

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES

PART 59

*Justice*

CAROL BABELI,

Plaintiff,

- v -

7-11 EAST 13<sup>TH</sup> STREET TENANTS CORP., BOARD OF DIRECTORS OF 7-11 EAST 13<sup>TH</sup> STREET TENANTS CORP., and MIDBORO MANAGEMENT, INC., Defendants.

Index No.: 109601/03

Motion Date: 06/27/03

Motion Seq. No.: 01

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion for a preliminary injunction.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
_____	1
_____	2
_____	3

Cross-Motion:  Yes  No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Plaintiff Carol Babeli moves for a preliminary injunction against defendants, the owners, board and managing agent of the cooperative housing property at 7-13 East 13<sup>th</sup> Street, New York County, wherein plaintiff resides. Plaintiff is a shareholder in the cooperative corporation. The underlying action arises out of an October 22, 2002 contract (the "Alteration Agreement") between plaintiff and defendant board, in which the board granted plaintiff permission to perform alterations to her apartment to connect it by a new staircase with space plaintiff held on the roof of the premises pursuant to her proprietary lease.

Check One :  FINAL DISPOSITION  NON-FINAL DISPOSITION

Plaintiff alleges that in reliance upon the Alteration Agreement, plaintiff hired contractors and commenced renovation work. Plaintiff further alleges that upon initiating the work defendants attempted to have plaintiff purchase additional shares for the space on the roof. According to plaintiff, defendants have prevented plaintiff from proceeding with the renovation by imposing additional approvals not contemplated in the Alteration Agreement and that finally on December 24, 2002, defendants sent notice to plaintiff to cease and desist all construction work on the roof until further notice.

Plaintiff seeks a preliminary injunction allowing her to continue and complete the alterations. Plaintiff claims that she and her husband have been forced to live in the midst of renovation with a large opening in one portion of her apartment.

Defendants oppose plaintiff's application.

The case of Residential Board of Managers of the Columbia Condominium v Subotsky, 178 AD2d 121 (1<sup>st</sup> Dept 1991) is similar on its facts and therefore instructive. In that case, defendants husband and wife were owners of adjoining apartments in plaintiff condominium, which approved defendants' plans to combine their apartments by incorporating the hallway between them. The renovations were substantially completed when a disagreement arose as to whether a building permit was required for the alterations.

The Subotsky court denied plaintiff condominium's motion for a preliminary injunction to compel defendants to restore the hallway to its original condition. It pointed out that the function of the provisional remedy of preliminary injunction is to maintain the status quo until there can be a full hearing on the merits, but not to obviate the necessity for plaintiff to prosecute its action to completion. It further reasoned that the condominium sought not merely to restrain action but to mandate action in the absence of any demonstration that such extraordinary relief was essential to maintain the status quo. Finally, the court found that even if the condominium were successful in showing that a building permit was required, the plaintiff failed to demonstrate that injunction as opposed to monetary relief was warranted. Subotsky, 178 AD2d, at 122.

A party seeking a preliminary injunction must establish (1) a likelihood of success on the merits of the underlying action; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in its favor. Olympic Tower Condominium v Cocozziello, 306 AD2d 159, 160 (1<sup>st</sup> Dept. 2003).

The court finds that plaintiff has demonstrated a likelihood of success on the merits. The correspondence relating to plaintiff's alleged failure to coordinate with defendants' roof installer either predate the Alteration Agreement, in which defendants granted plaintiff permission to proceed with the

alterations plan, or post-date defendants' letter to plaintiff concerning her purchase of additional shares. Further evidence that defendants' current roof concerns are merely a pretext for their refusal to abide by the Alteration Agreement are the terms of the Agreement itself. Under the Agreement, plaintiff assumes all risks of damage to the building resulting from or attributable to the performance of work thereunder. The Agreement states specifically that such work covers roofs and maintenance of mechanical systems. It requires plaintiff to procure from her contractors a comprehensive property damage insurance policy in the amount of \$1,000,000 naming plaintiff and defendants as named insured. Thus, as there is no dispute that plaintiff has met all her obligations under the Agreement, it is likely that plaintiff will ultimately prevail on her action for breach of the Agreement.

Moreover, the court is persuaded that plaintiff is suffering irreparable harm by being forced to live amidst construction in progress that has been halted. This finding is consistent with Columbia Condominium, where the court found that continuation of the work would not irreparably harm the condominium, even though no governmental permit had been issued for the work, but that the Subotskys would be deprived of the use of their leased premises if required to demolish the new construction. Here, plaintiff is currently being deprived of use of her premises as permitted under the Alteration Agreement,

which was one of the effects the Subotsky tenants would have suffered had the court granted its condominium board's request for provisional relief. The court finds that in this situation, which is nearly the procedural reverse of the Subotsky case, extraordinary relief is essential in order to maintain the status quo, i.e. the circumstances at the time defendants granted plaintiff permission to proceed with the alterations.

Nor does a preliminary injunction give the plaintiff the ultimate relief sought pendente lite. The question of plaintiff's purchase of additional shares attributable to the altered space remains to be resolved.

Finally, the equities tip in favor of plaintiff, as this is not the case, as in Matter of Levandusky v One Fifth Avenue Apt. Corp., 75 NY2d 530, 540 (1990) and Board of Managers of the Ocean Terrace Towne House Condominium v Lent, 148 AD2d 408 (2d Dept.), lv denied 75 NY2d 702 (1989), where the cooperator had either not sought or had been expressly denied approval for an alteration or renovation, but proceeded in the defiance of the rules. Here, there is no dispute that plaintiff complied with all the rules, obtaining all the necessary governmental permits and bank approval, and that based on her compliance, defendants granted her permission to execute the work. It would be unjust to further delay plaintiff in completing the renovation, when defendants expressly granted her approval for the alteration.

Therefore, it is hereby


ORDERED that plaintiff's motion for a preliminary injunction is GRANTED; and it is further

ORDERED that defendants are hereby restrained and enjoined from prohibiting plaintiff from completing the alteration to her cooperative apartment in accordance with the Alteration Agreement dated October 22, 2002 on condition that plaintiff file with the court and deliver to defendants photocopies of current policies of insurance for the benefit of defendant in the amount and covering the risks set forth in the Alteration Agreement.

ORDERED that the parties are hereby directed to attend a preliminary conference on October 14, 2003, at 11:00 A.M., at the Courthouse, IAS Part 59, Room 949, 111 Centre Street, New York.

**Dated:** September 26, 2003

ENTER :

  
**DEBRA A. JAMES** J.S.C.  
J.S.C.