900 Eighth Ave. Condominium LLC v Samarelli
2021 NY Slip Op 32142(U)
October 27, 2021
Supreme Court, New York County
Docket Number: Index No. 157591/2021
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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900 EIGHTH AVENUE CONDOMINIUM LLC,

Plaintiff,

- v -

JAMES SAMARELLI,

Defendant.

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INDEX NO. 157591/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 21, 22, 23, 24, 25, 26

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Plaintiff-landlord, the owner of the building at 160 West 54th Street in the County, City and State of New York, commenced the instant action on August 13, 2021 against defendant-tenant claiming he breached the parties' lease by engaging in objectionable and nuisance-type conduct and behavior on multiple occasions.[1] The complaint asserts claims for a declaratory judgment that defendant is in breach of lease; a declaratory judgment that plaintiff is entitled to rescind the lease; injunctive relief to direct defendant to cease all nuisance-type behavior because of the alleged breach of lease; ejectment; monetary damages for the breach of lease alleged to be not less than $25,000; and attorneys' fees as set forth in the lease.

Upon the foregoing documents, plaintiff moves for (1) a preliminary and permanent injunction compelling defendant to appear before this Court and ordering defendant to immediately cease all illegal and/or objectionable, nuisance-type conduct in the building and his apartment, 21A, consisting of (a)

[1] Plaintiff also previously commenced a holdover proceeding in New York City Civil Court, Housing Part under Index number LT-304076-21/NY, which is currently scheduled for an appearance in Part Z on December 14, 2021. The petition states that the lease term expired on May 31, 2021 and that the respondent (the defendant herein) has remained in possession after expiration of the same. The petition also asserts that, per the $2,600 monthly rent as set forth in the lease, defendant is liable for the sum of $10,450 through the end of June for rent arrears and use and occupancy. The notice of lease termination accompanying the petition references the objectionable and nuisance-type conduct as alleged here.

urinating in the building elevator, (b) aggressively begging other building residents for money and food in the building lobby, (c) harassing other building residents in the elevators, (d) engaging in dangerous, menacing and erratic behavior inclusive of knocking on other residents' apartment doors in the building and causing other tenants to be afraid, (e) allowing foul odors to permeate the common areas of the building, and (f) exposing himself in front of building staff and residents in an inappropriate manner; and (2) authorizing plaintiff, plaintiff's employees and/or agents (including without limitation locksmiths) and/or the New York City Police Department to forcibly remove and change the locks to the apartment and permanently bar defendant from the building and apartment based upon the ongoing escalating threats to the health and safety of building residents and staff arising out of the defendant's dangerous conduct, threatening and erratic behavior (see NYSCEF Doc No. 21).

The Court granted a temporary restraining order (TRO) injunction as to the first branch of the relief sought on August 18, 2021 pending the hearing of this motion, which was further extended on September 17, 2021, September 22, 2021, October 1, 2021, October 8, 2021 and October 18, 2021 pending the determination of this motion. The Court also granted the motion by the New York City Department of Social Services (DSS) to appoint a guardian ad litem (GAL), which was granted by order dated October 7, 2021 and appointed Kenneth Barocas, Esq. as GAL for the defendant (see NYSCEF Doc No. 41).[2]

CPLR 6301 provides that a preliminary injunction may be granted:

> in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

[2] Mr. Barocas appeared at the last motion appearance on October 18, 2021 along with DSS and an attorney from Mobilization for Justice (MFJ), who was unable to affirmatively state whether the office would represent the defendant in this matter.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the [trial court]" (Doe v Axelrod, 73 NY2d 748, 750 [1988]). Additionally, because a preliminary injunction is a "drastic remedy," the movant "must establish a clear right to that relief under the law and the undisputed facts" (Omakaze Sushi Rest., Inc. v Ngam Kam Lee, 57 AD3d 497, 497 [2d Dept 2008]).

For purposes of this motion, "all that must be shown is the likelihood of success [on the merits]; conclusive proof is not required" (Ying Fung Moy v Hohi Umeki, 10 AD3d 604, 605 [2d Dept 2004]; see J. A. Preston Corp. v Fabrication Enters., 68 NY2d 397, 406 [1986] ["a preliminary injunction . . . depends upon probabilities, any or all of which may be disproven when the action is tried on the merits"]). Indeed, this decision is not considered as "the law of the case," "so as to preclude reconsideration of [the issues] at a trial on the merits" (Icy Splash Food & Beverage, Inc. v Henckel, 14 AD3d 595, 596 [2d Dept 2005], quoting Peterson v Corbin, 275 AD2d 35, 40 [2d Dept 2000], citing J. A. Preston Corp., 68 NY2d 397).

In support of the motion, plaintiff submitted affidavits from management representatives and co-tenants in the building as to defendant's objectionable and nuisance-type conduct and behavior (see NYSCEF Doc Nos. 4, 5, 6, 7, 8, 9 and 10). The Court also heard limited sworn testimony during oral argument from tenants Mark Huelsenbeck and Martha Duke, and the building's management agent Kim Cafaro, about the continuation of defendant's objectionable and nuisance-type conduct and behavior subsequent to the issuance of the TRO. Defendant's alleged objectionable and nuisance-type conduct and behavior is alleged as follows: panhandling in the lobby and elevator; urinating and defecating himself in common areas of the building; vomiting on himself; wearing the same soiled clothes;

allowing odors to permeate his body and his surroundings; and not wearing enough/adequate clothing to cover his buttocks.

Accordingly, plaintiff claims that the alleged behavior violates certain provisions of the lease. Specifically, paragraph 12 of the lease states in relevant part:

> 12. OBJECTIONABLE CONDUCT As a tenant in the Building, you will not engage in objectionable conduct. Objectionable conduct means behavior which makes or will make the Apartment or the Building less fit to live in for You or other occupants. It also means anything which interfered with the right of other to properly and peacefully enjoy their Apartments, or causes conditions that are dangerous, hazardous, unsanitary and detrimental to other tenants in the Building. Objectionable conduct by You gives Owner the right to end this Lease (NYSCEF Doc No. 1, complaint at ¶ 18).

In light of the above evidence, the Court finds that plaintiff has met its burden on the likelihood of success on the merits as to its claims premised upon breach of the lease as it relates to objectionable conduct and nuisance-type conduct and behavior (see, e.g., Bd. Of Mgrs of the 400 Central Park West Condominium v Henriquez-Berman, 2016 WL 7911821, Index no. 152705/2016 [Sup Ct, NY County April 20, 2016] [hereinafter Henriquez-Berman]). The Court further finds that the complained of conduct and behavior presents a danger to the safety, health and well-being of the building's occupants and may therefore constitute an irreparable injury (see id.). For example, the building's tenants' affidavits and testimony indicate that they are fearful of encountering defendant, and that the human excrements around the building present a danger to their health as well as to their children. It has been alleged that the odor is so strong that it lingers in elevators and causes them to avoid going outside their apartments or using the elevators. Defendant's apartment itself has had to be thoroughly cleaned by building management and allegedly contained maggots and other vermin. Following complaints to management, at least one neighboring tenant felt compelled to move due to the odors emanating from defendant's apartment.

"In order for a preliminary injunction to issue it must be shown that the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant through imposition

of the injunction" (Nassau Roofing & Sheet Metal Co., Inc. v Facilities Dev. Corp., 70 AD2d 1021, 1022 [3d Dept 1979]). This element also tips in favor of the plaintiff and its co-tenants. Without the injunction, the plaintiff will see more tenants continue to have their lives disrupted and continue to have interference with the peaceable enjoyment of their residential units and shared living spaces. Considering the panhandling occurring in their homes, the odors, the possibility that they, too, might encounter his excrement or vomit, and in consideration of the routine cleaning to try to rid the excrement, vomit, and related odors, all elicit the harm plaintiff and the building's tenants face without an injunction. On the other hand, to grant the entire injunction would essentially eject defendant from his home. DSS noted that, should that happen, neither it, nor his GAL, nor any attorney, or other "friend" of the defendant would be able to locate him, check on him, and get him the help that he needs.[3] However, the defendant has been in and out of hospitals multiple times over the pendency of this action. Once released, he returns to the building and engages in the same behavior. It is clear that defendant requires assistance, and it is this Court's hope that he will receive that assistance as soon as possible (whether at a hospital or an in-patient treatment center). Thus, any temporary bar on his ability to enter the premises, whilst in between hospitals or other treatment centers, should be minimal and of a limited duration. Indeed, this injunction is not to serve as "law of the case" on the merits for an ejectment action, such that he will be permanently barred from residing at the premises. Defendant should be able to maintain this current address for mailing or other purposes pending the ultimate disposition of the claims in this case.

Accordingly, it is hereby ORDERED that the motion for a preliminary and permanent injunction is granted to the following extent:

At all times when Defendant is permitted to be in the Building pursuant to this Order:

[3] DSS and others have appeared as a "friend" of defendant's during Court proceedings, however no answering or opposition papers have been filed.

(a) Defendant shall refrain from urinating and defecating in the Building elevator and Building common areas; and

(b) Defendant shall refrain from aggressively begging other Building residents for money and food in the Building lobby; and

(c) Defendant shall refrain from harassing other Building residents in the elevators; and

(d) Defendant shall refrain from allowing and permitting foul odors to permeate the common areas of the Building, to the extent that they emanate from his body or apartment; and

(e) Defendant shall refrain from exposing himself in front of Building staff and residents in an inappropriate manner; and it is further

ORDERED that plaintiff, its employees and/or agents (including without limitation locksmiths) and/or the New York City Police Department are authorized to forcibly (if necessary) remove and change the locks to defendant's apartment and temporarily bar defendant from the building and apartment until defendant is able to refrain from the delineated objectionable and nuisance-type conduct and behavior (potentially after assistance is rendered in an appropriate facility); and it is further

ORDERED that the preceding paragraph shall be effective at least twenty-four (24) hours after service of a copy of this order on the defendant; and it is further

ORDERED that the plaintiff personally serve defendant with a copy of this order with notice of entry within 10 days; and e-file proof of service of the same within 5 days thereafter; and it is further

ORDERED that, per CPLR 6312, plaintiff shall post an undertaking in the sum of $10,000; and it is further

ORDERED that this matter shall be scheduled for a **status conference** on November 30, 2021 at 3:00 pm.

This constitutes the decision and order of the Court.

10/27/2021
DATE

ALEXANDER TISCH, J.S.C.

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