2022-05-12

HPS 50TH AVENUE L1HTC ASSOCIATES LLC v. GALLO

NEW YORK STATE SUPREME COURT, PART 24– QUEENS COUNTY

Present: HON. SALLY E. UNGER

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HPS 50TH AVENUE L1HTC ASSOCIATES LLC, **Index No. 700878/22**

Plaintiff,

-against- **DECISION/ORDER**

KATHLEEN GALLO,

Defendant.

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By interim order dated January 28, 2022, this Court set this matter down for an evidentiary hearing, for the limited purpose of determining whether a preliminary injunction should be issued against the defendant herein. The hearing was initially scheduled for February 1, 2022. However, various administrative scheduling issues arose for the Court and the plaintiff's only witness. After a couple of adjournments for these reasons, as well as unsuccessful attempts to settle the disputed issues, the hearing was conducted on May 6, 2022. The court had ample opportunity to observe and assess the credibility of all the witnesses presented.

The plaintiff is the landlord of the building known as and located at 1-50 50th Avenue, Long Island City, New York 11101 (hereinafter "subject building"). The defendant is the rent stabilized tenant of apartment 231 (hereinafter "subject premises") in the subject building, pursuant to an initial lease commencing in December 2015, which was most recently renewed for a term which had a natural expiration date of December 31, 2021. Had the parties not been involved in the dispute which brought them before this Court, presumably the plaintiff would have renewed the defendant's lease pursuant to the Rent Stabilization Laws.

The underlying motion by order to show cause seeks injunctive relief *inter alia* to remove detritus and clean the alleged Collyer conditions in the subject premises. The plaintiff requests this preliminary and permanent injunctive relief through various methods during the pendency of this ejectment action, ranging from mild to extreme in nature. In detail, the plaintiff seeks to have the defendant ordered to:

(a) Immediately remove all items giving rise to the Collyer conditions throughout the Unit and grant immediate, unimpeded access to all areas of the Unit to Plaintiff, its employees and/or agents for the purpose of inspecting the Unit and responding to emergency conditions therein;

(b) Immediately eliminate the severe Collyer condition and haven for extermination issues visible in the Unit by removing all fire hazards and piles of combustible materials haphazardly stacked throughout the Unit;

(c) Grant immediate, unimpeded access to the Unit to Plaintiff, its employees and/or agents for the purpose of responding to and treating any and all vermin and other infestation (and related odors) in the Unit arising out of the Collyer conditions created by Defendant;

(d) ln the event of Defendant's immediate non-compliance or non-appearance, grant Plaintiff, Plaintiff's employees and/or agents (including without limitation locksmiths and exterminators) and/or the New York City Police Department or the Fire Department of the City of New York power to enter the Unit for the purposes of (i) immediately eliminating the severe Collyer condition visible in the Unit by discarding all such items and (ii) treating any and all extermination issues and odors in the Unit arising out of the Collyer conditions at Defendant's sole cost and expense;

(e) In the event of Defendant's immediate non-compliance or non-appearance, grant Plaintiff, Plaintiff's employees and/or agents (including without limitation locksmiths and exterminators) and/or the New York City Police Department and/or the Fire Department of the City of New York power to forcibly remove Defendant from the Unit pending the removal of all fire hazards and Collyer conditions consisting of piles of combustible materials haphazardly stacked throughout the Unit, which may be discarded at Plaintiff's sole discretion and at Defendant's sole cost.

The parties have a history of litigation which was also premised upon the conditions in the subject premises during the defendant's tenancy. In 2020, the plaintiff commenced a summary eviction holdover proceeding grounded upon similar allegations of nuisance conditions in the subject premises (Index #: L&T 56289/20/QU) (hereinafter "holdover proceeding"). That holdover proceeding was resolved by a May 19, 2021 a so ordered stipulation, which provided that the holdover proceeding was discontinued on consent (hereinafter "stipulation"). The stipulation discontinued the holdover proceeding with prejudice as to the allegations in the January 6, 2019 notice to cure (hereinafter "NTC") and the February 18, 2020 notice of termination (hereinafter NOT-1). Therefore, any

conduct and/or behavior which occurred **after February 18, 2020**, is relevant to the instant action.[1]

Thereafter, the conditions in the subject premises allegedly recurred. The plaintiff served its second termination notice (hereinafter "NOT-2") upon the defendant dated November 11, 2021, which demanded that the defendant vacate and surrender the subject premises on or before November 26, 2021, i.e. the date of the lease termination. In sum and substance, NOT-2 alleged that the defendant is committing a nuisance by damaging the subject premises and engaging in a "continuing course of conduct" which is annoying, inconveniencing and discomforting the plaintiff or other residents of the subject building. This behavior is alleged to be in violation of the defendant's lease as well as the NYC Housing Maintenance Code and the NYC Health Code.

Specifically, the nuisance behavior complained of in NOT-2, upon which this litigation is premised, is creating what is commonly known as Collyer conditions in the subject premises. The plaintiff alleges the defendant has created: dangerous conditions by accumulating piles of rubbish in the form of boxes, clothing and generally combustible materials which is a fire hazard threatening the safety of other residents of the subject building; cluttered conditions with combustible materials which pose a tripping hazard and risk of personal injury to building staff and potential first responders; unsanitary conditions which are a harbinger for vermin and resulting in a fly infestation as well as noxious offensive odors emanating from the subject premises which also interferes with the other residents' health safety and welfare. All of the conditions alleged pose a health hazard to building staff, other residents and the defendant herself.

The defendant herself has never appeared for any of the court appearances in the instant action, whether for a conference which directly affects her, or the evidentiary hearing on May 6, 2022. By letter dated January 28, 2022, and without any medical records to substantiate her claim, the defendant's attorney made a request, without any admission or denial of the underlying allegations "that she be allowed additional time to resolve any clutter condition in her apartment and/or comply with any Order of this Court, and for an adjournment until Ms. Gallo may access the Court with the assistance of someone who may help her to appear virtually or with the assistance of someone who may help her appear in person once the risk of contracting COVID-19 is reduced."

At or around the time this correspondence was generated, the Court conducted a conference with plaintiff's counsel and defendant's counsel, including Sateesh Nori, Esq., the then "Attorney-in-Charge" of the Legal Aid Society Queens Neighborhood Office. During this conference, Mr. Nori explained that his organization had computer tablets on

[1] Apparently, plaintiff was operating under the misapprehension that it somehow was limited to submitting evidence from on or after a conference conducted on March 14, 2022 and unnecessarily confined itself to submitting such a limited time frame of evidence.

hand and that he would deliver a tablet to the defendant himself. Nonetheless, the defendant failed to appear for the hearing conducted on May 6, 2022. When the Court made mention of the defendant's absence on the date of the evidentiary hearing, defendant's counsel stated the accommodation provided to the defendant was temporary and conducted under the auspices of a school, which was in the midst of exams. Apparently, defense counsel made no effort to substitute the provision of services for her client or saw the need to discuss the issue to this Court until the Court raised the fact of the defendant's failure to appear for the hearing.

The Court can only conclude the importance of the defendant's accommodation is not as significant to her as was proclaimed previously. The Court notes that on at least two occasions in the pendency of this action, reference has been made to the fact that the defendant has a son; and that her son is an attorney. Yet, no one identified as the defendant's son has testified on her behalf or ever even appeared in this action.

At the evidentiary hearing, the plaintiff presented one witness, Mike Ferenburg, the general manager of the subject building, also known as Hunters Point South Commons. He has been the manager of the subject building for approximately 4 years, with 13 years prior experience. The subject building contains 619 dwelling units, with 37 dwelling units on each floor, with his office on site. He is present at the subject building on alternating days.

Mr. Ferenburg has received complaints about the defendant from other residents and he has witnessed an infestation of bugs, odious smells emanating from the subject premises piles of garbage, various items filling up the bathroom, particularly the bathtub and the hoarding of boxes. The situation rose to the extreme level of his staff not wanting to enter the subject premises. The defendant had many boxes delivered to the subject building, some of which contained perishable food. She requested that her delivered boxes be brought up to the subject premises. However, there was insufficient room to put them in her apartment. At one point there were 60 boxes delivered to the subject building for her. Since the boxes could not fit inside the subject premises, they were stacked in the hallway outside the subject premises. The expired perishable food ultimately was disposed of by the building staff.

Mr. Ferenburg testified that his last visit in the subject premises was on March 18, 2022, to inspect the clean up after the defendant engaged a cleaning service. His office is located on the main floor of the building. The subject premises is approximately 100' away from the stairwell. He testified that the odor outside the subject premises is a combination of the cleaning product used by the building staff mixed with a strong malodorous smell. He stated the stench can be smelled as soon as someone exits the stairway and it becomes stronger as one gets closer to the subject premises. Inside the subject premises he described a strong garbage smell and the presence of flies dead in corners of counter

tops. He added that his staff installed 3 fly traps outside the subject premises, because the flies were entering other apartments. He stated the conditions continue to the present.

The plaintiff also introduced photographs that were taken on the date of the inspection. Several of these photographs depict disturbing images. The Court's description of the contents of the photographs only includes items that are discernable. Much of the random items can only be described as dirty clutter.

Exhibit "1" shows a bathtub filled with various random items, many of which are unidentifiable. What can be discerned is a metal based chair with roller wheels on its side, towels, a cardboard box, a plastic coated wire rack of some sort, towels, a white plastic bag with mailing label. These are merely items on or near the top of the pile of items that filled the bathtub. There are some items hanging directly over the bathtub. Immediately outside the bathtub are a few covered containers, a plastic water bottle, a green plastic tub, a couple of cooking spice bottles, a cardboard box on its side with two coffee mugs turned upside down on top of the box, a couple of plastic bags with unknown contents, a spray bottle and what appears to be a tub for caulk. Some of the latter described items as outside the tub are immediately in front of and block the bathroom sink and vanity. Only one corner of the sink counter is clear. No less than six tubs and a coffee mug take up half of the sink counter. The back corner of the counter-top has what appears to be 3 soap dishes stacked on top of each other and some other unidentifiable items. The bathroom mirror appears to be covered in soap scum or something else which minimizes the ability to see it clearly.

Exhibit "2" shows more of the bathroom floor and the area around the toilet. Only small portions of the floor are exposed, but those that are showing are soiled with mud or something else. The floor has an empty dirty ceramic bowl, a couple of cooking pots with lids piled on top of each other, a plastic jug, two boxes of plastic hangers and some other type of cabinetry with various items stacked on top of it, a pair of sneakers and some type of cleaning brushes in the corner. The floor also has paper towels balled up and strewn about. In sum, the conditions are filthy and filled with detritus, indicative of Collyer conditions.

The balance of the photos shows other areas of the subject premises, some of which depict wood flooring that appears to have been badly stained throughout and a shopping cart filled with 4 filled large plastic bags. Exhibit "5" shows the one area in the subject premises which appears to have some level of cleanliness, i.e. the stove and kitchen countertop. Although, there is a bug zapper on the countertop, the need for which does not emanate from cleanliness. The tan flooring in the kitchen and elsewhere throughout the subject premises is badly stained and colored black from dirt or something else. In Exhibit "8" there is pantry type metal shelving with grocery items piled in it. There also

appears to be grease, dirt and/or mold on the outside of the closet area, on the walls and other areas in the subject premises.

Mr. Ferenburg has had to have continuous cleaning and deodorizing around the subject premises. This takes time away from the other chores of the staff in maintaining the subject building for other residents. According to the manager, two other tenants vacated their apartments which were near the subject premises due to the conditions caused by the defendant. Moreover, he has not seen any further cleaning service at the subject premises since his visit on March 18, 2022.

The defendant presented two witnesses, each of whose testimony was of little probative value due to their only minimal interaction with the defendant. Merve Ozak, the supportive housing worker assigned to the defendant was defendant's first witness. Ms. Ozak has only been working with the defendant for the last 7 months although the conditions that gave rise to the litigations between the parties first came to light with the NTC from January 6, 2019. Ms. Ozak's involvement with the defendant is extremely limited. She has been to the subject premises a total of 3 times, the most recent having been the day before the evidentiary hearing. The prior occasion was 3 months earlier and presumably her first visit was at or about the time she was first assigned to work with the defendant.

Ms. Ozak stated she did not detect an odor from the subject premises when she visited the day before the hearing. There was nothing piled outside the subject premises on that occasion and she did not see any flies. Although Ms. Ozak testified she took photographs during her visit, she did not submit any into evidence at the hearing. While not drawing any conclusion from this omission, they may have aided the Court in making its determination as they would have been the most recent images of the subject premises. Perhaps they would not have shed a favorable light upon the defendant.

The other witness presented by the defendant was Mr. Nori. He is currently the Executive Director of Just Fix Inc., a nonprofit geared toward protecting tenants' housing rights. Mr. Nori testified that he has been an attorney specializing in the area of landlord tenant law since 2001. He never visited the subject premises before or after March 10, 2022. His only visit to the subject premises was on the morning of March 10, 2022. Mr. Nori's visit to the subject premises and his resulting testimony was merely a snapshot in time.

When asked whether the defendant was depicted in one of the photographs, Mr. Nori equivocated. This was clearly an attempt to protect his client and was somewhat disingenuous. Nonetheless, there is no doubt the defendant is depicted in Exhibit "7". Interestingly, she seems to be walking, without assistance of a walker, cane or other support.

Mr. Nori testified that during his March 10th visit, the hallway was clear outside the subject premises. Most of the kitchen counter was clear. There were boxes in the living area and

on the couch. There were also “some” items in the tub, but the floor appeared to be clear. Mr. Nori testified that there were no smells in the subject premises, nor blockage of the front door to the subject premises.

On cross examination, Mr. Nori attempted unsuccessfully to convince the Court that the sink depicted in plaintiff’s Exhibit “1” was usable, despite being blocked by approximately 80% on the counter-top. The only way someone would be able to wash their face in this sink would be to lean over the corner and get jabbed by the counter-top. He did acknowledge that the photographs in evidence showed there were more items in the bathtub and on the bathroom floor than during his solitary visit in early March. He also agreed he noticed the floors were stained. However, according to him the subject premises appeared to be more organized in the photographs admitted into evidence than they were during his visit.

In seeking a preliminary injunction, the applicant must satisfy three criteria: 1) the likelihood of success on the merits; 2) irreparable injury in the absence of a preliminary injunction; and 3) a balancing of the equities in its favor. *See, Evans–Freke v. Showcase Contracting Corp.,* 3 A.D.3d 549, 770 N.Y.S.2d 640 (2nd Dept.2004). The determination of whether to issue a preliminary injunction is a matter left to the sound discretion of the Court. *See, Doe v. Axelrod,* 73 N.Y.2d 748, 536 N.Y.S.2d 44 (1988); *Pudalov v. Pudalov*, 6 Misc. 3d 558, 561, 786 N.Y.S.2d 729, 732 (Sup. Ct. Westchester 2004).

In the case at bar, the plaintiff has sustained its burden. The plaintiff possesses a likelihood of success on the merits. Mr. Ferenberg’s years of employment and direct interaction at the subject building where his office is located provided some direct knowledge of the conditions created by the defendant. While testimony of the defendant’s neighbors, current and perhaps former, would most likely have been more compelling, it is understood that neighbors are often reluctant to testify against one another. Mr. Ferenburg presented testimony which was more probative than that of defendant’s witnesses. The stench and infestation which Mr. Ferenburg described, together with the March 18th photographs and the need for 2 neighbors to vacate their own homes, makes it clear that the conditions the defendant has created are deplorable. Her behavior has been both negligent and reckless, seemingly without regard to the neighbors she is subjecting to disgusting odors, potential infestation and fire hazard.

Not only are the conditions severe, they are ongoing. Considering that 2 other residents have already vacated their homes nearby the defendant’s residence due to the severity of the conditions and the continuing nature of this behavior, irreparable injury has already occurred and will recur in the absence of a preliminary injunction. In balancing the equities, the Court has considered the defendant’s tenancy which is of relatively brief duration. When contrasted against the remaining 36 homes of residents on the floor of

the subject premises and the threat to their health safety and welfare, the equities tip in favor of granting preliminary injunctive relief.

Typically, injunctive relief is prohibitory and is utilized to prevent a party from committing a particular act, such as enforcement of a law (*Collateral Loanbrokers Ass'n of New York, Inc. v City of New York*, 148 AD2d 133, 46 NYS3d 600 [1st Dept 2017]); or construction of a structure or building (*Birch Tree Partners, LLC v Windsor Digital Studio, LLC*, 95 AD3d 1154, 945 NYS2d 162 [2nd Dept 2012]) or competition of former employees (*Laro Maintenance Corp v Culkin*, 255 AD2d 560, 681 NYS2d 79 [2nd Dept 1998]) or perhaps commercial use of an apartment (*Besser v Beckett*, 253 AD2d 648, 677 NYS2d 364 [1st Dept 1998]).

However, there is a distinction between a prohibitory injunction which prevents behavior and a mandatory injunction. "A mandatory injunction, which is used to compel the performance of an act, is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." *Matos v. City of New York,* 21 AD3d 936, 937, 801 NYS2d 610 (2nd Dept 2005); (S*ee Zoller v. HSBC Mtge. Corp. [USA],* 135 AD3d at 933, 24 NYS3d 168 [2nd Dept 2016]; *Second on Second Café, Inc. v. Hing Sing Trading, Inc.,* 66 AD3d 255, 264, 884 NYS2d 353[1st Dept 2009]; *Village of Westhampton Beach v. Cayea,* 38 AD3d 760, 762, 835 NYS2d 582 [2nd Dept 2007]; *Rosa Hair Stylists v. Jaber Food Corp.,* 218 AD2d 793,794, 631 NYS2d 167[2nd Dept 1995]). *See also* NY CPLR §6301.

The plaintiff is seeking both a prohibitory and mandatory injunction. The prohibitory nature of the relief requested is being granted. In essence, the plaintiff is seeking injunctive relief to prohibit the defendant from causing and/or maintaining Collyer conditions in the subject premises. The Court has no reservations about granting that relief. However, the mandatory injunction the plaintiff seeks if the defendant does not comply with the prohibitive injunctive relief is extreme and reminiscent of a storm trooper invasion. The mandatory injunctive relief being sought consists of permitting the plaintiff to have immediate and unimpeded access with locksmiths, exterminators, the New York City Police and/or Fire Departments for the purpose of: eliminating the severe Collyer condition in the subject premises by discarding all items objectionable to the plaintiff; and treating the extermination issues and odors in the subject premises resulting from the Collyer conditions, at the defendant's sole cost and expense.

In the event that the defendant does not comply with the requested prohibitory injunctive directives, the plaintiff also wants this Court to grant the plaintiff the power to forcibly remove the defendant from the subject premises pending the removal of the fire hazard and Collyer condition, including the defendant's belongings which may be discarded at

plaintiff's sole discretion and at the defendant's cost. This mandatory injunctive relief is extreme and tantamount to seizing control over all of defendant's possessions and achieving the ultimate goal of this litigation, i.e. possession of the subject premises. That the Court is unwilling to grant at this juncture.

Accordingly, it is

ORDERED, that the defendant is to immediately cease creating the Collyer conditions throughout the subject premises and grant periodic access to all areas of the subject premises to the plaintiff, its employees and/or agents for the purpose of inspecting the conditions of the subject premises once per month on the first Friday morning of each month until this litigation is concluded or there is a further order of the court; and it is further

ORDERED, that the defendant shall cease creating and maintaining extermination issues visible in the subject premises; and it is further

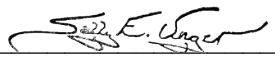
ORDERED, that the defendant shall cease creating and maintaining a fire hazard comprised of piles of combustible materials haphazardly stacked throughout the subject premises; and it is further

ORDERED, that the defendant shall cease causing noxious foul odors to emanate in and from the subject premises: and it is further

ORDERED, that due to the nature of this action and the underlying circumstances, this case must be "fast-tracked". Therefore, the parties shall complete discovery, if any within 45 days of this order. A note of issue shall be filed within 60 days of this order. Immediately thereafter, the parties shall contact the **Trial Support Part** for a pre-trial conference date.

This constitutes the decision and order of the court.

Dated: May 12, 2022



SALLY E. UNGER, A.J.S.C.