Board of Mgrs. of Vil. View Condominium v Forman
2008 NY Slip Op 33183(U)
November 14, 2008
Supreme Court, Queens County
Docket Number: 19519/07
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 22

SUA SPONTE ORDER

Index No. 19519/07

Motion
Date May 6, 2008

Motion
Cal. No. 3

Motion
Sequence No. 1

BOARD OF MANAGERS OF THE VILLAGE VIEW CONDOMINIUM,
Plaintiff,

-against-

DONATA FORMAN,
Defendant.

The Court *sua sponte* recalls its Decision/Order dated September 3, 2008 and hereby issues the following Decision/Order in its place:

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Upon the foregoing papers it is ordered that the motion by plaintiff, Board of Managers of the Village View Condominium seeking summary judgment against defendant, Donata Forman (hereinafter "Forman") pursuant to CPLR 3212 and the cross motion by defendant, Donata Forman for an order dismissing plaintiff, Board of Managers of the Village View Condominium's action or, in the alternative, for summary judgment are decided as follows:

Plaintiff seeks: an order declaring that defendant is in breach of the By-Laws and House Rules that govern the Village View Condominium (hereinafter "Condominium") by virtue of her harboring and maintaining a dog in her condominium unit; an order compelling defendant to permanently remove her dog from the condominium unit; and attorney fees and expenses incurred.

Summary judgment is a drastic remedy and will not be granted

if there is any doubt as to the existence of a triable issue. (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 Ad2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy *(Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (s*ee, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

The Condominium is comprised of the apartment building and land located at and known as 66-15 69th Street, Middle Village, New York (the "Building"). The Building has 24 condominium units, with Unit #3D being owned by defendant Donata Forman, since September 2000.

1. Plaintiff established its *prima facie* entitlement to summary judgment.

Plaintiff presents *prima facie* proof that defendant Donata Forman is in breach of the By-Laws and House Rules that govern the Condominium by virtue of her harboring and maintaining a dog in her condominium unit. In support of its motion, plaintiff presents, *inter alia*: (1) an Affidavit from Catherine Marino, a board member of the plaintiff Board of Managers, (2) an Affidavit from Robert Testa, the managing agent of the Condominium, who was formerly an officer and principal of the sponsor of the Condominium, Lamar Homes, Inc. ("Sponsor") at the time of the Sponsor's filing of the Offering Plan and Declaration creating the Condominium in 1984, and (3) portions of the By-Laws, Offering Plan and Declaration. Plaintiff established as follows: From 1984 to 1986, the Condominium Sponsor controlled the Board of Managers and had a "no-pet" policy which existed in practice, but not in writing. Thereafter, in late 1986, the unit owners gained majority control of the Board pursuant to the Condominium Offering Plan, and the unit owners maintained a "no-pet" policy. On February 18, 2000, the Board met and adopted a set of written House Rules (the "February 2000 House Rules") with House Rule No. 1 stating: POSITIVELY NO PETS ARE ALLOWED IN THE BUILDING FOR ANY

REASON. The Board circulated the February 2000 House Rules via Memorandum to all unit owners. In September 2000, Forman purchased Unit #3D in the Building from the Sponsor. Forman was provided with a copy of the Offering Plan when she purchased her unit. The Offering Plan contains a copy of the initial Declaration and By-Laws of the Condominium. Forman was provided with a copy of the February 2000 House Rules when she purchased her unit. The pertinent provisions of the Offering Plan provide:

> **Offering Plan = Compliance with Declaration. By-Laws and Rules of Condominium and Use of Units**
>
> Each Unit Owner shall be required to comply with and abide by the Declaration and the By-Laws of the Condominium and . . .each Unit Owner shall be required to comply with the Rules and Regulations adopted pursuant thereto. Such obligations shall be enforceable by the Board of Managers by . . .action for damages, by injunction or by other appropriate relief.
>
> (i) No pets shall be kept or harbored in the building unless the same in each instance be expressly permitted in writing by the Board of Managers or the managing agent. Such consent, if given, shall be revocable by the Board of Managers or managing agent in their sole discretion at any time if same unduly disturbs the unit holders.
>
> Declaration = Paragraph ELEVENTH - "All present or future Unit Owners, tenants, future tenants, or any other person that might use the facilities of the Community in any manner, are subject to the provisions of this Declaration, the By-Laws and Rules and Regulations of the Condominium . . . ."
>
> By-Laws = Article VIII - HOUSE RULES - Section 1. In addition to the other provisions of these By-Laws, the following house rules and regulations together with such additional rules and regulations as may hereafter be adopted by the Board of Managers shall govern the use of the Unit and the conduct of all residents thereof.

In between September 2000 and October 31, 2000, the Board discovered that Forman brought a dog named "Rugby" into her unit without first obtaining the consent of the Board. (Plaintiff maintains even if Forman had made a request to keep the dog, such request would have been denied pursuant to the "no-pet" policy). The Board then sent a letter advising Forman that she was in

violation of the By-Laws, and that she had to remove the dog by October 31, 2000. On February 14, 2001, the Board commenced an action in Supreme Court, Queens County, under Index No. 4120/01 and brought a motion by Order to Show Cause for a preliminary injunction to compel removal of the dog named "Rugby" immediately. On May 15, 2001, a set of House Rules were adopted by the Board (hereinafter "Revised House Rules"); that the Revised House Rules reiterated the "no-pet" policy set forth in the February 2000 House Rules verbatim. The May 2001 Revised House Rules were circulated to all unit owners, including Forman, by certified mail return receipt requested. The May 2001 Revised House Rules clarified that they supplemented the House Rules contained in the Condominium By-Laws printed in the Offering Plan. By letter dated February 16, 2007, Forman advised the Board of the death of "Rugby" and requested consent for a replacement dog to be brought into her unit. By letter dated May 23, 2007, the Board denied consent for a replacement dog. In the end of May 2007, a member of the Board of Managers of the Condominium, Catherine Varvaro, saw Forman carrying a dog and advised the Board that Forman had brought a second dog into her unit, and by letter dated June 1, 2007, the Board mailed Forman a letter advising her that the Board had become aware that she was harboring a replacement dog and demanded removal of the replacement dog. By letter dated July 14, 2007, the Board sent Forman a second letter again demanding removal of the replacement dog. Thereafter, on August 7, 2007, plaintiff filed a Summons and Complaint in the instant action under Index No. 19519/07 for declaratory, injunctive, and monetary relief. Plaintiff established that the House Rules which prohibit pets were delivered to Forman, that such rules are a valid and enforceable exercise of the Board's governing power, and that defendant Forman is in breach of the House Rules. Accordingly, plaintiff established its *prima facie* entitlement to summary judgment.

2. Defendant raises triable issue of fact
(a) CPLR 3211(a)(4)

Defendant argues that the case must be dismissed or at least consolidated, pursuant to CPLR 3211(a)(4) which section states in relevant part, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . .(4) there is another action pending between the same parties for the same cause of action." It is undisputed that in February, 2001 an action was commenced entitled *Village View Condominium Board of Managers v. Donata Forman*, under Index Number 4120/01 (hereinafter referred to as "Action 1"). This action was commenced with the service of a Summons with Notice which states in relevant part, "[t]he nature of this action is for breach of contract/breach of condominium by-laws by allowing a pet to permanently remain in defendant's condominium unit. The relief being sought is: judgment directing the defendant to permanently remove the pet from the condominium unit." Plaintiff filed a voluntary discontinuance of Action 1 which notice of

discontinuance dated February 26, 2008 indicated that plaintiff discontinued the Action without prejudice. Accordingly, as Action 1 was discontinued, there is no other action currently pending between the same parties for the same cause of action.

Even if the Court were to assume *arguendo* that Action 1 was still pending, defendant has admitted that Rugby, the first dog, was permanently removed from the condominium unit by virtue of his death at some point just prior to February 16, 2007. Therefore, Action 1 is rendered moot since the circumstances that made up the factual basis for the cause of action in Action 1 i.e. defendant harboring a pet in her condominium unit, no longer exist. Additionally, defendant has failed to prove that the cause of action in Action 1 is the same as the cause of action in the current action.

Action 1 is pet-specific in that it pertains only to the pet that was in the condominium unit in February, 2001 (ie. Rugby, the first dog). Action 1 is in the nature of breach of contract and each time a contract is breached, there is a different cause of action (*see generally, Seed v. Johnston*, 63 App Div 340 [2d Dept 1901]; *Pakas v. Hollingshead*, 99 App Div 472 [1st Dept 1904]). The breach allegedly consisted of harboring Rugby, the first dog, in the condominium unit in or about that date. The harboring of a second dog, Charlie, into the condominium unit is a different cause of action, since it involves a different pet. "A comparison of the allegations of the two complaints must demonstrate that the claims of each are identical and the same relief is sought upon a likely theory (*Simon v. 36 C.P.S., Inc.*, 132 NYS2d 891 [Sup Ct, Kings Co 1954])(internal citations omitted). The Court notes that there was never any Complaint served or filed in Action 1. Even if the Court were to assume *arguendo* that Action 1 was still pending, Action 1 is rendered moot due to the death of the first dog, Rugby, and furthermore, defendant has failed to prove that the causes of action in the two cases are the same.

b. Administrative Code of the City of New York § 27-2009.1

Moreover, defendant contends that if plaintiff is entitled to a new suit based upon each dog, then the Administrative Code of the City of New York § 27-2009.1 and its three-month statute of limitations period should apply. Administrative Code § 27-2009.1(b) provides in pertinent part as follows:

> b. Where a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of a unit, harbors or has harbored a household pet or pets, the harboring of which is not prohibited by the multiple dwelling law, the housing maintenance or the health codes of the city of New York or any other applicable

> law, and the owner or his or her agent has knowledge of this fact, and such owner fails within this three month period to commence a summary proceeding or action to enforce a lease provision prohibiting the keeping of such household pets, such lease provision shall be deemed waived.

Regarding this Code Section, the Appellate Division, Second Department has held that: "[i]n effect this statute provides that when the owner of a building prohibits the occupants of that building from having household pets, the owner must take legal action to enforce the prohibition within three (3) months of the date it or its agents became aware of the violation." (*Board of Managers v. Lamontanero*, 579 NYS2d 557, 558 [Civ Ct, Queens Cty 1991]). The Second Department has held the Administrative Code of the City of New York § 27-2009.1 to be applicable to condominiums. (*Id.*) If the condominium fails to commence this action within the three (3) month period, then the condominium has waived its right to enforce its regulation. The Complaint in the action entitled *Board of Managers of the Village View Condominium v. Donata Forman*, under Index No. 19519/07 was filed on August 7, 2007. Defendant argues that the statute of limitations in the instant matter had expired at the time this action was commenced.

There are triable issues of fact as to, *inter alia*, when the plaintiff first became aware of defendant's alleged violation of the "No Pet" rule, and whether defendant openly and notoriously harbored her pet Charlie in the condominium for more than a three-month period prior to plaintiff commencing this action and whether the defendant or its agents had knowledge of it. In defendant's own affidavit, she states that she brought her pet dog, Charlie, home to her unit in the Village View Condominium on April 25, 2007 and has lived with him there ever since and she attests that she carries him in and out of her unit in a large shoulder bag out of which the dog's head peeks out. Ms. Forman further affirms that she lives next to a former board member, who she believes left the board in June of 2008, and that when she first got Charlie he was "a barker" and the dog's barking sound placed the board member on notice of the dog's presence within a few days of his being in the unit. Finally she asserts that the initial barking period Charlie went through in his new surrounding was the way in which the board became aware of Charlie's presence. Plaintiff submits an affidavit from Catherine Marino, a member of plaintiff, wherein she states that the Board commenced the action within 90 days of becoming aware that defendant had brought a second dog into her unit. Ms. Marino affirms that she first became aware of the dog when she saw him peeking out of defendant's shoulder bag in late May 2007. Plaintiff additionally submits an affidavit from Catherine Varvaro, a member of plaintiff, wherein she states that "[a]t the end of May 2007, I was on my terrace as defendant Donata Forman

was exiting the building below me. I could see that she was carrying a large shoulder bag, and from my vantage point, I could see the head of a small dog peeking out." Accordingly, there are triable issue of fact as to when the condominium first knew of the violation of the "No Pet" rule (ie. the second dog, Charlie's presence in the building), and whether defendant openly and notoriously harbored her pet Charlie in the building for more than three months. As there are triable issues of fact, the case may not be disposed of summarily and a trial is warranted.

Therefore, as there are triable issues of fact, plaintiff's motion and defendant's cross motion are denied.

3. Plaintiff's motion to dismiss defendant's counterclaim

That branch of plaintiff's motion which seeks an order pursuant to CPLR 3212(a) for summary judgment dismissing the defendant's counterclaim in its entirety is hereby granted. Defendant asserts a counterclaim for intentional infliction of emotional distress and harassment. The counterclaim states: "Having brought a similar action once before, having failed to prosecute it in a timely manner, and now by acting maliciously when the Condominium's Board of Managers has actual knowledge that defendant's psychiatrist has recommended that defendant have a dog for companionship, the Plaintiff should be held liable for willful infliction of emotional distress as well as for harassment. Plaintiff seeks damages in the amount of $100,000 for such emotional distress and harassment." Plaintiff asserts that its action "was and is based solely on its decision that the Condominium rules had to be evenhandedly enforced, and because [defendant] had sworn in her March 24, 2001 affidavit that she would abide by the house rules after the old dog died." Plaintiff claims that it was neutrally enforcing longstanding rules and regulations which defendant herself had acknowledged and sworn to abide by.

Regarding the tort of intentional infliction of emotional distress, the Court of Appeals of New York in *Howell v. New York Post Company*, 596 NYS2d 350 [1993], held:

> "The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress... [T]he 'requirements of the rule are rigorous, and difficult to satisfy. Indeed, of the intentional infliction of emotional distress claims considered by [the Court of Appeals of New York], every one has failed because the alleged conduct was not sufficiently

> outrageous.' 'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" [*internal citations omitted*]).

Plaintiff made a *prima facie* showing that there is an absence of any material issues of fact. Defendant has failed to proffer any evidence whatsoever to establish that plaintiff acted with the requisite outrageous conduct necessary to support a claim of intentional infliction of emotional distress (*Walentas v. Johnes*, 683 NYS2d 56 [1st Dept 1988]). In order to establish a claim that severe emotional distress was suffered, medical evidence must be proffered to support the claim. (*Id*). Plaintiff established that defendant failed to substantiate her counterclaim with any medical, psychological or psychiatric and/or hospital records, reports, or other medical evidence and has failed to provide authorizations allowing plaintiff to inspect such records despite having been ordered to provide same at a Preliminary Conference. Plaintiff also established that there was no intent to cause severe emotional distress. Additionally, the enforcement of contractual rights cannot constitute the basis for the recovery of intentional infliction of emotional distress, when there is no duty upon which liability can be based (*Wehringer v. Standard Security Life Insurance Co. of New York,* 454 NYS2d 984 [1982]). Finally, regarding the harassment counterclaim, [t]here is no cognizable common-law claim for malicious harassment (*Gentile v. Allstate Ins. Co.*, 732 NYS2d 116 [2d Dept 2001]).

Defendant failed to present any evidentiary, non-conclusory proof sufficient to establish the existence of material issues of fact (*see, Giuffrida v. Citibank Corp*., 100 NY2d 72 [2003]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Defendant submits a letter from defendant's treating psychiatrist, Victor Rudy, M.D., which letter indicates that defendant's "mental health is dependent to a significant degree on the ownership and companionship of a pet dog living with her in her condominium," and that plaintiff had actual knowledge of such letter defendant's proof does not demonstrate any extreme and outrageous conduct or intent to cause severe emotional harm on the part of the plaintiff. Accordingly, defendant failed to sufficiently raise a triable issue of fact on her counterclaim for intentional infliction of emotional distress. Additionally, defendant failed to present sufficient evidence that there is a common-law claim for harassment.

As there are no triable issues of fact on the counterclaim, a trial is not warranted on the counterclaim and the branch of

plaintiff's motion which seeks an Order pursuant to CPLR 3212(a) for summary judgment dismissing the defendant's counterclaim in its entirety is hereby granted.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: November 14, 2008

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Howard G. Lane, J.S.C.