

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

PRESENT: GISCHE

Justice

PART 10

DeL ESDE Villas IV

- v -

Condo

Benjamin EPPS

INDEX NO. 116536/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

APR 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/2/08

J.S.C.

Check one: FINAL DISPOSITION

JUDITH J. GISCHE, J.S.C.
 NON-FINAL DISPOSITION

Check if appropriate:

 DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

BOARD OF MANAGERS OF THE DEL ESTE
VILLAGE IV CONDOMINIUM,

Plaintiff,

-against-

BENJAMIN EPPS and AMY MONROE,

Defendants.

Decision/Order

Index No.: 116536/07
Seq. No. : 001

Present:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's OSC w/JJ affid, exhs	1
Def's GB affirm in opp, exhs	2
Def's affid of BE, exhs	3
Pltf's JJ reply affid	4

APR 07 2008
FILED
COUNTY CLERK'S OFFICE
NEW YORK
Numbered

Upon the foregoing papers, the decision and order of the court is as follows:

This is a declaratory judgment action. Plaintiff Board of Managers of the Del Este Village IV Condominium (hereinafter "plaintiff" or "Board") seeks an order declaring that defendants unauthorized construction and installation of a roof structure on a common area of the building is in violation of the bylaws of the Del Este Village IV Condominium (the "Condominium") and must thus be removed.

Plaintiff is an unincorporated condominium association located at 613-617 East 11th Street, New York, New York. Defendants Benjamin Epps ("Epps") and Amy Monroe are the owners and residents of the condominium unit B-3 within the building 615 East 11th

Street, New York, New York (the "premises").

Plaintiff now moves by order to show cause for a preliminary injunction restraining and enjoining defendants or their agents from entering upon and/or utilizing, for any purpose or reason, the roof structure. Defendants oppose the motion.

Plaintiff claims that the defendants constructed and installed a raised deck on the roof of the premises, without the approval of the Board. According to the Condominium's Declaration, the roof of the building is a common area. Plaintiff represents that Paragraph 29 of the building's Rules and Regulations prohibit any unit owner from installing or maintaining any personal property on any roof of the building without the prior written consent of the Board of Managers. However, plaintiff has not provided a copy of the building's Rules and Regulations nor a complete copy of the Condominium's bylaws.

Plaintiff sent defendants a Notice of Default, dated May 15, 2007, wherein plaintiff notified defendants that they had "violated and breached the Bylaws and Rules and Regulations of the Condominium in that [they] have illegally entered and intruded upon a common element of the Condominium and constructed a 'roof deck' without approval of the Board of Managers of the [Condominium]."

Plaintiff states that the defendants do not have a permit for the construction of the deck nor have the defendants submitted an alteration agreement to it, which is required by the Condominium's bylaws.

Arguments of the Parties

On this motion, plaintiff claims that it is entitled to the preliminary injunction for several reasons. Plaintiff maintains that defendants' failure to submit the required alteration agreement prevents plaintiff from gauging the safety and quality of the

construction, assuring defendants' compliance with Department of Buildings' rules and regulations and to determine whether sufficient insurance has been procured by defendant to protect plaintiff from liability. Plaintiff also argues that the defendants have failed to demonstrate that they have procured sufficient insurance to protect it from liability in the event that the roof deck causes harm to any individual or entity.

In opposition, defendant Epps claims that while he was President of the Board of Managers and during a "building wide meeting" on or about November 11, 2005, the topic of roof decks was discussed. During this meeting, Epps claims that [all the unit owners] "discussed the matter in detail and ultimately voted on the proposal that the building take all necessary steps to formally allow the use of the rooftop for decks." According to Epps, this proposal was passed by a super majority in which "10 out of 12 of the unit owners voted in favor, and 2 voted against allowing roof decks." In support of this claim, Epps has provided a handwritten vote tally on a one-page ledger of the unit owners which is dated October 31, 2005. It is unclear to the court who made the notations on the ledger.

Plaintiff contends that the unit owners did not vote on a proposal to construct roof decks at the November 11, 2005 meeting, but merely voted "to allow for exploration of the issue." Plaintiff, in its reply, has provided a copy of the Minutes from the November 11, 2005 meeting. Item 15 of the Minutes provides as follows:

Roof Deck: In exploratory stage. All upstairs homeowners agree to shoulder all expenses associated with it. Questions still remain re: permits, liability, report of structural engineer, architectural plans, etc.

Epps states that in his capacity as the President of the Board, he assisted the Board in "researching and implementing projects of the building which affect common elements

of the building" and "[t]o that end, [he] took the responsibility of implementing the roof deck." Epps claims that he met with numerous contractors, architects and engineers to research and effectuate the installation of the roof decks. Epps states that the Board choose Al Terry Design ("ATD") as the contractor for the project and that ATD's installation of the roof deck did not require a permit from the City of New York or any other license or paperwork from the Department of Buildings.

Epps represents that in or about the Spring of 2007, the first roof deck was installed and that other unit owners were in the early stages of building their own roof decks. However, it is undisputed that no other roof decks have been installed to date.

Defendants have also provided an email dated June 15, 2007, wherein the Board wrote to the "613-617 Homeowners" the following:

Because of the barrage of new information presented by the attorney last week and the lack of time to digest all this new information - which resulted in a confused and hurried vote, the Board has decided it would be in everyone's best interest to "re-set the clock" and start afresh from the beginning.

The first issue that needs to be resolved is the removal of the illegal structure on the roof. Only after this situation is rectified can we proceed in a reasonable step-by-step fashion to determine (a) what kind of decks are in fact permissible by the building code (if any decks at all), and (b) whether the building wishes to "amend the by-laws" to allow for them at all.

Discussion

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair House

Associates, 70 A.D.2d 571 (1st Dept. 1979); Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). “Likelihood of success” need only be shown from the evidence presented; conclusive proof is not required. Id. The granting of any preliminary injunction requires the posting of security. CPLR § 6312 (b).

Contrary to defendants’ assertion, it has failed to establish that construction of the roof deck was authorized by the Board in November 2005. There is no dispute that the roof deck has been affixed to a general common element of the building in contravention of the Bylaws. The Minutes from the November 11, 2005 contradict defendants’ assertion that construction of the roof deck was authorized by the Board and the handwritten notations by an unidentified individual on the ledger dated October 31, 2005 do not unequivocally support defendants’ claims.

Moreover, it is undisputed that defendants have failed to comply with the bylaws in that they have failed to submit an alteration agreement. There is no documentation relevant to the safety and lawful construction of the roof deck nor with respect to the existence of any liability insurance for the otherwise unauthorized roof deck. For these reasons, plaintiff has met its burden in establishing that irreparable harm may occur to either the building, individuals and unit owners absent the granting of a preliminary injunction and a likelihood of success on the merits.

Finally a balance of the equities weighs in plaintiff’s favor because defendants’ use of an unauthorized roof deck on a general common area of the building, without following proper procedures, disadvantages plaintiff and exposes it to liability as a direct result.

Accordingly, plaintiff's motion for a preliminary injunction is granted in its entirety.

Pending the trial or other disposition of this action, defendants and their agents are hereby restrained and enjoined from entering upon and/or utilizing, for any purpose or reason, the roof structure on the premises.

Although defendant has not asked for such relief, pursuant to CPLR 6312 (b), plaintiff is required to post an undertaking prior to the granting of a preliminary injunction. Since defendant has not requested an undertaking in any amount, the court orders that plaintiff post an undertaking in the sum of \$5,000, in the event it is finally determined that they are not entitled to an injunction. CPLR 6312 (b).

The court hereby schedules a preliminary conference in this matter on May 8, 2008 at 9:30 a.m. at 80 Centre Street, Room 122.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
 April 2, 2008

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

FILED
APR 07 2008
COUNTY CLERK'S OFFICE
NEW YORK