

Setareh Family L.P. v Cosmic Realty Partners, LLC

2021 NY Slip Op 30887(U)

March 22, 2021

Supreme Court, New York County

Docket Number: 159165/2019

Judge: Paul A. Goetz

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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: HON. PAUL A. GOETZ **PART** **IAS MOTION 47EFM**

Justice

-----X

THE SETAREH FAMILY LIMITED PARTNERSHIP

Plaintiff,

- v -

COSMIC REALTY PARTNERS, LLC,

Defendant.

-----X

INDEX NO. 159165/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for CONTEMPT.

By order to show cause plaintiff moves: 1) for a preliminary injunction directing defendant to make certain repairs to prevent further water infiltration of its building allegedly caused by defendant’s construction activity on an adjacent building; 2) to hold defendant in contempt for failing to comply with the court’s order dated January 17, 2020; and 3) for an order directing defendant to pay plaintiff use and occupancy.

BACKGROUND

Plaintiff owns 254 Fifth Avenue a six-story commercial building in Manhattan (NYSCEF Doc No 55 ¶¶ 1 – 2). In 2015 defendant started a partial demolition of a 250-252 Fifth Avenue (*id.* ¶ 3). Under a license agreement dated February 6, 2017 plaintiff granted defendant a license to “to use such portions of the Adjacent Premises and Building Site to extent reasonably necessary required for the Work, Monitoring, Protection Work and Underpinning and to perform and install the Work, the Protection Work, Monitoring and Underpinning . . .” (NYSCEF Doc No 7 ¶ 10). The license agreement also requires defendant to protect plaintiff’s building from damage with scaffolding and sheds as roofing protection at defendant’s sole cost and expense

(*id.* ¶ 2). In exchange for the access license to plaintiff's building defendant agreed to pay plaintiff during the term of the agreement \$10,000 per month for a "Sidewalk Scaffold license fee" and \$15,000 per month as "Duplex Unit fee" "to reimburse plaintiff for rent for the fifth and sixth floor duplex unit" (*id.* ¶ 13 [b] & [c]). Any rent that plaintiff receives from a tenant for the duplex unit is deducted from the Duplex Unit fee (*id.* ¶ 13 [c]).

The parties settled plaintiff's prior motion for a preliminary injunction in this action by stipulation dated January 15, 2020 and "so ordered" by the court on January 17, 2020. The January 2020 stipulation requires defendant upon notice from plaintiff to "perform reasonable repairs that plaintiff's waterproofing consultant reasonably requires to stop" water penetration into plaintiff's building (NYSCEF Doc No 41 ¶ 1). Defendant is also required under the January 2020 stipulation to pay plaintiff's expert fees incurred to inspect leaks to the building related to conditions caused by defendant's project (*id.* ¶ 4).

DISCUSSION

Preliminary Injunction

"A preliminary injunction is an extraordinary provisional remedy which will only issue where the proponent demonstrates (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balance of equities tipping in its favor" (*Harris v Patients Med., P.C.*, 169 AD3d 433, 434 [1st Dept 2019]). Monetary damages are not a basis for granting a preliminary injunction (*id.* 434 - 435).

In support of the order to show cause, plaintiff submits an affidavit from one of its partners, Abby Setareh, who states that a broken skylight is allowing water, dust and debris to enter the motor room of the elevator in plaintiff's building (NYSCEF Doc No 55 ¶ 14). Setareh also states that expert fees for the initial inspection of the site in August (the year is not

specified) are \$4,442.00 and she states that the invoice for the expert fees is attached as exhibit K. However, exhibit K is a photograph not an invoice, and no other exhibit annexed to plaintiff's order to show cause is identified as an invoice for expert's fees (*id.* Doc No 17).

Plaintiff also submits an affidavit from Damon C. Baumann, a building scientist who specializes in roofing and exterior envelope waterproofing. Bauman inspected the building in August 2020 and found new water leaks on the third, fourth and fifth floors (NYSCEF Doc No 54 ¶3). On August 21, 2020 Baumann inspected the building with defendant's general contractor Charles Blaszkka from Rinaldi Group and the two of them reached an agreement on the scope of work necessary to address the water penetration problem (*id.* ¶ 7). The work to eliminate the water penetration was never done and according to Baumann if the water penetration continues, it will cause damage to the structural integrity of the building (*id.* ¶¶ 8 – 10).

In opposition, defendant submits only an attorney affirmation arguing in part that the alleged weakening of plaintiff's building is gradual, and that plaintiff has failed to show that it is occurring or that it has undertaken its own remediation efforts. Therefore, according to defendant plaintiff has not shown irreparable harm. (NYSCEF Doc No 75 pgs 7 - 9). Defendant further argues that plaintiff has not shown a likelihood of success on the merits because it fails to establish the water penetration was caused by work done by defendant (*id.* ¶ 31).

