

Armstrong Realty, Inc. v Roche
2021 NY Slip Op 32172(U)
October 27, 2021
Supreme Court, Kings County
Docket Number: Index No. 505211/18
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
ARMSTRONG REALTY, INC.,

Plaintiff(s),
-against-

Index No: 505211/18

JOHN EDWARD ROCHE,

Defendant(s)

DECISION AND
ORDER AFTER
CONTEMPT
HEARING

X

Plaintiff Armstrong Realty Inc. [Armstrong] moved by way of separate orders to show cause [motion seq. nos. 6 and 8], for an order: (1) pursuant to CPLR 5104 and Judiciary Law §§ 753, 756, and 770, holding defendant John Edward Roche [Roche] in civil contempt for his willful violation of this court’s temporary restraining order [TRO] entered on July 9, 2020; and (2) pursuant to Judiciary Law § 773, directing defendant to comply with the TRO, and directing Roche to pay plaintiff’s attorney’s fees in connection with the motions.

By decision and order dated March 3, 2021, this court set the matter down for a virtual contempt hearing on April 8, 2021.

At the virtual hearing, Jason Frosch and Kacey Sou of Kucker, Marino, Winiarsky & Bittens, LLP, appeared for Armstrong. Margaret Sandercock and Elizabeth Sandercock of Goldfarb & Sandercock, LLP, appeared for the Roche.

The issues presented to the court for hearing were: (1) the failure of Roche to procure insurance, which was purged by the time of the hearing, and (2) Roche’s alleged violation of the court’s TRO dated July 9, 2020 precluding access to the roof of the subject premises.

The testimony of the witnesses, in pertinent part, was as follows:

Jacinto Chua

Mr. Chua testified that he is the owner of Armstrong which owns the building located at 120 Waterbury Street, Brooklyn. Mr. Chua indicated that Roche is in possession of the 3rd floor unit in the building. As soon as the TRO was issued, Mr. Chua had cameras installed to monitor the roof as Roche had constructed a room on top of the building with windows to provide access to the roof. Armstrong’s Exhibits 1-4 were identified as pictures of people on the roof and Exhibits 2-4 bore dates after the

date of the TRO. Exhibit 5, consisting of 3 photos, depicts the access windows, etc. that lead to the roof.

On cross-examination, Mr. Chua agreed that none of the photos were pictures of the defendant. He further identified the date of Exhibit 1 as 8/4/20. Mr. Chua first became aware of the structure on the roof in 2017 when he was notified by the Department of Buildings, and at that time he commenced eviction proceedings.

On redirect, Mr. Chua indicated that there were leaks from the roof well before 2020, and that they continue.

John Roche

Mr. Roche testified that he has occupied the 3rd floor of 120 Waterbury St., Brooklyn since 2009 and has not accessed the roof since July 2020. Exhibit 6 & 7 are rough diagrams of the layout of the 3rd floor. Mr. Roche identified a passageway to roof access and a stairway to a hatch which also provides roof access. Roche further testified that in July 2020 the 3rd floor was also occupied by Dominique Engalaro and Luis Ruelas. Both the hatch and passageway are located in the unit occupied by Roche. After learning of the photos of people on the roof Roche told his roommates not to use the roof and boarded the window access with plywood. Roche's Exhibit A shows the plywood block installed on the window. There were no texts or other communications produced from this time period related to notifying anyone of the court order.

On cross-examination, Mr. Roche testified that he created the passageway and hatch about 10 years ago. In 2009, he spoke to Mr. Chua about putting in sky lights, and at that time Chua was aware that the roof was leaking. Roche also indicated that he had no responsibility for maintaining the roof.

On redirect, Roche was shown an affidavit that he signed on 9/29/20 in which he swore that no one had used the roof, but at the time he was already aware that Dominique had in fact used the roof.

Dominique Engalaro

Ms. Engalaro testified that she used the roof twice in July and August 2020 before she was told of the TRO. The last time she accessed the roof was on 8/28/20. She could not recall if she saw or spoke to Mr. Roche at the premises prior to that time.

Kelly Koh

Ms. Koh testified that she lived at the premises from 1/2021-3/2021 and that she never accessed the roof.

Luis Ruelas

Mr. Ruelas testified that he lives at the premises and was last on the roof on 7/4/20 to see the fireworks.

Discussion

In order to prevail on a motion to hold a party in contempt, “[t]he movant must establish that: (1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) the movant was prejudiced by the offending conduct (*Bongiorno v Di Frisco*, 196 AD3d 452, 454 [2d Dept 2021]). “Prejudice is shown where the party’s actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party” (*id.* at 454-455 [internal quotation marks omitted]). “The element of prejudice to a party’s rights is essential to civil contempt, which aims to vindicate the rights of a private party to litigation” (*El-Dehdan v El-Dehdan*, 114 AD3d 4, 11 [2d Dept 2013] *aff’d* 26 NY3d 19 [2015]). “Elements of contempt must be proven by clear and convincing evidence” (*Battinelli v Battinelli*, 192 AD3d 957 [2d Dept 2021]).

Here, although Armstrong establishes that the roof was accessed after the TRO went into effect, it fails to demonstrate by clear and convincing evidence that disobedience of the order prejudiced its rights or remedies. Because the primary purpose of civil contempt is remedial, any penalty imposed “is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court’s mandate or both” (*Palmitesta v Palmitesta*, 166 AD3d 782, 782-783 [2d Dept 2018]). The testimony does not reflect that Roche, himself, ever accessed the roof after the issuance of the TRO, and that once he became aware that the apartment’s other occupants were continuing to do so, he put in measures to block entry to the roof. Aside from the 4 times that the roof was accessed between August and September 2020, there was no showing of further violations of the TRO. Moreover, there was no showing that as a result of the roof access, Armstrong incurred any fines or that the building sustained physical damage or other injury. As Roche appears to continue to comply with the terms of the TRO, and as there is no showing that Armstrong was prejudiced as a result of Roche’s initial failure to comply with the TRO’s directives, a finding of civil contempt is not warranted.

Finally, since the finding of civil contempt is not supported by clear and convincing evidence, Armstrong is not entitled to attorneys’ fees pursuant to Judiciary Law § 773 (*see Romanello v Davis*, 49 AD3d 652 [2d Dept 2008]).

Accordingly, it is

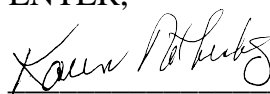
ORDERED that Armstrong's separate orders to show cause [motion seq. nos. 6 and 8] to hold Roche in civil contempt is denied, and it is further

ORDERED that the request for attorneys' fees pursuant to Judiciary Law § 773 is also denied.

This constitutes the decision and order of the court.

Dated: October 27, 2021

ENTER,



Hon. Karen B. Rothenberg
J.S.C