

**Board of Mgrs. of the 19th Ave. Condominium v 19th
Ave Props. LLC**

2024 NY Slip Op 32465(U)

July 16, 2024

Supreme Court, Kings County

Docket Number: Index No. 504261/2024

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BOARD OF MANAGERS OF THE 19TH AVENUE
CONDOMINIUM,

Plaintiff, Decision and Order

- against -

Index Number 504261/2024

19th AVE PROPERTIES LLC, BERNARD
JACOBOWITZ, DAVID JACOBOWITZ and JOEL
BRAVER,

Defendants,

-----X
19th AVE PROPERTIES LLC, BERNARD
JACOBOWITZ, DAVID JACOBOWITZ and JOEL
BRAVER,

Third-Party Plaintiffs,

- against -

HILINE CONSTRUCTION INC. n/k/a HC MERGER
LLC, SANDSTONE STRUCTURES LLC,
SOLOMON BANDA, KARL FISCHER ARCHITECT
PLLC a/k/a KARL FISCHER ARCHITECTURE
PLLC, FISCHER AND MAKOOI ARCHITECTS
PLLC, FABRIKA MAKOOI, CLEAR BLUE
INSURANCE CO., HANOVER INSURANCE CO.,
and HUDSON EXCESS INSURANCE CO.,

July 16, 2024

Third-Party Defendants,

-----X
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking a preliminary injunction pursuant to CPLR §6301. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The defendant 19th Avenue Properties LLC acquired the subject building on June 27, 2016. Thereafter, the defendant sponsored the offering of units pursuant to a condominium plan. The offering plan was approved and 164 were offered for sale.

Construction commenced and was completed and all were sold by February 2024. This lawsuit was instituted wherein the plaintiff an association of unit owners, alleges the building was constructed with defects and thus the sponsor breached the offering plan, engaged in fraud and breach of a fiduciary duty among other causes of action. This motion seeking a mandatory injunction has been filed. The plaintiff seeks to compel the defendant to erect a safety shed around the perimeter of the entire building to protect the public from falling bricks. The defendant concedes that repairs are necessary but dispute the extent of such repairs. In any event, the New York City Department of Buildings has issued four summonses against the sponsor for falling bricks and the failure to remedy the situation. The most recent summons was issued on February 15, 2024. Thus, the plaintiff seeks to compel the defendant to erect a protective shed to secure the safety of the public. As noted, the motion is opposed on the grounds the plaintiff has prevented the necessary repairs from taking place and therefore the true motive of the plaintiff is merely money damages which is not a proper basis upon which to secure any injunction.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the

plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]). Moreover, the plaintiff also seeks to impose upon the defendant a mandatory injunction requiring the defendant to erect a protective shed.

A mandatory injunction is rarely granted and only under unusual circumstances to maintain the status quo pending trial (Matos v. City of New York, 21 AD3d 936, 801 NYS2d 610 [2d Dept., 2005]). Thus, where a party is engaged in unlawful conduct which is continuous then a mandatory injunction is proper (Rosenthal v. Helfer, 136 Misc2d 9, 516 NYS2d 1020 [Civil Court New York County, 1987]). Furthermore, a mandatory injunction is proper where the public safety is at risk. In Doe v. Dinkins, 192 AD2d 270, 600 NYS2d 939 [1st Dept., 1992] the court explained that

"human safety is in issue. The ultimate relief may be rendered inadequate, as the loss of one life would render permanent injunctive relief, granted at a later date, ineffective. The proof required for a finding of the likelihood of success on the merits is reduced...The plaintiffs need not demonstrate a certainty of success but rather, must make a showing of a likelihood of success on the merits...The plaintiffs have amply demonstrated a likelihood of success on the merits and a danger of irreparable injury" (id). Although that case dealt with municipalities the impact of public safety issue is not minimized simply when dealing with private citizens.

The defendants present a number of arguments against an injunction. First, they assert there is no likelihood of success against the individual defendants who are shielded by the corporate entity. While that may be true that argument would not bar the corporate defendants from being subject to any mandatory injunction.

Next, the defendants argue there is no likelihood of success since the defendants have proposed a plan to repair the facade which is opposed by the plaintiff. However, the defendants thus admit that repairs must be undertaken. Consequently, the defendants admit the plaintiffs have demonstrated a likelihood of success on the merits. The precise and specific manner of relief may be in dispute and may require further litigation, however,

the core relief sought, namely repairs of the facade, is not disputed.

The defendants make the curious argument this relief is only about money and thus is not appropriate for injunctive relief. While the lawsuit may be about money, this motion seeking an injunction surely is not about money. Indeed, it is difficult to imagine how erecting a safety shed somehow inures financially to the plaintiff. Moreover, there is no merit to the argument the plaintiff has not demonstrated any irreparable harm if someone may be injured by falling bricks since only the plaintiff can claim any potential injury. The obvious fact that the public may be injured by falling bricks demands immediate action be taken. As noted, the Department of Buildings has issued four summonses for the very facade work that is the subject of this motion directly to the defendant 19th Ave Properties LLC. To the extent the defendant argues the plaintiff has frustrated the defendant from implementing a plan of repair, such issue can be resolved in the course of this litigation. However, since the defendant is the subject of these summonses the defendant bears the burden of erecting such protective measures in the first instance.

Concerning the parameters of any protective shed as well as the composition of such protections, there is no dispute the building has numerous sides, as many as fifteen. Thus,

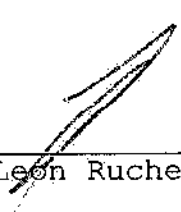
protections must be placed protecting all sides where reports of experts have indicated there is a possibility of falling bricks. Further, the defendant can use any materials that satisfy these safety measures. Therefore, the motion seeking an injunction is granted to the extent indicated.

Turning to the request seeking a bond, it is well settled that pursuant to CPLR §6312(b) a bond must be imposed. The statute provides that the amount reflect "all damages and costs which may be sustained by reason of the injunction" (id). The only actual damages sustained by the plaintiff should they prevail is the inconvenience or some ancillary damages caused by the protective measures. Thus, it is hard to quantify these damages. Therefore, the court imposes a bond of \$25,000.

So ordered.

ENTER:

DATED: July 16, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC