

Kirschner v 233 W. 99th St., Inc.

2021 NY Slip Op 30515(U)

February 22, 2021

Supreme Court, New York County

Docket Number: 653282/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ARLENE P. BLUTH</u>	PART	IAS MOTION 14
	<i>Justice</i>		
-----X		INDEX NO.	<u>653282/2020</u>
STEVEN KIRSCHNER, SHULIE KIRSCHNER,		MOTION DATE	<u>02/16/2021</u>
Plaintiff,		MOTION SEQ. NO.	<u>001</u>

- v -

233 WEST 99TH STREET, INC., THE BOARD OF DIRECTORS OF 233 WEST 99TH STREET, INC., ORSID REALTY CORP, ZACHARY GANZARSKI, GINA DOYNOW, CHARLIE BRENNAN, ISAMIL BEHAMCHI, SUSAN GIBSON, LINDA RODD, PAM FAIRCLOUGH, IRENE PIERETTINI, DAVID SPIRA

DECISION + ORDER ON MOTION

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25 were read on this motion to/for DISMISS.

The motion by defendants to dismiss the complaint is granted.

Background

Plaintiffs are shareholders in a cooperative located at 233 West 99th Street in Manhattan. They have a proprietary lease for the commercial space located on the ground floor of the co-op. Plaintiffs claim that defendants erected a sidewalk shed on August 31, 2019 in front of their space without plaintiffs' permission. They complain that the sidewalk shed continues to obstruct their business. Plaintiffs bring causes of action for declaratory judgment, trespass, nuisance, mandatory injunction, conversion, "breached [sic] of fiduciary duty," and legal fees. Plaintiffs sued the co-op, the board of directors, the management company for the co-op, an agent for the management company and the individual board members.

Defendants move to dismiss on the ground that the sidewalk shed was erected to protect the public while the co-op repairs the façade and the windows. They claim this lawsuit is merely an effort by plaintiffs to force defendants to take down the sidewalk shed. Defendants point to the proprietary lease, which makes clear that the commercial space has no interest in the sidewalk.

Defendants argue that they are responsible for keeping the building in good repair; they explain that they are replacing steel windows with fire-rated windows on certain floors and also replacing other windows on floors that have aluminum windows. They maintain that the sidewalk shed does not block access to plaintiffs' commercial space. Defendants stress that they were required to erect a sidewalk shed in order to complete the necessary window work.

In opposition, plaintiffs assert that the sidewalk shed encroaches on their business and is an "abnormally large sidewalk shed and scaffolding." They complain that the shed has raised safety concerns and has interfered with their quiet enjoyment of their space. Plaintiffs argue that no window work has been done since the scaffolding was erected in August 2019.

In reply, defendants emphasize that there has been no taking or entry into their leasehold interest.

Discussion

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction. Indeed, we accord plaintiffs "the benefit of every possible favorable inference. [On a] "motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"(*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

The Court grants the motion. The fact is that erecting a sidewalk shed does not constitute trespass, nuisance, conversion, or a breach of defendants' fiduciary duty based on the allegations alleged here. The Court is unable to find that a shareholder can state a viable cause of action where a building puts up a protective device that is required by law.

A Court considered similar claims (although raised by an adjoining landowner rather than a shareholder) and found that "it is undisputed that the reason for the alleged entry on to the land is that it is required by law and is for public safety. Both reasons provide a justification for the entry and do not give rise to trespass" (*22 Irving Place Corp. v 30 Irving LLC*, 57 Misc 3d 253, 256 [Sup Ct, NY County 2017] [rejecting claims for trespass and nuisance based on a sidewalk shed that extended twenty feet onto plaintiff's building]).

Plaintiffs' complaint only contains conclusory assertions as to why it can state a cause of action. But plaintiffs do not adequately explain why a protective device that is required by law should be taken down simply because plaintiffs don't like it. The Court recognizes that plaintiffs believe it hinders their business and is not aesthetically pleasing. They also suggest it has led to unsavory characters congregating underneath it. But those amount to mere complaints, not to the causes of action alleged by plaintiffs.

And, of course, the business judgment rule permitted defendants to erect the sidewalk shed to protect people walking on the sidewalk in front of the coop. It also helps protect the coop from liability by reducing the chances that a passerby gets hit with falling debris during the window repair. Of course, that is the entire point of the scaffolding laws—to allow construction and protect pedestrians.

Plaintiffs' allegation that defendants have not actually done the window work in over a year is a reasonable point but it does not justify denial of the instant motion. When considering

the fact that the ongoing pandemic has slowed construction work (and stopped it completely for months during 2020), the Court cannot find that defendants' failure to complete the work gives rise to a cause of action (see 300 W. 48th St. Assoc. v The 306 W. 48th St. Condominium, 2019 N.Y. Slip Op. 33614[U], 3 [Sup Ct, NY County 2019] [dismissing claims for encroachment and trespass based on a sidewalk shed that had been erected for over two years]).

The facts and timing here do not support a cognizable cause of action. Instead, the allegations from plaintiffs merely establish that they are unhappy with how defendants are handling this matter. That may be why they sued everyone, including the individual board members. That unhappiness, however, is not a basis for the relief sought here.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss the complaint is granted, and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

2/22/2021

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE