

Brodie v Board of Mgrs. of the Aldyn
2022 NY Slip Op 34316(U)
December 20, 2022
Supreme Court, New York County
Docket Number: Index No. 652081/2022
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

STEFAN BRODIE and IRINA DENISOVA,
Plaintiffs,

INDEX NO. 652081/2022

MOTION DATE 10/19/2022

MOTION SEQ. NO. 002

- v -

BOARD OF MANAGERS OF THE ALDYN, ALLIED
PARTNERS and JOHN DOES #1 THROUGH #10,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 70, as well as NYSCEF document numbers 71, 72, 73, 75, 76, 77, and 78

were read on plaintiffs' motion for CONTEMPT, and defendant's letter application for Work Order relief in connection with the court's June 24, 2022, Decision & Order.

LOUIS L. NOCK, J.

Plaintiffs move by order to show cause (NYSCEF Doc. No. 55) for an order of contempt against defendant and its former attorneys herein (the firm of Seyfarth Shaw LLP, New York, New York), alleging contemptuous violation of this court's decision and order dated June 24, 2022 (NYSCEF Doc. No. 26) (the "June Order"), which granted plaintiffs' motion (seq. no. 001) for a preliminary injunction to the extent of nullifying defendant's Stop Work Notice until November 30, 2022.¹ The motion is opposed.

Distinct of that, defendant has made a letter application to the court, dated December 13, 2022 (NYSCEF Doc. No. 77) for, in essence, a declaration by this court that work presently being performed and anticipated to being performed, by plaintiffs' contractors in connection with plaintiffs' condominium apartment that is the subject of this action, and occurring after the

¹ Familiarity with the June Order is presumed.

November 30th expiration of the preliminary injunction, is in violation of defendant's Stop Work Notice and, as a consequence, subject to the rights and remedies granted by plaintiffs to defendant in the parties' Alteration Agreement governing the parameters of plaintiffs' now-protracted renovation of their apartment. The application is opposed.

The foregoing matters are consolidated for disposition and determined as follows.

Background

This action, seeking injunctive, declaratory, and compensatory relief, was commenced May 4, 2022, by summons and complaint. Per the complaint:

Plaintiffs jointly purchased the subject luxury condominium apartment in the beginning of the year 2019 – nearly four years ago. On February 15th of that year, the parties entered into an Alteration Agreement (NYSCEF Doc. No. 12) governing the parameters of plaintiffs' planned renovation of their apartment. Demolition work took place from June 25, 2019, to July 17, 2019. Construction work started September 9, 2019, and continued to December 23, 2019. Due to COVID-19 gubernatorial action, work ceased from March 27, 2020, to June 8, 2020, and, while re-commencing, encountered a reduction in labor force, also alleged to be a by-product of COVID-19 circumstances, as well as related difficulties abroad where certain construction-related materials were being manufactured.²

As observed in the June Order, the blank space in the Alteration Agreement (dated February 15, 2019) that was designed to fix a "Required Completion Date" for plaintiffs' renovation project was never filled in.³ But after protracted renovation work lingering into the

² The complaint speaks of "products, materials, and tradespeople coming from Europe" (Complaint ¶ 17).

³ As further observed in the June Order, the uncertainty given rise to by virtue of that missing term is quite to blame for the instant controversy. However, this court does not accept the unacceptable premise that such uncertainty grants license to plaintiffs to protract their renovation project in virtual perpetuity. Indeed, the mere fact that a "Required Completion Date" paragraph – so titled – exists in the agreement is viewed by this court as evidence of the parties' mutual understanding that the project, at some reasonable point in the future, must come to an end. As for how to deal with such situations, the law has been clear for generations that the court is empowered to supply a

spring of this year – three years after execution of the Alteration Agreement – defendant issued a Stop Work Notice on April 29, 2022 (NYSCEF Doc. No. 47), ordering the suspension of work and seeking to assess financial penalties including, but not limited to, a \$500 daily fine for each day of work occurring after said date in intended pursuance of paragraph 5 (d) of the Alteration Agreement.

Plaintiffs commenced this action alleging breach of the Alteration Agreement – citing the absence of a “Required Completion Date” – and challenging defendant’s ability to assess the daily fine, and seeking “an amount exceeding \$50,000, but which accrue daily” (Complaint ¶¶ 39-40). A second cause of action seeks a declaratory judgment which would nullify any attempt by defendant to assess fines or penalties “on account of late completion under the Alteration Agreement” (Complaint ¶ 44). A third cause of action seeks to enjoin defendant, permanently, from enforcing its Stop Work Notice. Defendant answered the complaint, asserting affirmative defenses.

After joinder of issue, plaintiff moved for a preliminary injunction (motion seq. no. 001) to restrain defendant from enforcing its Stop Work Notice during the pendency of this action. The June Order, dated June 24, 2022 (NYSCEF Doc. No. 26), granted that motion “to the extent that the Stop Work Notice . . . is nullified until November 30, 2022; but no later.” Otherwise stated, this court supplied the missing term for the contractual “Required Completion Date” by affording plaintiffs an additional five months to complete their renovation project (*see, e.g., Haines v City of N.Y.*, 41 NY2d 769 [1977] [court is empowered to supply missing contractual terms]; *Atco Canton Corp. v Costanzi*, 133 AD2d 949 [1987] [same]).

missing contractual term guided by objective and reasonable analysis of the circumstances (*see, e.g., 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88 [1991]), and especially “where it is clear from the language of an agreement that the parties intended to be bound” (*id.*, at 91). Such is the case here where a “Required Completion Date” paragraph was included in the Alteration Agreement (at ¶ 5 [d]).

Plaintiffs' Motion for an Order of Contempt

Subsequent to the issuance of the June Order, defendant filed a lien against plaintiffs' apartment, dated August 17, 2022 (NYSCEF Doc. No. 52), for an aggregate sum of \$115,030.62 (plus an added sum as attorneys' fees), representing various charges stated by defendant as "common charges and/or additional common charges due from February 1, 2022, through August 1, 2022." Plaintiffs claim that such a lien, and underlying assessment of charges, cast as "common charges," are really fines continuing to be assessed by defendant in connection with its Stop Work Notice, which had been nullified by this court in its June Order (*see*, NYSCEF Doc. No. 43 [Plaintiffs' Mem.] at 2). Thus, argue plaintiffs, are defendant and its former attorneys (who filed the lien) in contempt of the June Order.

Defendant's counsel, in opposition,⁴ assert that there can be no finding of contempt because the June Order went only as far as allowing the renovation work to continue till November 30, 2022 – i.e., the suspension of work part of the Stop Work Notice; but did not address defendant's ability to assess a fine for continuing work – i.e., the fine assessment part of the Stop Work Notice. To quote defendant's counsel at oral argument: "There's nothing in the order that says fines imposed previously are nullified, nothing that says they are void, it remains an issue in this litigation" (NYSCEF Doc. No. 70 [Transcript of Proceedings] at 11).

"A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence" (*El-Dehdan v El-Dehdan*, 114 AD3d 4, 10 [2d Dept 2013], *aff'd* 26 NY3d 19 [2015]). "To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that

⁴ Defendant's counsel has asserted that approximately \$65,000 out of the total lien amount are in the category of fines assessed on account of renovation work, with the balance representing common charge arrears and attorneys' fees (*see*, NYSCEF Doc. No. 70 at 9-10).

the party charged with contempt willfully violated a clear and unequivocal mandate of a court’s order” (*Rubin v Rubin*, 78 AD3d 812, 813 [2d Dept 2010].) Viewed by this very heightened standard, this court concludes that, while defendant and its former counsel may have erred in their comprehension of this court’s mandate in its June Order, lacking here is clear and convincing evidence that defendant and its former counsel consciously understood their lien and fine assessment to be in violation of the June Order, which spends the bulk of its discussion on the saliency of “afford[ing] some additional time to complete the project” (June Order at 4; *see, id., passim*) – i.e., the suspension of work part of the Stop Work Notice. In terms of an “unequivocal mandate of” the June Order, again: while nullification of fines might have been divined from the June Order, one cannot say that such was stated as expressly as to constitute an “unequivocal mandate” (*Rubin, supra*). Thus, this court is constrained by the applicable standard to deny the motion for an order of contempt. That said, however, this court now provides express clarification that its intendment underlying its June Order was to nullify the fine assessment part of the Stop Work Order, as well – at least, as to fines correlating to the period of the preliminary injunction – June 24, 2022, through November 30, 2022.

Defendant’s Application for a Declaration that the Stop Work Notice
Applies to Work Occurring After November 30, 2022

The Alteration Agreement speaks in terms of “Work” being performed on the apartment. It is defined broadly as “the work called for by the Plans or any other work performed by or on behalf of Unit Owner” (NYSCEF Doc. No. 12 ¶ 2 [emphasis added]). With that broad definition in mind, the “Required Completion Date” paragraph of the Alteration Agreement only exempts fines for the limited category of “Work” characterized as “decorative work such as painting, wallpapering and carpeting” (*id.*, ¶ 5 [d]). That paragraph further provides that “[t]he

determination of whether the Work is completed [i.e., non-decorative work] shall be made by the Board . . . and such determination shall be conclusive” (*id.*).

The immediately subsequent paragraph of the Alteration Agreement – paragraph 5 (e) – titled “Evidence of Completion,” provides that “[u]pon completion of the Work, Unit Owner shall obtain and deliver . . . (i) a certificate from the architect or engineer who prepared the Plans certifying that the Work has been completed in accordance with all applicable laws and codes and the Plans” Yet again, the conclusive determination of completion, as regards this paragraph, rests with the Board (*see, id.*). It is important to note, however, that this paragraph is limited to completion of work “in accordance with all applicable laws and codes and the Plans” (*id.*). It stands distinct of plaintiffs’ coexisting and express contractual duty, stated earlier, in paragraph 5 (d) (titled “Required Completion Date”), to cease any non-decorative work by the Required Completion Date (which the June Order fixed at November 30, 2022) at risk of financial penalty (*see, American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990] [“A contract should be construed so as to give full meaning and effect to all of its provisions”] [citations omitted], *lv denied* 77 NY2d 807 [1991]).

In apparent pursuance of plaintiffs’ certification requirement (Alteration Agreement ¶ 5 [e]), plaintiffs delivered the certification of their architect, Adam Campagna AIA, dated December 7, 2022 (NYSCEF Doc. No. 72), stating that all work, other than “decorative work,” “was completed on November 30, 2022.” Defendant’s counsel’s letter application reacts to that certification by claiming that “renovation work beyond decorative work is outstanding” (NYSCEF Doc. No. 77), and, therefore, seeks a direction from this court permitting defendant “to enforce its remedies pursuant to the terms of the parties’ Alteration Agreement” (*id.*). The application relies primarily on photographs depicting the apartment in its current state (*see,*

NYSCEF Doc. No. 78). The court has reviewed those photographs; but finds stronger support for defendant’s position from the very language of plaintiffs’ architect’s certification.⁵ After addressing what clearly resemble structural and/or code-related accomplishments (life safety equipment, sprinkler system, smoke detectors, HVAC system, cooking gas hook-up, plumbing, electrical work, communications system, fireproofing, and access to building systems), the certification letter goes on to itemize outstanding work which the architect considers to be “decorative work.” But those outstanding items, while not necessarily related to structural and/or code-related items (coined herein as “paragraph 5 [e] items”), present to this court as non-decorative work (subject to paragraph 5 [d]’s penalty provision), seeing as they provide necessary functionalities for home living at its basic level (coined herein as “paragraph 5 [d] items”). Those items include doors, tiling (presumably for flooring), washer and dryer appliances, glasswork (presumably for windows), fixtures (presumably for lighting), and hardware (*see*, NYSCEF Doc. No. 72 at 2-3). Given the fact that they are basically functional and, thus, non-decorative (despite their anticipated aesthetic nature),⁶ and especially in light of the Alteration Agreement’s vesting of conclusive determination in the Board⁷ (for which defendant’s counsel is its agent), this court finds that the outstanding work itemized by plaintiffs’ architect are non-decorative items which, subsequent to the preliminary injunction’s expiration date of November 30, 2022, are subject to the assessment of fines pursuant to Alteration Agreement paragraph 5 (d) (*see, e.g., Mazzola v County of Suffolk*, 143 AD2d 734, 734 [2d Dept

⁵ Again – it is worth emphasizing that the architect’s certification, required under paragraph 5 (e) of the Alteration Agreement, relates solely to compliance with “applicable laws and codes and the Plans.” It does not negate the distinct requirement under paragraph 5 (d) of the Alteration Agreement, which, in coexistent fashion, relates to timely completion of all non-decorative work at risk of penalty.

⁶ The Alteration Agreement took pains to describe the types of items that fall within the “decorative” rubric: “such as painting, wallpapering and carpeting” (Alteration Agreement ¶ 5 [d]) – clearly extraneous to the functionalities necessary for home living at its most basic level.

⁷ Per Alteration Agreement ¶ 5 (d).

1988] [“The words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties”).

Conclusion

Accordingly, it is

ORDERED that plaintiffs’ motion for an order of contempt is denied; and it is further

ORDERED that defendant’s application for a declaration that this court’s decision and order of June 24, 2022 (NYSCEF Doc. No. 26), does not allow plaintiffs to perform their outstanding work vis-à-vis their apartment that is the subject of this action free of defendant’s fine assessment remedies, is granted; and it is further

ORDERED that said decision and order is to be construed, also, as nullifying any fines assessed in connection with plaintiffs’ renovation work on said apartment assessed during the period of said decision and order’s preliminary injunction – i.e., June 24, 2022, through November 30, 2022.

This will constitute the decision and order of the court.

ENTER:



<u>12/20/2022</u>					<u>LOUIS L. NOCK, J.S.C.</u>
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CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
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CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE