

Buchman v 117 E. 72nd St. Corp.

2025 NY Slip Op 34459(U)

November 21, 2025

Supreme Court, New York County

Docket Number: Index No. 650576/2025

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42M

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PHYLLIS BUCHMAN,

Plaintiff,

- v -

117 EAST 72ND STREET CORP., BOARD OF
DIRECTORS OF 117 EAST 72ND STREET CORP.,
RICHARD STERNE, CHARLES AYRES

Defendants.

INDEX NO. 650576/2025

MOTION DATE 02/03/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
ORDER TO SHOW CAUSE**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

APPEARANCES:

Smith Buss & Jacobs, LLP, Yonkers, NY (Jacqueline Lisa Aiello, Esq., of counsel), for plaintiff.

Boyd Richards Parker & Colonnelli, P.L., New York, NY (Maria A. Boboris, Esq., of counsel), for defendants.

HON. EMILY MORALES-MINERVA, J.S.C.:

This is an action for, among other things, constructive eviction and for a declaration that plaintiff PHYLLIS BUCHMAN is not obligated to pay maintenance. Plaintiff now moves, by order to show cause (motion sequence number 01), for an order, pursuant to CPLR § 6311, granting her a preliminary injunction and temporary restraining order against defendants 117 EAST 72ND STREET CORP. (Co-op), and BOARD OF DIRECTORS OF 117 EAST 72ND STREET CORP. (Board), restraining them from selling the shares

of stock in the premises known as apartments 1-B West a/k/a Apt. 1W and SR-1C a/k/a SR1C, 117 East 72nd Street, New York, New York.

Defendants Co-op, Board, RICHARD STERNE, and CHARLES AYRES (collectively, defendants) oppose this application. They argue that plaintiff cannot demonstrate irreparable harm or succeed on the merits of her claims, and that the balance of equities favors the Co-op.

For the reasons set forth below, the court grants this motion, by order to show cause (seq. no. 01), to the extent that the temporary restraining order issued on February 04, 2025 is extended and shall continue until further order of this Court.

BACKGROUND

This dispute centers on 117 East 72nd Street, New York, New York, a residential building, which cooperative defendant 117 EAST 72ND STREET CORP. (Co-op) owns. The initial certificate of occupancy for the building, dated on or about August 10, 1928, listed the legal use and occupancy of the building's first floor as an "Entrance Hall, Doctor's Office and Tenement" (New York State Court Electronic Filing System [NYSCEF] Doc. No. 03, 1928 certificate of occupancy, dated August 10, 1928). According to Co-op, the "doctor's office" listed therein refers to suite 1E

and the "tenement" refers to suite 1W (see NYSCEF Doc. No. 53, defendants' opposition to plaintiff's order to show cause, dated February 07, 2025).

In or around 1965, non-party Dr. Myron I. Buchman, now deceased, purchased suite 1W in the building. The lease to said suite provides:

"The Lessee shall not occupy or use the apartment, or permit the same or any part thereof to be occupied or used, for any other purpose other than as a private dwelling apartment for the Lessee and the family of the Lessee, except to the extent that the apartment may lawfully be used for the practice of a profession in the premises in which the practitioner resides, . . ."

(NYSCEF Doc. No. 44, lease, dated September 24, 1965 [emphasis added]). Dr. Buchman operated his medical office from suite 1W.

Later in 1970, the building's amended certificate of occupancy again listed the permissible use for the first floor as an "Entrance Hall, doctor's office and one (1) apartment" (NYSCEF Doc. No. 05, amended certificate of occupancy, dated February 24, 1970). Thereafter, in or around 1977, Dr. Buchman purchased suite SR1C in the building, which is also on the first floor.

Plaintiff PHYLLIS BUCHMAN contends that her husband Dr. Buchman used SR1C as an administrative office, and the Co-op maintains that Dr. Buchman used said space only as storage for

his medical office (see NYSCEF Doc. No. 53, defendants' opposition to plaintiff's order to show cause, supra).

However, the next amended certificate of occupancy, dated in 1985, again indicated the permissible use for the first floor as an "Entrance Hall, doctor's office and one (1) apartment" (NYSCEF Doc. No. 08, amended certificate of occupancy, dated December 23, 1985). Around this time, non-party Dr. Buchman transferred both 1W and SR1C to his wife plaintiff (owner) (see NYSCEF Doc. No. 32, plaintiff's affirmation in support of order to show cause).

Thereafter, a third party began using 1E on the first floor as a dermatology practice. Consequently, two medical practices were apparently being operated on the building's first floor in seeming contradiction to the certificate of occupancy. However -- as the certificates of occupancy did not list which premises were respectively the "doctor's office and [the] one (1) apartment" -- problems arose.

On or about January 13, 2015, non-party Jean Goutal (Goutal) purchased the shares associated with 1E, which was being used as a dermatological office (see NYSCEF Doc. No. 02, complaint, dated February 03, 2025). Goutal intended to use the space as a residence and, prior to performing necessary alterations, their architects submitted to the New York Department of Buildings (DOB) forms and information,

representing 1E as the medical office and 1W as a residential apartment, despite 1W being used openly as a doctor's office for over forty years at that point (see NYSCEF Doc. No. 23, forms submitted to DOB). Non-party Robert Pincus, former employee of the Co-op's managing agent, signed the application (see NYSCEF Doc. No. 02, complaint).

In 2017, the DOB issued a new certificate of occupancy, listing the permissible use of the first floor as an "ENTRY HALL AND TWO (2) APARTMENTS" (NYSCEF Doc. No. 24, certificate of occupancy, dated February 15, 2017 [emphasis in original]). At or around the same time, plaintiff attempted to sell the shares of 1W (see NYSCEF Doc. No. 02, complaint). She then allegedly learned, for the first time, that the certificate of occupancy now barred the use of 1E as a commercial office space (see id.).

However, plaintiff took no formal action, and her husband Dr. Buchman continued to operate a medical office from 1W until he retired in 2018, having run his practice on the first floor for 50 years or so (see id.). A veteran of World War II, Dr. Buchman later died, on November 11, 2020 (see id.).

Thereafter, on or around August 2021, plaintiff commenced an action for breach of fiduciary duty against non-party board members and Robert Pincus; for aiding and abetting breach of fiduciary duty against non-parties Goutal and his architects; and for fraudulent concealment, breach of the covenant of good

faith and fair dealing, and promissory estoppel against Co-op (see Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021 [Sup Ct NY Cnty 2021]).

Following motion practice in that action, the Court (L. Billings, J.S.C.), (1) dismissed all of plaintiff's claims against non-party architectural defendants, (2) dismissed all claims against non-party Goutal except plaintiff's claim for aiding and abetting breach of fiduciary duty, (3) dismissed all claims against Co-op except for breach of implied covenant of good faith and fair dealing and for attorneys' fees and expenses, and (4) dismissed the same claim against, among others, defendants Richard Sterne and Charles Ayers (see Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021, NYSCEF Doc. No. 121, decision and order, dated August 21, 2023).

The Court (Billings, J.S.C.) also dismissed plaintiff's request for a permanent injunction against the Co-op, compelling the Co-op to, among other things, amend the certificate of occupancy to indicate the permissible use of 1W and SR1C as medical offices. Said court reasoned:

"Plaintiff . . . does not show irreparable damage from being disallowed use of her suite as a professional office. [] She does not intend to use her premises as a professional office. If she sells her premises for less due to the amended CO's use restrictions, she will incur

ascertainable, compensable damages.
Plaintiff thus retains an adequate remedy at
law that defeats her claim for injunctive
relief"

(id., at p 15 [internal citations omitted]).

During that litigation, at or around 2022, plaintiff stopped making maintenance payments to the Co-op. Consequently, in 2023, Co-op commenced a non-payment proceeding against plaintiff in the Civil Court, Housing Part, seeking payment of said fees and possession of 1W and SR1C (see 117 East 72nd Street Corp. v Phyllis Buchman, Index No. LT-320062-23/NY [Civ Ct NY Cnty]). That action remains pending, and is marked and assigned to a Housing Court judge for trial (see id.).

In or around 2024, Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021, was re-assigned to Honorable S. Adams, J.S.C. In that context, plaintiff requested consolidation of the non-payment proceeding (117 East 72nd Street Corp. v Phyllis Buchman, Index No. LT-320062-23/NY) with the 2021 action (Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021). However, upon consideration of plaintiff's application, the court (S. Adams, J.S.C.) declined to consolidate the Housing Part proceeding with the Supreme Court action (see NYSCEF Doc. No. 220, decision and order, dated August 06, 2024 [S. Adams, J.S.C.] [denying plaintiff's application for consolidation]).

On or about December 19, 2024, Co-op served on plaintiff "Notification of Disposition of Collateral to Satisfy a Default by the Lessee under a Proprietary Lease", notifying plaintiff of its intent to sell 190 shares of the common stock allocated to 1W and the possessory rights to such premises, at a public auction on February 5, 2025 at 2:30 p.m., despite no decision on the matters (see NYSCEF Doc. No. 28, notifications). On or about the same date, Co-op also served on plaintiff "Notification of Disposition of Collateral to Satisfy a Default by the Lessee under a Proprietary Lease" by which it notified plaintiff that the Co-op intended to sell 60 shares of the common stock allocated to SR1C and the possessory rights thereto at said auction, despite the same (see id.).¹

Then, on or around February 03, 2025, plaintiff commenced the instant action against Co-op, Co-op's Board of Directors, Richard Stern, and Charles Ayers, for constructive eviction, for breach of quiet enjoyment, and attorneys' fees, and for a declaratory judgment that she has no obligation to pay rent (see NYSCEF Doc. No. 02, complaint).²

Shortly, thereafter, plaintiff filed the instant motion (seq. no. 001), by order to show cause, seeking

¹ Three days later, Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021, was re-assigned to the undersigned.

² Even though the 2021 action remains pending before the undersigned, plaintiff commenced the instant 2025 action as a separate action.

(1) a preliminary injunction enjoining Co-op and Board from selling the shares of stock in 1W and SR1C, and (2) a preliminary injunction enjoining Co-op and Board from issuing a new certificate for the shares and a new proprietary lease for 1W and SR1C (see NYSCEF Doc. No. 38, order to show cause).

Defendants Co-op, THE BOARD OF DIRECTORS OF 117 EAST 72ND STREET CORP., RICHARD STERNE, and CHARLES AYRES, submit opposition to the order to show cause. They argue that plaintiff cannot demonstrate irreparable harm, that plaintiff cannot succeed on the merits of her claims as they are time-barred or otherwise lacking factual basis, and that the balancing of equities weighs in Co-op's favor (see NYSCEF Doc. No. 53, defendants' opposition to plaintiff's order to show cause).

ANALYSIS

Statute of Limitations

It is well-settled in the Appellate Division, First Department, that the statute of limitations for a constructive eviction claim is one year (see Kent v 534 E. 11th St., 80 AD3d 106, 111 [1st Dept 2010], citing CPLR § 215 and Jones v City of New York, 161 AD2d 518, 518-519 [1st Dept 1990]). Contending that the claims here accrued on February 15, 2017 -- when the

current certificate of occupancy took effect -- defendants argue that plaintiff's summons and complaint, filed on or around January 31, 2025, is time barred to the extent plaintiff asserts an action for construction eviction.

Plaintiff counters that the statute of limitations is tolled because defendants' failure to seek an amendment of the 2017 certificate of occupancy constitutes a continuous wrong as plaintiff cannot market the apartment for its intended purpose. In making this argument, plaintiff solely relies on King v 870 Riverside Dr. Hous. Dev. Fund Corp., 74 AD3d 494, 495 [1st Dept 2010].

There, the First Department held that a plaintiff's "claim for damages arising from the coop's alleged failure, in violation of the proprietary lease, to repair . . . continuing leaks is not time-barred" (id., citing Kaymakcian v Board of Mgrs. of the Charles House Condominium, 49 AD3d 407 [1st Dept 2008]). Kaymakcian, in turn, found that a breach of fiduciary duty claim was not time-barred because, "pursuant to the condominiums' by laws, [the Co-op] had a continuing duty to repair the building's limited common elements . . . which w[ere] the source of the subject recurring leaks"; therefore, the Co-op's failure to repair those common elements constituted a continuing wrong (49 AD3d at 407).

This case is distinguishable. Here, there is no clear duty of the Co-op to seek a change in the certificate of occupancy. An issue of fact appears to exist as to whether 1W was ever listed as a medical office in any of the buildings' certificates of occupancy and/or whether such is dispositive when the premises were openly used as a medical office for at or around 50 years.

Notably, the lease for 1W describes said premises as a private dwelling, and plaintiff did not pay corporate taxes for 1W. Still, both parties knew Dr. Buchman used it as a functional medical practice for decades. Further, no certificates listed plaintiff's unit SR1C in any regard. In addition, the Court (Billings, J.S.C.) dismissed plaintiff's request to compel the Co-op to amend the certificate of occupancy to indicate the permissible use of 1W and SR1C as medical offices (see Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021, NYSCEF Doc. No. 121, decision and order, dated August 21, 2023).

Therefore, even considering King, 74 AD3d 494, upon which plaintiff relies, the Court appears compelled to find that the statute of limitations has run on the claim for constructive eviction.

Preliminary Injunction

"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"

(CPLR § 6301).

"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]; see also DKC Group Holdings, LLC v Reece, Inc., 2025 NY App Div LEXIS 1558, 2025 NY Slip Op 01597 [1st Dept 2025]; BDC Mgt. Servs., LLC v Singer, 144 AD3d 597, 597 [1st Dept 2016]).

Here, plaintiff does not demonstrate a probability of success on the merits on her first, third, and fourth causes of action, which the Court addresses below in turn.

Plaintiff's first cause of action, constructive eviction, is addressed here only as dicta. Such eviction exists where --

although there has been no physical expulsion or exclusion of the tenant -- the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises (see Barash v Pennsylvania Terminal Real Estate Corp., 26 NY2d 77, 83 [1970]; see generally Port Morris Distillery Inc. v Sengdara LLC, 233 AD3d 552, 553 [1st Dept 2024] [applying Barash in evaluating a claim for constructive eviction]; Flatiron 30 LLC v Continuum Co. LLC, 227 AD3d 463, 463 [1st Dept 2024] [applying the same]).

In this action, plaintiff contends that the wrongful act of the Co-op occurred in 2017, when it allegedly took part in amending the certificate of occupancy to change the permitted use of 1W from medical office to residential apartment. However, according to plaintiff's complaint, the change in the certificate of occupancy did not result in a substantial and material deprivation of how she used the property or an abandonment of the property (see NYSCEF Doc. No. 02, complaint).

Indeed, plaintiff's husband continued operating a medical office at 1W until he retired in 2018, long after plaintiff discovered the changed certificate of occupancy (see id.). Further, no dispute exists that, since 2018, said premises have been vacant. Plaintiff has had no apparent intent to use 1W as medical office or otherwise. In addition, the lease for 1W identifies plaintiff's unit as one for private use, indicating a

known discrepancy between the parties on how the premises were listed on plaintiff's lease and how plaintiff's husband openly used the premises as a medical office for five decades.

Plaintiff also has not shown a likelihood of success on her claim of breach of the covenant of quiet enjoyment (third cause of action). No allegations are presented of actual eviction or abandonment of the premises (see generally Iken v Bohemian Brethen Presbyt. Church, 162 AD3d 594, 594 [1st Dept 2018]; see also Schwartz v Hotel Carlyle Owners Corp., 132 AD3d 541, 542 [1st Dept 2015] [providing a plaintiff alleging breach of the covenant of quiet enjoyment "must show an ouster, or if the eviction is constructive, an abandonment of the premises"]).

Further, the claim for attorneys' fees (fourth cause of action) depends on the success of the above causes of action and, in any event, would not serve as a basis for a preliminary injunction.

However, the Court will not determine, at this juncture, plaintiff's likelihood of success on her claim for a declaratory judgment that she may withhold maintenance/rent from defendants (second cause of action). To do so would risk a contrary decision with the Housing Part (E. Ofshtein, H.C.J.), which is presiding over the related nonpayment proceeding that defendants commenced against plaintiff and that was decidedly not consolidated in Supreme Court (see Phyllis Buchman v 117 East

known discrepancy between the parties on how the premises were listed on plaintiff's lease and how plaintiff's husband openly used the premises as a medical office for five decades.

Plaintiff also has not shown a likelihood of success on her claim of breach of the covenant of quiet enjoyment (third cause of action). No allegations are presented of actual eviction or abandonment of the premises (see generally Iken v Bohemian Brethen Presbyt. Church, 162 AD3d 594, 594 [1st Dept 2018]; see also Schwartz v Hotel Carlyle Owners Corp., 132 AD3d 541, 542 [1st Dept 2015] [providing a plaintiff alleging breach of the covenant of quiet enjoyment "must show an ouster, or if the eviction is constructive, an abandonment of the premises"]).

Further, the claim for attorneys' fees (fourth cause of action) depends on the success of the above causes of action and, in any event, would not serve as a basis for a preliminary injunction.

However, the Court will not determine, at this juncture, plaintiff's likelihood of success on her claim for a declaratory judgment that she may withhold maintenance/rent from defendants (second cause of action). To do so would risk a contrary decision with the Housing Part (E. Ofshtein, H.C.J.), which is presiding over the related nonpayment proceeding that defendants commenced against plaintiff and that was decidedly not consolidated in Supreme Court (see Phyllis Buchman v 117 East

72nd Street Corp. et al., Index No. 656460/2021, NYSCEF Doc. No. 220, decision and order, dated August 06, 2024 [S. Adams, J.S.C.]).

This Court was transparent as to this circumstance with counsel and appreciates the difficulty of the situation presented. However, the stay of this matter and Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021, shall continue, and includes motion sequence number 08 seeking discovery, which was filed pursuant to Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021, also pending before the undersigned.

Defendants suggest -- in an ex parte letter -- that plaintiff's "declining physical or mental health" requires a different result (see NYSCEF Doc. No. 119, letter to court, dated November 18, 2025 [unnecessarily disclosing plaintiff's alleged age in the same sentence]). However, this commentary on plaintiff's well-being is not based on evidence or supported in any manner.

Notably, age, by itself, is insufficient to justify accelerating discovery. Holding otherwise would reflect reasoning on counsel's behalf that this Court will not condone.

Further, the related proceeding in the Housing Part -- which has been subject to active litigation, since 2023 -- concerns the same facts and parties presented both in the

instant action and the companion 2021 action. In other words, there is space for the parties to engage in dialogue and, even exchange information, in the context of the pending Housing Part proceeding and otherwise.

Accordingly, it is

ORDERED that plaintiff's motion, by order to show cause (seq. no. 01), is granted to the extent that the temporary restraining order issued on February 04, 2025, is extended, and shall continue until further order of this Court; it is further

ORDERED that the instant action is stayed pending the outcome of the proceedings in 117 East 72nd Street Corp. v Phyllis Buchman, Index No. LT-320062-23/NY; it is further

ORDERED that Phyllis Buchman v 117 East 72nd Street Corp. et al., Index No. 656460/2021, is also stayed pending the outcome of the proceedings in 117 East 72nd Street Corp. v Phyllis Buchman, Index No. LT-320062-23/NY; and it is further

ORDERED that the Clerk of Court shall mark the file accordingly.

11/21/2025
DATE


EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: