

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

PRESENT: Hon. MICHAEL D. STALLMAN

Justice

PART 7

60 E. 9th STREET OWNERS CORP.,

Plaintiff,

- v -

ALBERT N. ZIHENNI,

Defendant.

INDEX NO. 104135/2008

MOTION DATE 4/17/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 141

The following papers, numbered 1 to 8 were read on this motion for summary judgment

Notice of Motion— Affidavit — Exhibits A-D, E [Affidavit],
Affirmation — Exhibits 1-5

Answering Affirmation — Exhibits 1-15

Replying Affirmation — Exhibits A-D, E [Affidavit],
F [Affidavit]

PAPERS NUMBERED

1-3

4-5

6-8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that this motion for partial summary judgment on the first cause of action is granted, the first cause of action is severed; and It is further

ORDERED and ADJUDGED on the first cause of action that defendant Zihenni is directed to remove the television satellite dish and exterior wall-mounted air conditioner condenser unit, and to restore those locations to their pre-alteration condition within 90 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on August 20, 2009 at 9:45 in IAS Part 7, 111 Centre St Rm 949, New York, New York. Copies to counsel.

In this action, plaintiff, a cooperative apartment corporation, seeks to compel defendant, a co-op apartment owner, to remove a television satellite dish and exterior wall-mounted air conditioner condenser unit, which were added during alterations to his unit. The complaint asserts three causes of action: the first seeks an order compelling defendant to remove the television satellite dish and exterior wall-mount air conditioner; the second seeks an order compelling defendant to file the alterations with the Department of Buildings as an "Alt-2" type of alteration for a full work permit; the third seeks to recover fees incurred in this action, including attorneys' fees and architectural fees.

Plaintiff has met its prima facie of summary judgment as a matter of law on the first cause of action against defendant. It is undisputed that defendant installed a satellite television antenna to the building exterior and installed a wall mounted air conditioner unit. It is undisputed that the parties entered into an Alteration Agreement made as of July 10, 2006. See Rosen Aff., Ex B. Section III.L.(iii) of the Alteration Agreement specifically provides, in pertinent part:

(Continued . . .)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

"Prohibited Construction Methods. Shareholder recognizes and agrees that:

* * *

III) That exterior masonry walls or roofs shall not be penetrated.

Ibid. Paragraph 17 of the Co-op's House Rules states, "No radio or television aerial shall be attached to or hung from the exterior of the building without prior written approval" of the Co-op. See Rosen Aff., Ex A. Paragraph 21 (a) of defendant's proprietary lease states, in pertinent part:

"The Lessee shall not, without first obtaining the written consent of the lessor, which consent shall not be unreasonably withheld or delayed, make in the apartment or building . . . any alteration, enclosure or addition or any alteration or any alteration of or addition to the . . . heating or air conditioning system or units, . . . or any other installation or facility in the apartment or building."

Rosen Reply Aff., Ex A. According to the Co-op's President, defendant neither requested nor obtained the Co-op's required written approval to affix a satellite dish and an exterior air conditioner unit. Rosen Aff. ¶¶ 12, 15. Therefore, plaintiff has established that defendant violated the Alteration Agreement, House Rules, and proprietary lease.

In opposition, defendant argues that the Co-op's managing agent approved installation of the air conditioner and satellite television aerial. Defendant claims that he transmitted to plaintiff's managing agent a full set of drawings indicating what the final renovation would be, which had notations as to the installation of the air conditioner unit and satellite dish. See Zihenni Opp. Aff., Ex 3. Exhibit 3 shows an "EXTERIOR DISH" and "EXTERIOR A.C. COMPRESSOR" on an architectural drawing labeled "NEW CONSTRUCTION PLAN." Defendant claims that, on July 14, 2006, he discussed installation of the air conditioner unit and satellite dish with the co-op's property manager, Brian Kenny. Zihenni Opp. Aff. ¶ 8. According to defendant, Kenny then approved the Alteration Agreement, exhibits, and documents attached thereto. Id. ¶ 12.

However, plaintiff claims that defendant's drawings were not included in the documents submitted to Kenny. Indeed, defendant claims that Kenney approved the exhibits and documents annexed as Exhibit 2 to his moving papers, not Exhibit 3. In Exhibit 2, the drawing labeled "NEW CONSTRUCTION PLAN" does not contain a drawing for an exterior dish or exterior a.c. compressor. Moreover, defendant states that he and Kenny "reviewed the Alteration Project Summary and agreed to its contents." Zihenni Opp. Aff. ¶ 10. Plaintiff points out that, on the Alteration Project Summary, the line corresponding to exterior work is blank. See Fleiss Affirm., Ex 5; Zihenni Opp. Aff., Ex 5. Thus, defendant fails to raise a triable issue of fact as to whether the Co-op approved the satellite television aerial and exterior air conditioner unit as part of the approval of defendant's proposed alterations. Because defendant fails to raise a triable issue of fact as to whether Kenny approved installation of the air conditioner unit and satellite antenna, defendant's argument that he relied on Kenny's approval to his prejudice is unavailing.

Therefore, plaintiff's motion for partial summary judgment on the first cause of action against defendant is granted. Plaintiff is entitled to an order directing defendant to remove the unapproved installations. See Levin v 40 Fifth Ave. Corp., 24 AD3d 244, 244 (1st Dept 2005) (affirming order, after non-jury trial, directing tenant to remove the washer/dryer and garbage disposal unit he installed in his apartment without approval). The Court does not express an opinion as to whether the work directed requires a work permit or other approval from the City. All work must conform with law and code.

Dated: 7/13/09

New York, New York

Check one: ☐

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1711).

J.S.C.

FINAL DISPOSITION

2009 JUL 13 PM 4:00