

Iwashiro v Board of Mgrs. of the Museum Bldg.

2022 NY Slip Op 30654(U)

March 1, 2022

Supreme Court, New York County

Docket Number: Index No. 157752/2021

Judge: Alexander Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

INDEX NO. 157752/2021
MOTION DATE 9/9/2021
MOTION SEQ. NO. 001

YUKI IWASHIRO,

Plaintiff,

- v -

THE BOARD OF MANAGERS OF THE MUSEUM BUILDING, A CONDOMINIUM, JOHN ROWAN, JUNKO YODA, JOE MANTEGNA AKA JOSEPH MANTEGNA, JAMES KALIARDOS, PRUDENCE CARLSON,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41

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

Upon the foregoing papers, plaintiff moves this Court for an order granting a preliminary injunction preventing John Rowan from commencing any work for the roof of 11 Mercer Street, in the County, City and State of New York (hereinafter the Building); and for an order voiding the sale/transfer of the rights to the common elements in the Building. Defendants collectively oppose the application. For the following reasons, the motion is denied.

Plaintiff commenced the instant action on July 26, 2021, alleging the defendants improperly granted Rowan the ability to purchase limited rights to the roof and portions of the fifth-floor hallway, resulting in an easement agreement for common elements in the Building. The relevant facts are as follows.

Plaintiff owns Unit #5A in the Building, and purports to be an owner of 8.5% of the common elements in the Building (NYSCEF Doc. No. 24 [hereinafter Yuki Iwashiro aff at ¶ 3]). During the relevant period, the board of the Building was comprised of the above-named individual

defendants (Iwashiro aff at ¶ 4). In or about June 2020, the board was tasked with replacing a roof tank on the roof of the Building. In an effort to resolve this issue, Rowan submitted a proposal to purchase certain rights to the roof and portions of the fifth-floor hallway, which were regarded as common elements of the Building, for \$450,000.00. In or about July 2020, Yuki Iwashiro, a former board president of the Building, and owner within, submitted a purchase proposal for rights to the same in the amount of \$550,000.00 (Iwashiro aff at ¶¶ 5-8). Before either proposal was accepted, Iwashiro contacted the board's attorney on or about July 31, 2020, inquiring about the transfer of ownership; specifically, how the transfer will be provided, and which sections of the declaration and bylaws validate such a transfer. In response, the board's attorney stated the transfer will be an easement, which the board has the power to grant under Article 2, Section 2.3(xxi) of the bylaws (Iwashiro aff at ¶ 10).

In or about August 2020, with competing proposals to consider, the board compiled a nine-page term sheet for the transfer of roof rights, outlining terms desired by the board (NYSCEF Doc. No. 45, Carlson aff at ¶ 11). The board invited Rowan and plaintiff to submit bids in response. Rowan submitted such while plaintiff did not, and the board accepted Rowan's proposal for \$600,000.00, as it viewed it being in the best interest of the Building (*id.* at ¶¶ 13-16). The board and Rowan agreed to the terms of the easement in or around November 2020 (*id.* at ¶ 17). The easement agreement provided Rowan with certain roof rights, but also carved out areas of the roof that Rowan did not have rights to (NYSCEF Doc. No. 43, defendants' mem at 10, citing Iwashiro aff, ex A). The board emailed all unit owners in the Building to advise them of the easement agreement, and the necessary amendments to the declaration in order to effectuate the agreement. Every unit owner consented to the declaration amendment except for plaintiff (Carlson aff at ¶ 20).

Plaintiff seeks a preliminary injunction to enjoin Rowan from doing any work in the aforementioned common elements of the Building, and for an order voiding the transfer of property to Rowan (Iwashiro aff at ¶ 25). Plaintiff contends the board breached their fiduciary duty to the Building by granting Rowan an easement in the property, in which Rowan will build permanent structures on the roof and make permanent alterations to the common elements that have been transferred to him (Iwashiro aff at ¶¶ 23-25). Plaintiff further contends these permanent structures and alterations will cause irreparable harm because these areas, the hallway and roof, are common elements of the Building in which all unit owners share an interest (NYSCEF Doc. No. 23, Bendet aff at ¶ 5).

In opposition, the defendants raise several issues contesting the issuance of a preliminary injunction. First, defendants argue that plaintiff lacks standing to bring this action, because individual unit owners do not have standing to assert claims regarding “common elements” of a condominium. Second, plaintiff’s delay in seeking relief, waiting more than one year after plaintiff first raised its legal arguments, and nine months after the completed transaction on behalf of the board, precludes injunctive relief as a matter of law. Furthermore, defendants claim that plaintiff has failed to prove a likelihood of success on the merits, because the Condominium Act and New York case law does not require unanimity amongst unit owners for a condominium board to change or limit the common elements of a condominium building. Defendants also argue plaintiff cannot establish irreparable harm because of its delay in bringing the motion, in addition that no construction work is imminent, other than the roof tank repair. For these reasons, inter alia, defendants claim the equities weigh in their favor.

New York Civil Practice Laws and Rules (“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.

“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]; 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).

The Court finds that plaintiff falls short of demonstrating a likelihood of success on the merits. Plaintiff argues it is likely to prevail because the defendants are in direct violation of New York's Condominium Laws and the Building's declaration and bylaws, by granting Rowan an

easement to utilize common elements within the Building to the exclusion of others, but this is incorrect. As mentioned within plaintiff's moving papers, Article 7(a) of the Building's declaration states "[t]he Common Elements consist of the Property including the Land and all parts of the Building and improvements thereon other than the Units." As it pertains to easements for common elements in the Building, Article 10 of the declaration states, in relevant part, "all...tenants and occupants of the Building...shall have, in common with all of the others, an easement for ingress and egress through, as well as for the use and enjoyment of, all of the Common Elements and the Common Elements shall be subject to such easement." Real Property Law § 339-i (4), also known as the Condominium Act, states "[e]ach unit owner may use the common elements in accordance with the purpose for which they are intended, without hindering the exercise of or encroaching upon the rights of the other unit owners, but this subsection shall not be deemed to prevent some unit or units from enjoying substantially exclusive advantages in a part or parts of the common elements expressed in the declaration or by-laws." The exclusive rights afforded to Rowan do not hinder or encroach upon the easement rights of plaintiff, or any other owner in the Building. The board rightfully provided Rowan an exclusive advantage to the Building's common elements in the form of an easement agreement, and this easement agreement does not strip anyone else of their rights to the common elements.

Article 12 of the Building's declaration confirms that each unit owner has vested the board with power to act on its behalf as the board deems necessary or appropriate concerning the condominium or the common elements.¹ Unlike common interests, "[c]ondominium common

¹ "Power of Attorney to the Board", section (a) states: "Each unit owner, by acceptance of a deed or otherwise succeeding to title to a unit, shall be deemed to have irrevocably nominated, constituted and appointed as such Unit Owner's attorney-in-fact, coupled with an interest, and with power of substitution, the Persons who shall from time to time constitute the Board, jointly: . . . to execute, acknowledge and deliver (1) any declaration or other instrument affecting the Condominium that the Board deems necessary or appropriate to comply with any Law applicable to the maintenance, demolition, construction, alteration,

elements are solely under the control of the board of managers” (WW-35th LLC v Morgan Ct. Condominium, 60 Misc 3d 1215[A], 2018 NY Slip Op 51137[U], *17, 2018 NY Misc LEXIS 3093 [Sup Ct, NY County 2018]; Jerdonek v 41 W. 72 LLC, 143 AD3d 43, 47 [1st Dept 2016] [“the Condominium Act . . . ‘recogni[zes] that the board exercises exclusive control over the common elements”], quoting Pekelnaya v Allyn, 25 AD3d 111, 120 [1st Dept 2005]; Rothstein v 400 E. 54th St. Co., 51 AD3d 431, 432 [1st Dept 2008] [common elements “were solely under the control of the condominium board of managers”]). Therefore, the board acted within its discretion when it accepted Rowan’s proposal and granted him an easement with rights to the roof and portions of the fifth-floor hallway.

Nor could plaintiff’s objection prohibit the board from amending the declaration to grant such an exclusive advantage. The board acted within its discretion when it chose to amend the Building’s declaration in order to address transfer rights within the easement agreement. Article 16 of the declaration titled “Amendments to this Declaration” states “[a]ny provision of this Declaration may be amended, modified, added to, or deleted by the vote, taken in accordance with the provisions of the By-Laws, of at least sixty-six and two-thirds (66 2/3%) percent of all Unit Owners, both in number and in aggregate Common Interests.” Despite plaintiff’s objection, the amendment was proper because said amendment was approved by 7 out of 8 units, representing 91.5% of the common interests in the Building. Thus, the Court finds plaintiff has failed to demonstrate that it is likely to prevail on the merits.

Plaintiff has also failed to meet its burden demonstrating it would suffer irreparable harm if a preliminary injunction were not granted. “In the context of a preliminary injunction... [t]he

repair, or restoration of the Condominium or (2) any consent, covenant, restriction, easement, or declaration, or any amendment thereto, affecting the Condominium or the Common Elements that the Board deems necessary or appropriate” (NYSCEF Doc No. 34 at 10-11).


alleged harm must be shown by the moving party to be imminent, not remote or speculative” (Winters Bros. Recycling Corp. v Jet Sanitation Serv. Corp., 23 Misc 3d 1115, 1115 [Sup Ct, Nassau County 2009], citing Golden v Steam Heat, Inc., 216 AD2d 440, 442 [2d Dept 1995]).

If an injunction is not granted, plaintiff claims Rowan will construct permanent structures on, or materially alter the common elements within the Building, and thus, injure plaintiff. The injuries alleged by plaintiff do not meet the threshold showing of an imminent, irreparable injury. Plaintiff’s claims of injury also appear speculative. Despite Rowan’s interest in the roof space of the Building, and other parts throughout, neither party has presented evidence as to the types of permanent structures or common element alterations Rowan allegedly will implement. As such, the Court is not convinced that irreparable harm will occur if a preliminary injunction is not granted.

The third and final element required for a preliminary injunction requires the movant to show the balance of equities favors granting the injunction. Based on the information provided, the equities balance in favor of the defendants. Plaintiff claims an injunction will maintain the status quo and prevent Rowan from erecting structures and altering the common elements within the Building. However, the board provided Rowan the easement agreement in December of 2020, and the defendants have represented that Rowan had not made any such alterations as of the date of argument on this motion. If an injunction were granted, the board will have to find alternative options to pay for the roof tank repair. The board will also have to reimburse Rowan for the funds he’s distributed under the easement agreement, and the Building would no longer be in a self-sufficient state. Thus the Court finds that the injunction is not warranted when it would alter, rather than preserve, the status quo (see, e.g. Buchanan Capital Mkts., LLC v DeLucca, 144 AD3d 508, 509 [1st Dept 2016]).

Accordingly, it is hereby ORDERED that the motion is denied; and it is further ORDERED the parties shall appear for a preliminary conference virtually via Microsoft Teams on **June 1, 2022**.²

This constitutes the decision and order of the Court.

<u>3/1/2022</u> DATE	 ALEXANDER TISCH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE

² Calendar invitation containing Teams link with preliminary conference form to be sent by Part 18 Clerk (SFC-Part18-Clerk@nycourts.gov).