser off of the roof deck due to the difficulties faced when trying to gain access from the Healys. This expense was all in an effort to ensure the HVAC condenser was properly maintained, which was not possible due to the Healys' refusal to grant access to the roof deck, discussed *infra*. The work entailed opening up the interior walls within the unit, running new piping through the walls, and installing a new HVAC condenser on the patio.

Building (other than the Units) that are for the use of one Unit or more Units to the exclusion of all other Units." *Id.* at Art. 7(d)(i). Article 7(d)(ii)(2) of the Condominium Declaration specifically includes "[t]he private roof terraces as indicated on the floor plans contained herein, which shall be for the exclusive use of the respective Owner of Units 6 and 8" as a Limited Common Element. *Id.* at Art. 7(d)(ii)(2).

The Condominium By-laws and Declaration indicate that all unit owners and the Board have an easement through Unit 8 in order to access the roof deck, as necessary, to service the HVAC condensers. Specifically, with respect to individual unit owners, Article 11 of the Condominium Declaration, entitled "Other Easements" states the following:

> [E]ach Unit Owner shall have, in common with all other Unit Owners, an easement to use any of the Common Elements, and all pipes, wires, ducts, cables, conduits, public utility lines and all other utility distribution systems, whether or not Common Elements, located in, over, under, through, adjacent to, or upon any other Unit or the Common Elements to the extent that such Common Elements and utility distribution system serves, or is necessary to the service of, such Owner's Unit, and each Unit and all of the Common Elements shall be subject to such easement.

Id. at Art. 11(a). With respect to the Board, Article 11 of the Condominium Declaration states the following:

> [T]he Board shall have an easement and a right of access to each Unit and to the Common Elements to inspect the same, to remove violations therefrom and to install, operate, maintain, repair, alter, rebuild, restore and replace any of the Common Elements located in, over, under, through, adjacent to, or upon the same, and each unit and the Common Elements shall be subject to such easement and right of access.

Id. Article 11(b) of the Condominium Declaration also permits the Board to create an easement for maintenance purposes if such an easement does not already exist:

> The Board shall have the right to grant such additional electric, gas, steam, cable, television, telephone, water, storm drainage, sewer and

> other utility easements in, or to relocate any existing utility easements to any portion of the Property as it shall deem necessary or desirable for the proper operation and maintenance of the Building or any portion thereof or for the general health or welfare of the owners, tenants and occupants of the appropriate Units, provided, however, that the grant of such additional utility easements or the relocation of existing utility easements, shall not unreasonably interfere with the use of the Units for their permitted purposes.

Id. at Art. 11(b). Such an easement would also create a right of access for the unit owners' utility professionals, such as HVAC companies: "Any utility company as well as its officers, employees and agents, shall have a right of access to each Unit and to the Common Elements in furtherance of such easement." *Id.* Each type of easement, those stated in the Condominium By-laws and Declaration under Article 11(a) or those created by the Board under Article 11(b), has its own notice and entry requirements stated therein. *Id.* at Art. 11(a)-(b).

Each spring, the individual unit owners request access to their HVAC condensers located on the roof deck, which is repeatedly denied by the Healys. In 2017, for example, the HVAC company that is used by most of the unit owners in the Condominium refused to work with the unit owners because it was too complicated to gain access to the roof deck. Since 2018, the Healys have given repeated excuses as to why access could or would not be granted to the Board or individual unit owners and the Healys have even gone so far as to threaten the Condominium with legal action. On May 29, 2018, at the Board's request, based upon the ongoing issues with the Healys pertaining to roof access, the Managing Agent, Michelle Smith, sent the Healys five separate requests for access to the roof deck for building-wide HVAC maintenance and repairs. Eventually the Healys reluctantly permitted access to two unit owners. One of the unit owners shared their appointment, allowing three HVAC condensers to be serviced. Other unit owners, including the Soareses, were not permitted access.

On June 30, 2018, when Ms. Soares learned that HVAC technicians were on the roof deck servicing other HVAC condensers, she requested for her HVAC condenser to also be serviced. Plaintiff alleges that, for no apparent or legitimate reason, the Healys refused and purportedly falsely stated that the technicians already left and would not be allowed re-entry onto the roof deck. To date, and despite multiple requests, the Healys have continued to refuse the Soareses access to the roof deck for the purpose of having their HVAC condenser serviced. Throughout the summer, in a civil manner, Ms. Soares continued to request access—specifically, on July 1, 2018, July 27, 2018, August 2, 2018, and September 5, 2018. Plaintiff claims that fully aware of the denial of access to the Soareses, Mr. Healy informed this Court that he had "never denied" access to a unit owner. NYSCEF Doc. No. 60, Tr. 20:15-18. During this time, "heat emergencies" were being issued by the National Weather Service and the Soareses did not have any air conditioning.

At the Board's request, in an effort to ensure that all units have access to the roof deck to have their respective HVAC condensers serviced, Clara Sokol, the current Managing Agent for the Condominium ("Ms. Sokol"), emailed the Healys on April 18, 2019 and April 19, 2019 requesting dates for access to the roof deck to schedule annual maintenance appointments. Ms. Sokol was informed by Ms. Healy to "stop harassing" them and threated her with legal action. NYSCEF Doc. No. 72, at 9. Plaintiff claims that, as a result of the instant lawsuit, the Healys contacted certain individual unit owners to schedule a time for roof deck access to service the HVAC condensers. The Healys scheduled HVAC appointments for all units that have HVAC condensers on the roof except for the Soareses. As a result, Ms. Soarses emailed the Healys on April 22, 2019 requesting access for HVAC maintenance on April 27, May 4, or May 11, 2019. Having learned that the Healys arranged other unit owners to access the roof deck on April 27,

2019 to have their HVAC condensers serviced, Ms. Soares emailed the Healys again stating the following:

> I understand that you have made arrangements with other unit owners to service the A/C condensers this Saturday, April 27th. Not sure if you received the email I sent you yesterday, but we would like to service our condenser at the same time to ensure that we have working air conditioning this summer. Please confirm that you will give us access and allow us to service our unit this Saturday along with everybody else.

NYSCEF Doc. No. 71, ¶ 25, Ex. J.

Mr. Healy denied the Soareses access unless the Board withdraws the instant action and "agrees not to pursue the access claims," which is out of Ms. Soares' control, and meet the following demands: (1) provide written notice to the Healys at least one week in advance of the time slot selected, which the Board indicates as directly contradicting the By-laws; (2) identify, in the written notice, the HVAC condenser that the Soareses wish to be worked on, specifying its precise location on the roof; (3) provide a bond to cover any damage potentially caused by persons working on the HVAC condenser on the Soareses' behalf, as well as the cost of removing debris from any work performed and restoring the Healys' premises to the condition it was in before access was granted; and (4) pay for a security guard, selected by the Healys, to oversee the activities of the persons working on the roof deck who will ensure that only the workers, and not the Soareses or anyone else, enters the Healys' unit. *Id.*, ¶¶ 26-30, Ex. K; NYSCEF Doc. No. 72, at 10 & n.2. Mr. Healy conceded that "[t]hese requirements are more onerous than the ones imposed on other unit owners." NYSCEF Doc. No. 71, Ex. K. However, the Board asserts that "these demands were not instituted with the permission or even knowledge of the Board, and nowhere in the By-laws or Declaration does it permit the Healys to impose requirements on other

unit owners in order to make use of the easement, let alone onerous demands, and [this includes] different requirements for different unit owners." NYSCEF Doc. No. 72, at 11.

On April 27, 2019, HVAC workers were permitted entry to the Healys' unit and were allowed to service the HVAC condensers for Units 2, 3, 4, 5, and 8. This excluded servicing the Soareses HVAC condenser, as they are the owners of Unit 1.

On January 17, 2019, the Board filed the instant action against the Healys alleging seven causes of action seeking declaratory judgments and injunctions relating to the air conditioning and roof repair work, including causes of action sounding in breach of contract related to said work and foreclosure of lien. NYSCEF Doc. No. 2. The first six causes of action relate to the Healys' repeated refusal, since at least 2014, to allow the Board and its agents, including individual unit owners, to access the roof deck to ensure the performance of maintenance and repairs to the individual units' HVAC condensers and inspect the roof deck for any alleged defects that may have been causing leaks into the units in the Building. The seventh cause of action seeks to foreclose on a lien entered by the Board as a result of the Healys' refusal to pay a recurring Special Assessment (the "Foreclosure COA"). On January 23, 2019, the Board filed an Amended Verified Complaint containing the same causes of action, setting forth the basis for bringing the instant action and citing to provisions of the By-laws and Declaration to indicate the Board's standing to bring this action. The Court notes that this action was brought by the Board, on its own behalf, and on behalf of all unit owners as the result of a unanimous Board vote and not at the request of a particular Board member or unit owner. The only unit owners who are not in support of the instant action are the Healys.

On November 5, 2018 the Healys filed an action against one individual unit owner and John Doe defendants 1-10, captioned *Healy v. Settle et al.*, Index No. 160265/2018 (the "Healy

Action"), for the following causes of action: (1) acting without authority and misrepresentation of authority; (2) unauthorized and unlawful filing of lien; (3) abuse of process; (4) breach of fiduciary duties; (5) defamation; and (6) damages, attorney's fees and costs. Index No. 160265/2018, NYSCEF Doc. No. 1. On January 18, 2019, one day after the instant action was filed, the Healys filed an Amended and Supplemental Summons with Notice ("Amended Notice"), which added the Soareses as defendants and the Condominium as a nominal defendant.[3] The Amended Notice contained additional causes of action: (1) breach of fiduciary duties as unit owners and occupants of residential condominium; (2) acting without authority and misrepresentation of authority; (3) unauthorized and unlawful filing of lien; (4) abuse of process; (5) breach of fiduciary duties; (6) breaches of contract; (7) bad faith; (8) defamation; (9) contempt of court order; (10) misappropriation of condominium funds; (11) aiding and abetting breaches of fiduciary duty by Eric Weissman; (12) enforcement of judgment; (13) tortious interference; and (14) damages, injunctive and declaratory relief, attorney's fees and costs. Index No. 160265/2018, NYSCEF Doc. No. 5. On February 15, 2019, the Healys filed a Complaint in that action, and on February 19, 2019, they filed an Amended Complaint. Index No. 160265/2018, NYSCEF Doc. Nos. 9, 10.

On February 26, 2019, in the Healy Action, the Healys filed an order to show cause for a preliminary injunction and a temporary restraining order seeking the withdrawal of the Foreclosure COA in the instant action. Index No. 160265/2018, NYSCEF Doc. No. 12. As the parties have failed to reach an agreement on how to settle the issue, the application is currently pending. The Court notes that there seems to be a proliferation of litigation corresponding to a breakdown in the relationship between the various parties as yet another action has recently commenced. The Court strongly encourages the parties to consider utilizing competent mediation services as a potential

[3] Eric Weissman was also named as a defendant.

means of reaching a resolution of their various disputes. Nonetheless, in the absence of a resolution, the Court is constrained to decide the various disputes on the merits, including the instant motion for a preliminary injunction and the multiple other motions that are currently being held in abeyance.[4]

On May 7, 2019, the Board filed this order to show cause (Mot. Seq. No. 002) for a preliminary injunction and a temporary restraining order. On May 8, 2019, this Court signed the order to show cause and put in place a temporary restraining order requiring "that immediate and continued access with one day[']s notice for all necessary HVAC maintenance and repairs together with servicing of condensers" and that "an individual associated with the managing agent [for the Building] will accompany workers performing repairs/services," as opposed to individual unit owners. NYSCEF Doc. No. 74, at 2.

The Board asserts that access to Unit 8 must be granted for the purpose of maintaining and repairing the HVAC systems for the Building. The only other possible, yet extremely impractical, way to get access to the roof deck HVAC condensers to perform repairs would be to use an emergency staircase from 211 East 2nd Street to access the roof and workers would then be required to climb over a three-foot-high metal fence and jump down to the roof of the Building, approximately seven feet below, where the condensers are stored. NYSCEF Doc. No. 135, at 9-10. The Board further claims that, without a preliminary injunction, the Healys will continue to deny access to the roof deck to the Board, other unit owners, and HVAC repair workers hired to perform services on the HVAC condensers and other roof work.

[4] In the within action, on March 6, 2019, the Healys filed a motion to dismiss in lieu of an answer, which is currently being held in abeyance pending a determination of the order to show cause for a preliminary injunction in the Healy Action.

Discussion

Because "[a] preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing," it is only granted in limited circumstances. *1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011). A party seeking a preliminary injunction must demonstrate "a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of the equities tipping in favor of the moving party." *Id.* "With respect to likelihood of success on the merits, the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action." *Id.* "It is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive." *Four Times Square Assoc., L.L.C. v. Cigna Invs., Inc.*, 306 A.D.2d 4, 5 (1st Dep't 2003).

Here, the Board has demonstrated a likelihood of success on the merits. The Board has submitted the Condominium's By-laws and Declaration, at Articles 7 and 11, respectively, grant both the Board and individual unit owners an easement through Unit 8 to the roof deck for the limited purpose of repair and maintenance of the HVAC condensers as related to the instant application. The Healys cannot refuse access for this purpose because even if the HVAC condensers are not considered a limited common element, Article 11(b) of the Condominium's Declaration grants the Board and individual unit owners an easement for the maintenance at issue. Additionally, the Board has established that the Healys have a repeated pattern of denying access both to HVAC maintenance workers and to individual unit owners since at least 2018. While the Healys have permitted access for HVAC maintenance to some unit owners once, they have completely denied access to the Soareses and there is no indication that they will continue to permit

future access based upon their pattern of behavior. Moreover, in denying access to the individual unit owners and imposing more stringent requirements for access on the Soareses, the Healys are completely disregarding the Condominium's governing documents, which can only be solved by the issuance of a preliminary injunction.

Next, the proponent of a preliminary injunction must show that there is irreparable injury if the requested relief is not granted. Irreparable injury must be any injury or loss incurred that cannot be compensated with money damages. *See Non-Emergency Transporters of N.Y., Inc. v. Hammons*, 249 A.D.2d 124, 127 (1st Dep't 1998). Mere "speculation is not a basis for the imposition of a preliminary injunction." *U.S. Re Companies v. Scheerer*, 41 A.D.3d 152, 155 (1st Dep't 2007).

Here, the Board has demonstrated that continued denial of access to the roof deck adjacent to Unit 8 for HVAC repair and maintenance has and can continue to cause irreparable injuries to the individual unit owners. This is particularly true for the Soareses who already spent an entire summer without air conditioning while the National Weather Service issued sixteen (16) heat warnings. Damaged or inoperable HVAC condensers will continue to cause damage to the individual unit owners who are forced to forego the use of air conditioning during the summer. In recent years, heat fluctuations in New York City have caused "heat emergencies" and without proper HVAC maintenance and repair, the health and well-being of individual unit owners and their families will be endangered. Absent a preliminary injunction, the individual unit owners cannot be assured that they will be able to have their HVAC condensers properly maintained so as to provide them with air conditioning during the summer.

Lastly, "[t]he balancing of the equities requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief." *Barbes Restaurant Inc. v.*

ASRR Suzer 218, LLC, 140 A.D.3d 430, 432 (1st Dep't 2016). "This is, by definition, a fact-sensitive inquiry, and in this case, the inquiry is much the same as that conducted for the element of irreparable injury." *Feinberg v. Silverberg*, 2011 WL 3875571, 2011 N.Y. Slip Op. 32299(U) (Sup. Ct. Nassau County Aug. 18, 2011); *Washington Title Ins. Co. v. Sand Lane Title Agency, LLC*, 2011 WL 766366, 2011 N.Y. Slip Op. 30451(U) (Sup. Ct. N.Y. County Feb. 15, 2011) (Warshawsky, J.).

Here, the Court finds that the balance of the equities favors the moving party. With no other practical method of gaining access to the HVAC condensers, the potential for great harm to individual unit owners who do not have functional air conditioning outweighs the minor inconvenience of allowing occasional access to the Healys' unit, with notice, and the lack of any actual harm to the Healys. It is important for the individual unit owners to be able to live in a habitable environment, which is the purpose behind governing documents such as the Condominium's By-laws and Declaration.

Accordingly, having satisfied all three elements, the Board is entitled to a preliminary injunction. Consistent with the temporary restraining order issued herein, one day's notice must be given to the Healys prior to entry to their unit for all necessary HVAC maintenance and repairs, including servicing of condensers so as to not unduly burden them with any surprise entry. Additionally, an individual associated with the managing agent for the Building will accompany any HVAC workers performing repairs or services, as opposed to individual unit owners to whom the Healys have previously denied access.

Conclusion

Based upon the foregoing, the documents submitted in support of the instant motion indicate that plaintiff has demonstrated a likelihood of success on the merits, will face irreparable

injury if a preliminary injunction is not granted, and that a balancing of the equities leans in plaintiff's favor, the application for a preliminary injunction is granted and the Healys are hereby enjoined from further depriving the Board and individual unit owners from accessing the roof deck appurtenant to Unit 8 for HVAC maintenance and repair. For the same reasons, the Healys' cross-motion to vacate the temporary restraining order is denied.

This constitutes the decision and order of this Court.

5/8/2020
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

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