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2021-04-14

Real World Holdings LLC v. 393 W. Broadway Corp.

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Real World Holdings LLC v 393 W. Broadway Corp.

2021 NY Slip Op 31001(U)

March 30, 2021

Supreme Court, New York County

Docket Number: 160732/2015

Judge: Carol R. Edmead

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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. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

REAL WORLD HOLDINGS LLC,

Plaintiff,

INDEX NO. 160732/2015

MOTION DATE 11/30/2020

MOTION SEQ. NO. 011

- v -

393 WEST BROADWAY CORPORATION, TIMOTHY
CLARK, JOAN HARDIN, JAMES SCHAEUFELE,
MARIACRISTINA PARRAVACINI, JOHN WOTOWICZ,
JANE SINCLAIR, ANTHONY FAGLIONE,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 011) 370, 371, 372, 373, 374, 375, 376, 377, 378, 386, 387, 388, 389, 390, 391, 392, 396, 397

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

Upon the foregoing documents, it is

ORDERED that the application of Plaintiff Real World Holdings, LLC for a preliminary injunction compelling Defendant 393 West Broadway Corporation (“the Corporation”) to remediate asbestos in Apartment Unit 6WBM (Motion Seq. 011) is denied in its entirety; and it is further

ORDERED that counsel for Defendants shall serve a copy of this order along with Notice of Entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this tort action, Plaintiff Real World Holdings, LLC seeks a preliminary injunction compelling Defendant 393 West Broadway Corporation (“the Corporation”) to remediate asbestos in Apartment Unit 6WBM (Motion Seq. 011). Plaintiff also seeks an award of fees and costs associated with the instant motion. Defendants oppose the motion in its entirety.

BACKGROUND FACTS

In a case involving a dispute in a cooperative building between a proprietary leaseholder of an apartment and the apartment building’s Co-Operative Corporation,¹ Plaintiff seeks a preliminary injunction directing the Corporation to remediate asbestos in Unit 6WBM (“the Apartment”), the subject unit of this lawsuit.

On July 17, 2018, Plaintiff submitted a Letter to the Court seeking similar relief; namely, an order directing the Corporation to conduct a “full and proper [asbestos] remediation” at Defendants’ sole cost and expense (NYSCEF doc No. 387).

On September 7, 2018, the Court held an evidentiary hearing where it found that asbestos was present in the Apartment at an above-acceptable range and the Apartment was not safe for occupancy (NYSCEF doc No. 388). The Court also found that it was the “obligation” of the Corporation to clean up the asbestos (“where else would it rest, if not with the cooperative, to clean up the unit?”) (*id.* at 296). However, the Court did not issue a ruling on the matter of the causation of the asbestos and thus declined to order Defendants to remediate the asbestos, on the ground that other issues needed to be resolved beforehand (*id.*). The Court noted that an order compelling Defendants to remediate would be tantamount to granting the ultimate relief sought and noted that such “relief is premature at this juncture” (*id.* at 145, l: 2-10).

¹ For a detailed background of the history of this proceeding, see this Court’s prior Decision and Order on Motion Seq. 004 (NYSCEF doc No. 158).

In the instant motion for injunctive relief, Plaintiff contends that asbestos is present in the Apartment at high and hazardous levels as a result of improper containment (NYSCEF doc No. 371 at 1-2). Plaintiff argues that emergency relief is necessary as water is leaking from the Apartment to a below unit, potentially carrying with it friable asbestos and mold, and Defendants have refused to take action on their own accord (*id.*).

In opposition, Defendants argue that the instant motion is premature given that there has been no determination on the causation issue since this Court's September 2018 hearing. Defendants also contend that granting Plaintiff injunctive relief on this matter would constitute granting Plaintiff the ultimate relief sought, given that the Sixteenth and Seventeenth causes of action of Plaintiff's amended Complaint allege that the Corporation's contractor caused asbestos to enter Plaintiff's Apartment during a roof replacement project, which has resulted in a trespass, and seek injunctive relief compelling Defendants to conduct a "full and proper remediation" (NYSCEF doc No. 390 at 57-59).²

In reply, Plaintiff argues that Defendants' contention that there is an issue of causation regarding the source of the asbestos is unsupported by the evidentiary record of this proceeding. Plaintiff also argues that the circumstances here warrant the emergency relief of a preliminary injunction (NYSCEF doc No. 396 at 9).

DISCUSSION

The decision of whether to grant a motion for preliminary injunctive relief is a matter of discretion for the trial court. (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Jiggetts v Perales*, 202 AD2d 341, 342, (1st Dept 1994). The primary test is whether a movant has shown: "(1) a

² Defendants also contend that Plaintiff is not entitled to injunctive relief as Defendants "offered to remediate" the asbestos prior to the filing of this motion and their offer was rejected by Plaintiff. In reply, Plaintiff disputes this narrative and contends that the "terms and conditions" of Defendants' offer were "unacceptable" to Plaintiff, rendering the instant motion necessary (NYSCEF doc No. 396 at 3).

likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor" (*Doe*, 73 NY2d at 750; *Housing Works, Inc. v City of New York*, 255 AD2d 209, 213 [1st Dept 1998]). Preliminary injunctive relief is a drastic remedy, which will only be granted if it is established that there is a clear right to the relief under the law and the facts (*Koultukis v Phillips*, 285 AD2d 433, [1st Dept 2001]). As preliminary injunctions are granted in advance of adjudication on the merits, they should be issued cautiously and only in rare circumstances (*Uniformed Firefighters Assoc. v. New York*, 79 NY2d 236 [1992]). Accordingly, the function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits (*Moltisanti v. East Riv. Hous. Corp.*, 149 AD3d 530 [1st Dept 2017])

Here, the Court finds as a preliminary matter that Plaintiff's application for injunctive relief must be denied as Plaintiff is essentially seeking the ultimate relief sought in this proceeding. While Plaintiff's complaint indeed seeks relief beyond the remediation of asbestos, the fact remains that the instant motion is duplicative of the sixteenth and seventeen causes of action in the complaint, which state a claim for trespass based on asbestos. Plaintiff argues that trespass is remediable by injunctive relief, citing to the First Department case of *Bly v Edison Electric Illuminating Co.* for the proposition that "[a] court of equity has jurisdiction of an action to restrain the commission of a continuing trespass" (54 App. Div. 427, 434 [1st Dept 1990]). However, Plaintiff cites to no caselaw in support of the proposition that a preliminary injunction may be granted where it demands the ultimate relief sought in the case.

The Court also finds that Plaintiff's application must be denied as Plaintiff has not demonstrated entitlement to a preliminary injunction under the three-prong test for injunctive

relief. Regarding the first element, Plaintiff has failed to demonstrate a likelihood of success on the merits given that, as discussed *infra*, the Court has determined that while it is the ultimate responsibility of the Corporation to clean up the asbestos in the Apartment, there has been no adjudication of the issue of *causation* of the asbestos. Plaintiff asserts that there is no question of causation given that at the September 2018 hearing, this Court sustained Plaintiff's cause of action for trespass based on asbestos contamination (NYSCEF doc No. 396 at 8). However, the fact that this Court held that Plaintiff has sufficiently *alleged* that Defendants have trespassed in no way renders the issue of causation moot as the question of what caused asbestos to be found in the Apartment has still not been adjudicated. Given that it remains unclear at this juncture whether the presence of asbestos in the Apartment was caused by any actions of the Corporation, Plaintiff has not demonstrated a likelihood of success on the merits.

Given that Plaintiff has failed to demonstrate likelihood of success on the merits, this Court is precluded from issuing a preliminary injunction as a matter of law (*Doe, supra*, at 751). Nevertheless, the Court also notes that Plaintiff has also not demonstrated that it would suffer an irreparable injury if the relief sought were not granted. While the health hazards caused by exposure to asbestos would generally constitute an irreparable harm, Plaintiff's members and their families have vacated the Apartment and are currently living in temporary quarters outside New York City while they await a time when they can resume renovation of the subject Apartment (NYSCEF doc No. 376). The forced relocation of Plaintiff's members and delayed renovation of the Apartment do not constitute irreparable injuries as Plaintiff's members can be made whole with money damages, and it is axiomatic that damages compensable with money and capable of calculation do not constitute irreparable harm (*Van Wagner Advertising Corp. v S&M Enterprises*, 67 NY2d 186 [1986]).

Plaintiff additionally argues that the asbestos must be immediately remediated for given that the building “is home to a number of elderly people with limited ability to choose other housing options” (NYSCEF doc No. 371 at 15). However, Plaintiff is a limited liability company that represents only the owners of the subject Apartment, not all residents of the co-operative building, and Plaintiff of course cannot rely on a potential harm to individuals not represented in this action. As Plaintiff does not argue that any of its own members will suffer any sort of non-monetary injury, the Court finds that there is no prospect of irreparable harm.

As Plaintiff’s application improperly seeks the ultimate relief in this proceeding, and Plaintiff’s submission in support of its application fails to make a showing of entitlement to injunctive relief,³ the Court accordingly finds that the instant motion must be denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Plaintiff Real World Holdings, LLC for a preliminary injunction compelling Defendant 393 West Broadway Corporation (“the Corporation”) to remediate asbestos in Apartment Unit 6WBM (Motion Seq. 011) is denied in its entirety; and it is further

ORDERED that counsel for Defendants shall serve a copy of this order along with Notice of Entry on all parties within twenty (20) days.



3/30/2021

DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	

³ Plaintiff’s papers are entirely silent regarding the third element of the three-prong test, whether a balancing of the equities tips in favor of granting an injunction. Regardless, the Court need not reach a discussion on this point given that Plaintiff has failed to make a showing under the first two elements.