SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 35

Present: **HON. STEVEN M. JAEGER**

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BEECHWOOD PLAINVIEW OLD BETHPAGE LLC, COUNTRY POINTE AT PLAINVIEW HOMEOWNERS ASSOCIATION, INC., AND THE BOARD OF MANAGERS OF COUNTRY POINTE AT PLAINVIEW CONDOMINIUM II,

Plaintiffs,

-against-

JAY GRINDELL and SANDRA SANDER,
Defendants.

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Index No.: 601500/2019
Motion Seq. No.: 001
Decision & Order

Papers submitted:

Order to Show Cause and Affidavit	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, Plaintiff's injunctive relief directing Defendant to provide Plaintiffs and their respective employees, contractors, consultants and suppliers, reasonable access into the premises known as 37103 Winterberry Drive, Plainview, New York located within the condominium community known as Country Pointe at Plainview Condominium II for the purpose of performing maintenance, repairs and/or improvements of the area between the dry wall of the Defendants' unit's ceiling and the subfloor of unit 37203, which is directly above the Defendants' unit in accordance with the Condo II's

governing documents; and a license for temporary access pursuant to pursuant to RPAPL §§ 881 and 339-i into the premises known as 37103 Winterberry Drive, Plainview, New York is granted.

The instant action seeks to compel the Defendants to allow temporary access to their home for the purpose of performing maintenance, repairs and/or improvements of the area between the drywall of the Defendants' Unit's ceiling and the subfloor of Unit 37203, which is directly above the Defendants' Unit and is owned by Cynthia Sakolsky; and granting Plaintiffs a license pursuant to RPAPL §§881 and 339-i, for temporary access to the Defendants' Unit for the purpose of performing the work.

Plaintiff alleges that it is a condominium formed pursuant to Article 9-B and governed by the "Declaration of Covenants, Restrictions, Easements, Charges and Liens." Defendants are the owners their unit by a deed dated June 13, 2018. On October 2, 2018, Plaintiff's service Department contacted the Defendants to arrange for access to their unit in an attempt to make necessary repairs to area between the drywall of the Defendant's Unit's ceiling and the subfloor of the Sakolsky Unit. Plaintiffs allege that their repeated requests were refused by Defendants.

Plaintiff contends that the HOA Declaration provides the Association and the Board of Managers with the authority to bring and defend actions by or against more than one homeowner and pertinent to the operation of the condominium and to level special assessments to pay for the cost of such litigation.

Defendants in opposition, state that Plaintiffs have failed to demonstrate their entitlement to a mandatory injunction as the relief they seek is the ultimate relief to which they would be entitled in a final judgment. Further Defendants argue that Plaintiffs have not demonstrated a likelihood of success on the merits as only the Sponsor sought access to the Defendants' Unit and that the governing documents do not grant authority to the Sponsor to access Defendants' Unit. Defendants contend that Plaintiffs have not met their burden of proof of irreparable harm. Defendant contend that the statements submitted by Plaintiff are bare and conclusory statements from individuals who lack personal knowledge of the alleged vibrations. Next Defendants contend that Plaintiffs failed to state that the balance of equities strongly favors them and not the Plaintiffs. They argue that Plaintiffs failed to demonstrate any harm absent the granting of a mandatory preliminary injunction while the Defendants would be displaced from their unit for an unspecified period of time while the work is performed.

As it relates to Plaintiffs' application for a license pursuant to RPAPL §§881, Defendants argue that Plaintiffs did not demonstrate the necessity for the requested access and that Plaintiffs did not explain why the work could not otherwise be performed.

Lastly, Defendants seek attorney's fees alleging that prior to submitting opposition, they consented to Plaintiffs' request for access and that Plaintiffs rejected the offer choosing instead to continue the instant litigation.

A party seeking a preliminary injunction must present to the court:

1) a showing of a likelihood of success on the merits of the claim,

2) irreparable injury absent such relief,
3) and a balancing of the equities in that party's favor.

See, Kelley v. Garuda, 36 A.D.3d 593 (2d Dept 2007).

Based on the foregoing, the Court finds Plaintiffs have satisfied their burden of showing the likelihood of success on the merits of the claim; irreparable injury absent such relief; and a balancing of the equities in their favor. Defendants do not dispute that the Declaration of Covenants, Restrictions, Easements, Charges and Liens and the Declaration of Condominium (hereinafter "The Governing Documents") define the subject area as a common element and authorize the Plaintiffs to access the unit to maintain and repair it. Bd. Of Managers of Bond Parc Condominium v. Broxmeyer, 62 A.D.3d 925 (2d Dept 2009)

RPAPL §881 provides that:

> When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

Pursuant to RPAPL, Plaintiffs have established an entitlement to a license to access Defendants unit.

Accordingly, it is hereby

ORDERED, that Plaintiffs' request for injunctive relief directing Defendant to provide the Plaintiffs and their respective employees, contractor, consultants and suppliers reasonable access to Defendant's unit to perform maintenance, repairs and/or improvements for the purposes stated in the Pleadings is **GRANTED**; and it is further

ORDERED, that Plaintiff's request for a license for temporary access to Defendants' Unit is **GRANTED,** and it is further

ORDERED, that Defendants shall provide access to 37103 Winterberry Drive, Plainview, New York, to Plaintiffs or their agents to perform maintenance, repairs, and/or improvements of the area between the drywall of the Defendants' Unit's ceiling in the kitchen and great room areas and the subfloor of Unit 37203 as follows:

1. for six (6) work days between the hours of 8:00am and 4:00pm
2. Plaintiffs shall provide Defendant written notice of the dates work is to occur no later than five (5) days before the start of the work
3. Plaintiffs shall safeguard Defendants' property at Plaintiff's cost and expense
4. Plaintiffs shall indemnify Defendants for any and all damage that may occur as a result of the work
5. Plaintiffs shall post a bond in the amount of $5,000 to secure payment for any damages as set forth above
6. Defendants shall be permitted to remain in the portion of the Unit unaffected by the work or, in the event Plaintiffs determine that this is not safe or practical, Plaintiffs shall reimburse Defendants for reasonable hotel and meal expenses from commencement of the work until Defendants are permitted to return to the Unit.

and it is further;

ORDERED, that Defendants' application for attorneys' fees is not properly before this Court and is hereby **DENIED**; and it is further

ORDERED, that Plaintiffs' counsel shall serve a copy of this Order upon Defendants' counsel pursuant to CPLR §2103 (b) 1, 2 or 3 within twenty (20) days of the date of this Order.

This constitutes the Decision and Order of the Court.

All applications not specifically address herein are **DENIED**.

Steven M. Jaeger
Acting Justice of the Supreme Court

Dated: May 9, 2019
Mineola, NY