

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND
PART 62

Justice

GLEN BRUCE LEINER,

Plaintiff,

- v -

370 RIVERSIDE TENANTS CORP. and ORSID
MANAGEMENT,

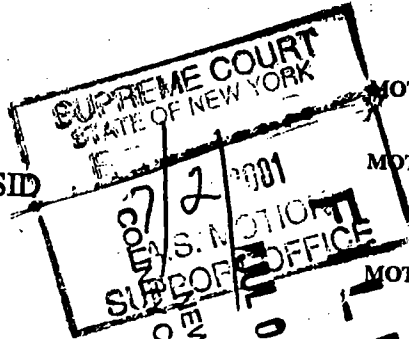
Defendants.

INDEX NO. 125879/00

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.



Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that: This action involves a dispute between an apartment cooperative and one of its shareholders over the ownership of a portion of the terrace located adjacent to the shareholder's apartment on the roof of the building. The plaintiff is a shareholder who claims exclusive ownership of the roof deck located on the southern, northern and eastern sides of his apartment. The coop concedes the plaintiff owns the roof deck on the southern side of his apartment but disputes his ownership rights with respect to the northern and eastern sides. The plaintiff brings this action seeking a declaration of his rights with respect to these two sides. The plaintiff has moved for a preliminary injunction restraining the defendants from removing any of the furniture and planters which he has placed on the disputed portions of the deck.

On a motion for a preliminary injunction, the moving party must demonstrate, by clear and convincing evidence, that 1) there is a likelihood that it will succeed on the merits of its claim, 2) it will suffer irreparable injury absent the issuance of the requested relief, and 3) the balance of equities lies in its favor. *See Aetna Ins. Co. v. Capasso*, 75 NY2d 860 (1990); *Little India Stores, Inc. v. Singh*, 101 AD2d 727 (1st Dept. 1984). If these criteria are satisfied, a preliminary injunction is appropriate in order to maintain the *status quo* pending a determination on the merits of a dispute about the right to the occupancy or ownership of a particular premises. *See Moczan v. Moczan*, 135 AD2d 692 (2nd Dept. 1987); *Finkelman v. Finkelman*, 105 AD2d 771 (2nd Dept. 1984).

Here, there is a likelihood that the plaintiff will succeed on the merits of his claim that he is entitled to the exclusive use of the disputed portions of the roof deck. *See Gracie Terrace Apartment Corp. v. Goldstone*, 103 AD2d 699 (1st Dept 1984). The building's cooperative offering plan clearly describes the plaintiff's apartment as including a terrace. The proprietary lease provided to the plaintiff states that the apartment includes the rooms in the apartment together with any "terraces, balconies, roof or portion thereof outside of said rooms, which are allocated exclusively to the occupant of the apartment." In this respect, both of the disputed portions of the roof deck are located directly outside of the plaintiff's apartment. Indeed, a number of windows in the plaintiff's apartment look directly out to these two sides of the deck and the door to the apartment is located on the northern side. The logical conclusion which is drawn from the cooperative documents and the physical layout of the area is that the disputed areas belong to the plaintiff. Indeed, the realtor who sold the apartment to the plaintiff in 1995 advertised that it included a "huge" wrap-around terrace and an appraiser who inspected the premises in connection with the plaintiff's application for a mortgage prepared a report which assumed that the apartment included a wrap-around terrace.

In arguing that the plaintiff's ownership rights to the roof deck are limited to the portion of the deck located on the southern side of his apartment, the coop is unable to point to any written document or earlier determination of its Board of Directors drawing a distinction between the southern side and the disputed

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northern and eastern sides. Although the defendants have submitted affidavits from a few building residents who state that over the years they have enjoyed making occasional use of the disputed portions of the roof deck, these affidavits hardly establish that these areas belong to the coop for the common use of its tenants. As the plaintiff points out, it appears that the apartment was vacant for many years before he took occupancy. Moreover, it would be entirely understandable that the a tenant owning a portion of the roof deck might tolerate the occasional, unobtrusive use of the deck by another tenant. Indeed, Daniel McGuire, one of the tenants who submitted an affidavit on behalf of the defendants, claimed to have used the roof area on the northern side of the plaintiff's apartment sometime during the last two years without incident and that several other residents were also present. Since the plaintiff had by that time already asserted an ownership right to the area, the fact that he did not object to their presence suggests a willingness to accommodate one's neighbors rather than an acknowledgment that the area is commonly-owned. In any event, it was not until recently that the defendants have even asserted that the disputed portions of the roof deck are commonly-owned. It is noteworthy that, unlike its conduct with respect to the areas of the deck which are indisputably designated for common use, the coop has never attempted to place on the disputed portions of the deck any furnishings for the common use of its tenants.

Finally, the defendants contend that the plaintiff's ownership of the disputed areas would violate sections 27-362 and 27-366 of the Administrative Code of the City of New York because the building's residents would have to pass through private premises in order to have access to the 16th floor fire escape. This argument appears to be a rationale for the defendants' position which they did not invoke, much less think of, until the plaintiff commenced this litigation. There is nothing in the record before the court, such as a letter, the minutes of a Board of Directors meeting or an affidavit, which indicates that the distinction which the defendants have drawn between the disputed and undisputed areas of the roof deck around the plaintiff's apartment was attributable to a concern about the application of the City Administrative Code. Nor is there is any indication that the defendants ever sought an advisory opinion from the City on this issue or that any city official ever inspected the roof deck to determine whether the building is in violation of the Administrative Code. In any event, there is no evidence that the plaintiff, in exercising his ownership rights over the northern and eastern portions of the roof deck, has in any way limited the access of the building's residents to the 16th floor fire escape or otherwise compromised their safety.

As to the two other prongs which are applied in determining whether a preliminary injunction should be issued, the court agrees with the plaintiff that he would suffer irreparable harm if his exclusive use and enjoyment of the terrace were impeded and that a balance of the equities weighs in his favor in this regard. However, in order to maintain the *status quo*, the plaintiff should not make any changes or alterations to the disputed portions of the roof deck while this proceeding is still pending.

Accordingly, it is hereby ordered that the defendants and all other persons acting under their direction are enjoined and restrained from removing any of the furniture and planters which plaintiff has placed on the disputed portions of the deck or in otherwise impeding or interfering with the plaintiff's use and enjoyment of this property, provided that the plaintiff, in turn, does not make any changes or alterations to these areas while this proceeding is pending. In view of the limited reach of the preliminary injunction issued herein and the absence of any indication from the defendants that they had plans to make immediate use of the property had the plaintiff's application been denied in its entirety, no undertaking shall be required to be posted. *See Goedel v. Lowell Holding Corp.*, 73 AD2d 551 (1st Dept. 1979).

The parties shall appear before the court in Room 248, 60 Centre Street, New York, New York on August 7, 2001 11:30 a.m. for a status conference.

ENTER ORDER

Dated: 7/2/01

FILED
JUL 05 2001
NEW YORK
COUNTY CLERK'S OFFICE

MARYLIN G. DIAMOND, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION