One Plaza LLC v Board of Mgrs. of Park Circle Condominiums
2022 NY Slip Op 31891(U)
January 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 500968/2020
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

Index Number 500968/2020
SEQ # 001 AND #002

DECISION/ORDER

ONE PLAZA LLC,

Plaintiff,

against

BOARD OF MANAGERS OF PARK CIRCLE CONDOMINIUMS,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed	1–2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3–4
Replying Affidavits	5
Exhibits	
Other	

Upon the foregoing papers, defendant's motion to compel arbitration (seq. 001) and plaintiff's motion to enjoin access to the garage until the resolution of this action (seq. 002) are decided as followed:

The plaintiff alleges the following facts. Plaintiff One Plaza LLC ("One Plaza") is a domestic limited liability corporation that purchased a commercial parking garage located in 346 Coney Island Avenue, Brooklyn, New York 11218 on March 19, 2019 (Complaint at ¶ 1). One Plaza acquired the garage at a tax lien sale on March 7, 2019. That garage is designated as a "Parking Unit" in the condominium declaration, and is delineated at 14,762 square feet, warranting a 16.2956% share of common element fees pursuant to the Condominium Act, RPL § 339–i (1) (iv) (Declaration at Schedule B). Plaintiff brings this action against the Board of Managers of the Park Circle Condominium (the "Board") that abuts the parking garage. The plaintiff's managing member, Kiumarz Geula, testifies that the Board of Managers has authorized its agents and officers to utilize the parking garage to access other common areas on the cellar level despite One Plaza's protests (Geula Aff. at ¶¶ 9–10). Plaintiff brought this action

seeking to preliminarily enjoin the Board's ingress and egress through the garage and to recover damages for breach of contract and breach of the Condominium Act for misallocation of percent common interests.

Defendant's Motion to Compel Arbitration

In the instant motions, the Board seeks to compel arbitration and stay this case pursuant to CPLR § 7503. In support of these requests, the Board relies on the relevant provision in the condominium bylaws (Bylaws § 9.1). These provisions state:

> Any dispute between the Unit Owners, members of the Condominium Board, or Officers of the Condominium shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association.

In opposition, the plaintiff contends that this provision of the bylaws does not apply to the instant action because this is a dispute between a unit owner ("One Plaza") and the Board of Managers itself, not "members of the Condominium Board." Because the Board of Managers is a legal entity that is substantively distinct from the individual members, it has unique powers and liabilities, differentiating it from the individuated members of the Board. One of those powers is the ability to maintain a foreclosure proceeding or action for money judgment against unit owners to recover unpaid common charges (Bylaws § 6.4, 7.1).

One provision of the bylaws appears to further the argument that the Condominium Board and the members of the Condominium Board are not synonymous, as both are included in a list. In the section titled "Alterations, Additions, Improvements, or Repairs in or to the Units and Limited Common Elements," unit owners agree to

> indemnify and hold the Condominium Board, the members of the Condominium Board, the officers of the Condominium, the Managing Agent and all other Unit Owners harmless from and against any such liability, cost and expense (Bylaws § 5.3 [D]).

In the other areas of the agreement, the phrase "members of the Condominium Board" is used to reference individuals (*see* Bylaws §§ 2.5–2.8, § 3.5, § 4.4). Elsewhere, however, the bylaws use the phrase "Condominium Board" to refer to the unified legal entity. In the declaration, the "Condominium Board" is defined as "the governing body of the Condominium, whose members shall be selected pursuant to the terms of Article 2 and 4 of the [Bylaws]" (Declaration Exhibit C). The absence of "Condominium Board" is in the arbitration provision is, therefore, conspicuous. At a minimum, this language renders the arbitration provision of the contractual agreement ambiguous.

This jurisdiction has a longstanding rule that "ambiguities in a contractual instrument will be resolved *contra proferentum*, against the party who prepared or presented it" (*151 West Associates v Printsiples Fabric Corp.*, 61 NY2d 732 [1984]).). As the Board is the drafter and presenter of the bylaws, the arbitration provision must be read to exclude the Board of Managers as a legal entity from the binding arbitration requirement. Under further precedents of this State, parties may not be compelled to arbitrate in the absence of clear, explicit, and unequivocal agreements to arbitrate (*see Matter of Waldron [Goddess]*, 61 NY2d 181 [1984]; *Jalas v Halperin*, 85 AD3d 1178 [2d Dept. 2011]. Accordingly, defendant's motion to compel arbitration is denied.

Plaintiff's Motion for Preliminary Injunction

The plaintiff moves for an injunction pursuant to CPLR §§ 6301 and 6311, to bar the Board of Managers, the only named defendant, from accessing the parking unit pending the determination of this action. To warrant a preliminary injunction, a party must demonstrate (1) a likelihood of success on the merits of the action; (2) the danger of irreparable injury in the

absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party (*Noby Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*Arcamone–Makinano v Britton Property, Inc.*, 83 AD3d 623, 624 [2d Dept. 2011]). A cause of action for trespass requires proof of "intentional entry into the land of another without justification or permission" (*Wheeler v Del Duca*, 151 AD3d 1005, 1007 [2d Dept 2017]).

To support this claim, plaintiff avers that it is entitled to sole and exclusive possession and use of its garage, and owns it in fee simple absolute (Geula Aff. at ¶¶ 3, 7; Parking Garage Deed). The plaintiff has requested that the Board restrict its agents or employees from entering the garage as a throughway to other common areas at the cellar level—the Board has not ceased the activity (*id.* at ¶¶ 9–10). The Declaration and the bylaws both imposed a 24-hour notice requirement on the Board's contractual easement to enter units for the purpose of repairing and maintaining common elements.

Defendant argues that the plaintiff fails on the "irreparable harm" prong of the test. If the plaintiff succeeds on the merits of their claim for trespass, defendant contends that there is an appropriate legal remedy for any damages incurred, barring the application of an equitable remedy like a preliminary injunction. However, seeking compensation for past use does not bar an application for an injunction to enjoin use going forward. Otherwise, damages will simply increase daily with continued use. Ultimately, the prospect of future trespass warrants an injunction (*see e.g. Man Yum Ng v Metro. Transp. Auth.*, 17 Misc 3d 1110(A) [Sup Ct 2007]). Accordingly, plaintiff's motion is granted.

ONE PLAZA -v. BD. OF MANAGERS - 500968/20

This constitutes the decision and order of the court.

January 12, 2022
DATE

DEVIN P. COHEN
Justice of the Supreme Court