Notwithstanding defendant's understanding to the contrary, plaintiff has established a causal connection between the water infiltration and the work done by defendant. Baumann explains that the leak is the result of a recently faultily installed storm drain-pipe system that defendant put in place as part of its repair obligations to plaintiff (NYSCEF Doc NO 54 ¶ 4 - 5). In addition, a hole in defendant's building is contributing to the water problem in plaintiff's building (*id.* ¶ 6). Defendant does not submit an affidavit from a waterproofing expert to

contradict plaintiff's expert and there is no obligation on plaintiff to undertake its own remediation of the water infiltration caused by defendants' project. Therefore, plaintiff has established a likelihood of success on the merits, irreparable injury and a balancing of the equities in its favor (*McMahon v Cobblestone Lofts Condominium*, 161 AD3d 536, 537 [1st Dept 2018] [court properly granted a preliminary injunction requiring defendant to make all necessary repairs to prevent further water infiltration]).

Accordingly, that branch of plaintiff's order to show cause seeking a preliminary injunction requiring defendant to make all the necessary repairs identified in paragraph 7 of Baumann's affidavit and to repair the broken skylight will be granted.

Contempt

To prevail on a motion to punish a party for civil contempt, the movant must demonstrate by clear and convincing evidence "(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct" (*El-Dehdan v. El-Dehdan*, 114 A.D.3d 4, 17 [2d Dept 2013]). Further, the element of willfulness is not required on a civil contempt motion made pursuant to Judiciary Law § 753[A][3] (*id.* at 18).

Here plaintiff has established by clear and convincing evidence that defendant failed to comply with the January 2020 "so ordered" stipulation. As set out above, Baumann and Setareh's affidavits establish that defendant failed to perform reasonable repairs required to stop the water penetration into plaintiff's building as required by the January 2020 order. Defendant was aware of the January 2020 order since the stipulation was signed by defendant's counsel, was uploaded to NYSCEF under the request to "so order" category for uploads (NYSCEF Doc

No 40) and was uploaded again in NYSCEF after signed by the court under the motion sequence number one resolving plaintiff's first motion for a preliminary injunction (NYSCEF Doc No 41). Finally, plaintiff establishes that it is prejudiced by defendant's failure to perform the repairs in that, according to Baumann and not disputed by an expert on defendant's behalf, the structural integrity of plaintiff's building is threatened if the water infiltration is not remedied

Accordingly, that branch of plaintiff's order to show cause seeking a determination that defendant is in contempt of the January 2020 order will be granted and plaintiff will be awarded the attorneys' fees it has accrued as a result of defendant's violation of the January 2020 order in the amount of \$12,637.50.

Use and Occupancy

While plaintiff's order to show cause requests use and occupancy, plaintiff's attorney affirmation reveals that it is seeking the monthly duplex unit and sidewalk scaffolding fees totaling \$25,000 a month. Plaintiff argues that defendant should be ordered to pay the license fees to maintain the status quo while this case is pending (NYSCEF Doc No 53 ¶ 41). However, monetary damages such as outstanding license fees are not a basis for granting a preliminary injunction (*Harris*, 169 A.D.3d at 434 - 435). The cases cited by plaintiff for the proposition that a party in possession of real property should be required to pay use and occupancy while a proceeding is pending to maintain the status quo are inapposite. Defendant is not possessing any part of plaintiff's building as that term is commonly understood. Rather defendant is merely granted permission to access portions of plaintiff's building when that access is required to perform work on its project. More, specifically defendant has a "limited right to enter the Adjacent Premises and the Building Site for the purpose of installing and periodically maintaining (and removing) [] roofing protection" (NYSCEF Doc No 57 ¶ 2). The license

agreement also grants defendant the right to put up sidewalk scaffolding in front of plaintiff's building (*id.* ¶ 3 [a]). These limited rights of access cannot be understood to grant defendant possession or occupancy of any part of plaintiff's building. Moreover, the license agreement does not grant defendant even a limited right of access to the Duplex Unit it merely requires defendant to compensate plaintiff for the lost rent revenue from the Duplex Unit plaintiff may experience as a result of the disruption caused by defendant's work. Indeed, under the terms of the license agreement either party may procure a tenant to occupy the duplex unit and the rent received is deducted from the Duplex Unit fee defendant owes to plaintiff (*id.* ¶ 13 & 13 [c]).

Accordingly, that branch of plaintiff's order to show cause seeking use and occupancy will be denied.

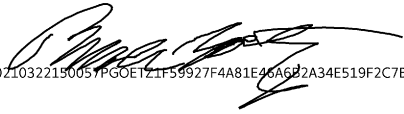
Any arguments not specifically addressed above have been considered and have been found unpersuasive.

CONCLUSION

ORDERED that that branch of plaintiff's order to show cause seeking a preliminary injunction is granted to the extent that defendant is directed to make all the repairs identified in paragraph 7 of the Baumann affidavit and repair the broken skylight as expeditiously as is practicable; and it is further

ORDERED that that branch of plaintiff's order to show cause seeking to hold defendant in contempt of the January 2020 order is granted and defendant is ordered to pay to plaintiff the sum of \$12,637.50; and it is further

ORDERED that that branch of plaintiff's order to show cause seeking use and occupancy is denied.



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3/22/2021

DATE

PAUL A. GOETZ, 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