

245 E. 25th Realty Corp. v Leone

2024 NY Slip Op 33232(U)

September 12, 2024

Supreme Court, New York County

Docket Number: Index No. 162094/2023

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

Justice

-----X

245 E. 25TH REALTY CORP.,

Plaintiff,

- v -

DINO LEONE and MALLORY LEONE,

Defendants.

-----X

INDEX NO. 162094/2023

MOTION DATE 12/14/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 2, 19, 20, 21, 23, 24, 25, 26, 27, 28, and 33

were read on this motion for INJUNCTION/RESTRAINING ORDER.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff’s motion for a preliminary injunction mandating that defendants allow plaintiff access to their apartment to conduct repairs on the shower is denied, for the reasons set forth in the affidavit of Dino Leone (NYSCEF Doc. No. 23) and the exhibits attached thereto, in which the court concurs, as summarized herein.

“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” (CPLR 6301). Preliminary injunctions “should be issued cautiously and in accordance with appropriate procedural safeguards” (*Uniformed Firefighters Assn. of Greater N.Y. v City of N.Y.*, 79 NY2d 236, 241 [1992]). “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 Housing, Inc.*, 4 NY3d 839, 840 [2005]).

Unlike ordinary preliminary injunctions, mandatory injunctions, i.e., those in which the court directs a party to perform some act to preserve the status quo rather than refrain from taking certain action, are disfavored (*Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 265 [1st Dept 2009] [“courts are generally reluctant to grant mandatory preliminary injunctions”] [internal quotation marks and citation omitted]). “A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite” (*Spectrum Stamford, LLC v 400 Atlantic Title, LLC*, 162 AD3d 615, 617 [1st Dept 2018]). The movant must satisfy a “heavy burden of proving a clear right to mandatory injunctive relief” (*Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793, 794 [2d Dept 1995]). Where the requested relief would effectively grant the movant the ultimate relief sought, or where the record establishes “sharp issues of fact, injunctive relief should not be granted” (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011] [internal quotation marks and citations omitted]). “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 lower courts (*Nobu Next Door, LLC*, 4 NY3d at 840).

Here, plaintiff has not met its burden. Plaintiff alleges that the shower in defendant’s apartment has continuously leaked, causing damage to the apartment below. As set forth in Mr. Leone’s affidavit, however; numerous repairs have been made to the shower since the first documented complaint to defendants in March 2023, with the last visit from a plumber to the apartment on July 5, 2023 (NYSCEF Doc. No. 23, ¶¶ 7-16). The affidavits offered by plaintiff in support of the motion do not point to specific instances of leaks prior to March 2023, and do not contain specific allegations regarding visits after defendants’ plumber tested the shower for leaks on July 25, 2023, or any subsequent leakage. At minimum, factual issues regarding the

source of the leaks and the extent of prior repairs preclude injunctive relief at this time (*Lehey*, 90 AD3d at 411).

Having said that, defendants expressed a willingness, both in their papers and at oral argument, to hiring a licensed and credentialed plumber to inspect the shower to determine if it is necessary to further repair the shower (Leone aff., NYSCEF Doc. No. 23, ¶ 46; transcript of proceedings, NYSCEF Doc. No. 33 at 12). This seems to the court to be a reasonable compromise in service of both parties' objectives. Therefore, the court will direct the same, with a report to plaintiff and the court to follow.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that defendants are directed to retain a licensed and credentialed plumber to inspect the shower in their apartment to determine if it is the source of the water damage to the apartment below, within 30 days of the date hereof; and it is further

ORDERED that defendants shall, within ten days of the inspection, provide a report to plaintiff and the court as to the plumber's findings; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on October 23, 2024, at 10:00 AM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at https://ww2.nycourts.gov/courts/ljd/supctmanh/preliminary_conf_forms.shtml, to the Principal Court Attorney of this Part (Part 38) at ssyaggy@nycourts.gov.

This constitutes the decision and order of the court.

ENTER:



<u>9/12/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> OTHER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE