

605 W. 42nd Owner LLC v Darwak

2023 NY Slip Op 32407(U)

July 17, 2023

Supreme Court, New York County

Docket Number: Index No. 160288/2021

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH

PART 18

Justice

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605 WEST 42ND OWNER LLC,

Plaintiff,

- v -

ROBERT DARWAK,

Defendant.

-----X

INDEX NO. 160288/2021

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 20, 30 were read on this motion to/for INJUNCTION/RESTRAINING ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29 were read on this motion to/for INTERIM RELIEF

Upon the foregoing documents, plaintiff moves for a preliminary injunction ordering defendant to cease dangerous, objectionable, nuisance-like conduct, including e.g., prohibiting defendant from intentionally tampering with the fire suppression system and gas pipes, and/or causing damage to the subject apartment. Plaintiff also seeks an order authorizing plaintiff and its agents to remove and change the locks to the apartment, barring defendant from the apartment based on such conduct that threatens the lives, health, safety and welfare of the defendant and co-tenants in plaintiff's building. Pursuant to the interim order dated January 6, 2023 and subsequent conference on January 19, 2023 (see NYSCEF Doc No 35), a hearing was scheduled and held on March 23, 2023 regarding factual issues presented in this application.

1 The initial return date on the subject Order to Show Cause was December 22, 2021 and, after hearing preliminary arguments, the motion was adjourned to March 1, 2022 for defendant to find counsel. Plaintiff then moved by Order to Show Cause dated January 11, 2022 (motion sequence no. 2) to advance the return date on the subject motion (see NYSCEF Doc No 27), which was essentially granted as that motion and this motion were then heard on January 27, 2022 rather than March 1, 2022.

Plaintiff in its initial Order to Show Cause (motion sequence no.1) sought, and was granted, a Temporary Restraining Order (“TRO”) to compel defendant to cease illegal conduct in the building including “intentionally causing physical damage to the Apartment and/or Building, and other apartments in the Building” and “physically destroying property and fixtures within the Apartment.” The Court did not grant plaintiff’s request to essentially remove the defendant and bar him from his apartment for “immediate non-compliance” with the TRO (NYSCEF Doc No 19). This was served on defendant on November 22, 2021 (NYSCEF Doc No 20). The Plaintiff’s second Order to Show Cause (motion sequence no. 2) sought, and was granted, a TRO extending the prohibition on the conduct in the first Order to Show Cause and ordering defendant to vacate the apartment effective twenty-four hours after service (NYSCEF Doc No 27). This was served on defendant on January 14, 2022 (NYSCEF Doc No 29).

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).

In support of the motion, plaintiff submitted evidence² from residents and employees of the managing agent of the building complaining of loud banging within defendant’s apartment and on other apartment doors on the floor in February of 2021. The residents stated that defendant placed large amounts of trash in the hallway around the same time. The residents also stated that in May of 2021, defendant tampered with the gas line and fire suppression system in the apartment based on a supposed fear that the gas line was being used by terrorists (NYSCEF Doc No 4 at ¶ 13). Plaintiff claims that the FDNY had to put a “red tag” on the stove and turned off its access (NYSCEF Doc No 3 at ¶ 9),

Plaintiff also claims that defendant caused “multiple floods” in the apartment (NYSCEF Doc No 3 at ¶ 10) but the evidence shows there was only one flood in October of 2021 (see NYSCEF Doc No 4 at ¶ 18), which caused substantial damage to the apartment, hallways and

² The evidence is from both affidavits submitted on the motion as well as live testimony from the hearing on March 23, 2023. Residents Hamid Moazed and George Tower submitted affidavits (NYSCEF Doc Nos 4-5) and testified at the hearing. Building employee Courtney Lees testified at the hearing. Building employees Kimberly Cafaro, Egli Medja and Hysen Hasanbelli submitted affidavits (NYSCEF Doc Nos 3, 6, 7 and 23).

common areas of the Building, including the telecommunications closet on the apartment floor (see NYSCEF Doc No 6 at ¶ 5).

Plaintiff also submits that, on January 5, 2022, after service of the initial TRO that barred defendant from engaging in illegal and other damaging and destructive conduct, the windows in the apartment broke and shattered pieces of glass fell from the apartment on to the ground (see NYSCEF Doc Nos 3, 23). The NYPD and a SWAT team were requested as defendant allegedly refused to provide access to the apartment. Once entry was gained, other damage to the apartment was visibly apparent and defendant was removed from the apartment and taken to the hospital (see NYSCEF Doc No 23). Defendant returned from the hospital on the morning of January 6, 2022 and at some point later in the day, there was a fire in the apartment, which, according to plaintiff's counsel, preliminary findings by the fire marshal indicate that the fire appeared to have been started by a lit cigarette inside the apartment (see NYSCEF Doc No 32, tr 1/27/2022 at 3-4). At some point defendant was taken back to the hospital and admitted into a psychiatric unit and later released on January 18, 2022 (see *id.* at 1-2, 6). Because of the fire department's vacate order and the second TRO (NYSCEF Doc No 27), defendant was placed in temporary housing with the assistance of the New York City Human Resources Administration.

Defendant appeared in Court pro-se and attempted to provide numerous excuses or justifications for his behavior. For example, defendant stated that the January 5, 2022 damage was caused by a guest or invitee while he was in the shower (1/27/2022 tr at 8). The guest was unannounced and the concierge downstairs just let him in, but defendant did admit to answering the door and admitting the guest after the guest knocked on his door (*id.* at 8, 10). Defendant also stated that he does not know how the January 6th fire started because he does not smoke inside the apartment (*id.* at 9). Further, defendant provided explanations for the other complained

of conditions. More specifically, any damage to the intercom was unintentional because the cover falls off on its own and has been repaired numerous times; there is no hoarding condition because it is just a small kitchen with stuff on the counter; and he never damaged his refrigerator (see id.). Defendant also stated that he had broken appliances and that his maintenance request tickets were constantly closed without the issues actually ever being addressed (NYSCEF Doc No 33, tr 3/1/2022 at 4-5). Further, the gas leak was actually water vapor, which was caused by the stove moving -- defendant testified that the apartment frequently moved or shifted because it is located so high above the ground on the 47th floor.

At the March 23, 2023 hearing defendant again appeared in Court pro se but also was sworn in as a witness where he testified to much of what he said in his earlier court appearances including his accounts of the broken window, the fire and the flood. He also admitted that he was aware of the Court ordered TRO.

In support of the application for an injunction, plaintiff cites to paragraph 12 of the parties' lease, entitled "OBJECTIONABLE CONDUCT," which states as follows:

"As a tenant in the Building, You will not engage in objectionable conduct. Objectionable conduct means behavior which makes or will make the Apartment or the Building less fit to live in for You or other occupants. It also means anything which interferes with the right of others to properly and peacefully enjoy their Apartments, or causes conditions that are dangerous, hazardous, unsanitary and detrimental to other tenants in the Building. Objectionable conduct by You gives Owner the right to end this Lease" (NYSCEF Doc No 9 at ¶ 12).

Additionally, paragraph 10 of the lease prohibits defendant from making alterations to the apartment as it may interfere with facilities needed for all tenants (see id. at ¶ 10).

In light of the above evidence and contentions, the Court is satisfied that plaintiff is entitled to a preliminary injunction barring defendant from his apartment based on objectionable behavior. The Court finds that the evidence shows defendant engaged in a pattern of recurring

objectionable, disruptive conduct, endangering the safety of other tenants (see generally Domen Holding Co. v Aranovich, 1 NY3d 117, 124 [2003] [“Nuisance imports a continuous invasion of rights — ‘a pattern of continuity or recurrence of objectionable conduct’”], quoting Frank v Park Summit Realty Corp., 175 AD2d 33 [1st Dept 1991]). Further, some of this conduct (the broken windows and other apartment damage) was in violation of the initial TRO (NYSCEF Doc No 19). The defendant’s testimony and statements in Court simply did not provide credible explanations for his behavior that cumulatively constitute a danger to himself, other tenants and even people passing by the building on the street. His violation of the initial TRO reflects a person who is unable or unwilling to follow a Court order to refrain from such objectionable conduct – even after the Court gave defendant an opportunity to correct his behavior by not agreeing to plaintiff’s request to have him barred from the apartment in the initial TRO.³

Accordingly, it is hereby ORDERED that the motions are granted in part to the extent of a granting a preliminary injunction, enjoining defendant from (1) intentionally engaging in regular erratic, menacing, violent, incoherent behavior; (2) intentionally tampering with the fire suppression system in Apartment 47X (the “Apartment”); (3) intentionally tampering with the gas pipes in the Apartment; (4) intentionally causing damage to the Apartment floors and appliances in the Apartment; and (5) intentionally engaging in nuisance and objectionable conduct in the Building; and it is further

³ Plaintiff’s counsel posted a letter dated June 27, 2023 (NYSCEF Doc No 37) asking for guidance from the Court following a claimed incident involving the defendant on June 25, 2023 when he allegedly entered the building where he “began to yell and scream in the common areas” after he was refused access to a restroom by the concierge. Defendant was arrested after the incident and has a criminal trespass complaint pending against him in NYC Criminal Court based in part on violating the TRO to “vacate the apartment and building.” The Court has not considered this new information in rendering its instant decision.

ORDERED that plaintiff and its agents and/or employees are authorized to forcibly remove defendant from the Apartment and bar defendant from the Apartment and Building; and it is further

ORDERED that the undertaking is fixed in the sum of \$ 25,000.00, plus \$1,000.00 per month after service of a copy of this order with notice of entry, conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within twenty days from entry.

This constitutes the decision and order of the Court.

7/17/2023
DATE


ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE