

Schmidt v Board of Directors of Duane Owners, Inc.

2023 NY Slip Op 31024(U)

March 31, 2023

Supreme Court, New York County

Docket Number: Index No. 651435/2023

Judge: Suzanne J. Adams

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SUZANNE J. ADAMS PART 39TR

Justice

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FRED SCHMIDT,

Plaintiff,

- v -

THE BOARD OF DIRECTORS OF DUANE OWNERS,
INC., DUANE OWNERS, INC., MARGARET L. BOODY

Defendant.

-----X

INDEX NO. 651435/2023

MOTION DATE 03/21/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

Upon the foregoing documents, and oral argument having been heard by the court on March 30, 2023, it is ordered that plaintiff's motion is denied. Plaintiff in this matter is the proprietary lessee and owner of 500 shares out of a total of 2,000 shares in defendant Duane Owners, Inc. (the "Corporation"), which owns, in part, the cond-op building located at 150-152 Duane Street in Manhattan (the "Building"). The Building is five stories and consists of a residential unit split into eight cooperative apartments on the second through fifth floors, a single commercial unit, and certain common areas which includes approximately 4,000 square feet of roof space. Nominal defendant Margaret L. Boody is a proprietary lessee and shareholder of the Corporation who occupies a penthouse apartment in the Building. In March 2001, Boody entered into a 25-year lease to occupy 977 square feet, or approximately 24%, of the roof. This lease will expire on February 28, 2026.

On March 3, 2023, defendant The Board of Directors of Duane Owners, Inc. (the “Board”), the Corporation’s board of directors, unanimously voted to amend the Corporation’s original by-laws. Pertinent to this matter is Article II, Section 8, of the original by-laws, which required 100% of outstanding shares to approve, *inter alia*, a change in rights pertaining to the Building’s roof. The amended by-laws now provide, in Article III, Section 8(b)(ii), that only 51% of outstanding shares are necessary to approve a sale and/or transfer of the roof space. On March 8, 2023, the Board sent notice of a special shareholders’ meeting to the Corporation’s shareholders to vote on entering into a 25-year extension to Boody’s roof lease. At the special meeting, which was held on March 22, 2023, 53.5% of the outstanding shares voted in favor of entering the lease extension

Immediately prior to the special meeting, plaintiff moved by order to show cause for a temporary restraining order and preliminary injunction to enjoin the Board from holding the special meeting, implementing any shareholder approval to lease the roof space at issue, and encumbering the Corporation’s interest in the roof and/or changing rights to the roof space. By order dated March 22, 2023, Hon. Jennifer Schecter, as the Ex Parte Judge, denied the temporary restraining order and scheduled oral argument on the remainder of the motion for March 30, 2023. Defendants and nominal defendant Boody oppose plaintiff’s motion.

New York CPLR § 6301 provides that preliminary injunctive relief may be granted

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.

Entitlement to a preliminary injunction under the statute is established by a showing of: “(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party’s favor.” *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). The purpose of a preliminary injunction is to maintain the *status quo* pending a trial. See *Terrell v. Terrell*, 279 A.D.2d 301, 304 (1st Dep’t 2001); *Sau Thi Ma v. Xuan T. Lien*, 198 A.D.2d 186, 187 (1st Dep’t 1993).

The gravamen of the relief sought in the Verified Complaint is a declaratory judgment that the rights to approve a sale or encumbrance of the Building’s roof, or any change in rights to the roof, are the shareholders’ vested rights; the amended by-laws are rescinded and null and void and the Corporation cannot amend Article II Section 8 of the original by-laws without 100% shareholder approval; and a permanent injunction on the Board’s holding a special shareholder meeting to vote or act on transferring rights to the roof, and the Board and Corporation’s creating or changing rights to the roof absent 100% shareholder approval. Plaintiff has not demonstrated entitlement to a preliminary injunction in this matter because he has not met any of the aforesaid requirements. First, he has not shown a likelihood of success on the merits because the Corporation’s operating documents, including the proprietary lease and the original by-laws, clearly authorized the Board to both amend the by-laws as it did, to propose the roof lease extension, and to hold the special shareholders meeting. There is no evidence that any shareholder in the Corporation has a “vested” right in the use and occupancy of the common roof space. Second, he has not shown any irreparable injury absent the relief requested, as the Corporation’s operating documents and the roof lease at issue were in effect at the time he became a proprietary lessee and owner in the Building. Any extension of the roof lease essentially maintains the *status quo*, which apparently did not cause enough of a harm so as to prevent plaintiff from purchasing

shares in the first place. Finally, the balance of the equities favor defendants. The roof lease has been in effect for over two decades and nothing in the record indicates that the lease has been problematic for the Building. As noted above, there is no “vested right” of the shareholders regarding use of the roof. Moreover, an extension of the lease will result in a monetary payment to the Building that benefits its maintenance and operation. In contrast, plaintiff fails to show any specific and imminent harm that he or the Corporation would suffer as the result of the by-law’s amendments or the extension of the roof lease.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is denied in its entirety.

This constitutes the decision and order of the court.



<u>3/31/2023</u> DATE					<u>SUZANNE J. ADAMS, J.S.C.</u>
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"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					OTHER
					REFERENCE