

**50 Gramercy Park N. Owners Corp. v GPH Partners
LLC**

2016 NY Slip Op 31085(U)

June 8, 2016

Supreme Court, New York County

Docket Number: 103736/2011

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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50 GRAMERCY PARK NORTH OWNERS CORP.,

Plaintiff,

-against-

GPH PARTNERS LLC (SPONSOR), GPH
INVESTORS LLC, RFR GRAMERCY PARK LLC,
S/A GRAMERCY LLC, ABY ROSEN,
MICHAEL FUCHS, IAN SCHRAGER, and
MICHAEL OVERINGTON,

Defendants.

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DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Plaintiff, 50 Gramercy Park North Owners Corp., moves, pursuant to CPLR 3212(a), (e), and (g), for an order granting it partial summary judgment on the first, eighth, ninth, tenth, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and twenty-third causes of action as alleged in the amended complaint, on the grounds (i) that defendants, GPH Partners LLC (Sponsor) (the "sponsor"), GPH Investors LLC, RFR Gramercy Park LLC, S/A Gramercy LLC, Aby Rosen, Michael Fuchs, Ian Schrage, and Michael Overington (collectively, with the sponsor, "defendants"), have pleaded sham general denials of the facts alleged in these causes of action rendering the allegations supporting these claims admitted, and (ii) that there are no

disputed material issues of fact or meritorious defenses requiring a trial on those causes of action.

Background

Plaintiff is a residential cooperative corporation owned by individual shareholders. Pursuant to a Leasehold Cooperative Offering Plan (the "offering plan"), filed with the Attorney General on March 29, 2005, and effective on March 3, 2006, the sponsor offered to sell to plaintiff twenty-three apartment units and twenty-seven storage lockers. At the time of the sponsor's offer, the property at issue, a seventeen-story building located at 50 Gramercy Park North in Manhattan ("cooperative property"), was undergoing renovation and construction.

The cooperative property adjoins a nineteen-story building at 2 Lexington Avenue, which is designated in the offering plan as the "Hotel Property" ("hotel property"). The sponsor owns The Gramercy Park Hotel (the "hotel"), located on the hotel property pursuant to a ground lease with the fee owner of the hotel property.

When the parties entered into the offering plan, defendant sponsor controlled plaintiff's board of directors during an "initial control period." In December 2008, the sponsor relinquished control of plaintiff's board of directors to

plaintiff's shareholders. According to the amended verified complaint ("amended complaint"), however:

After moving into their Units in the Building, the Shareholders began experiencing conditions indicating that the design and construction of their individual Units and the Building was defective, and not constructed in a skillful manner, in that the workmanship and materials used in the construction did not (i) conform with the Offering Plan, (ii) applicable code and laws, (iii) the plans and specifications filed with the New York City Department of Buildings, and (iv) industry standards.

(Amended Complaint ¶ 27).

Plaintiff also claims that after the end of the initial control period when the sponsor relinquished control of the board of directors plaintiff discovered several actions defendants had taken during the initial control period that contravened the sponsor's contractual obligations to plaintiff and the shareholders. In that regard, plaintiff alleges that defendants engaged in self-dealing agreements in which they misappropriated for the hotel exclusive access and usage of the annex building spaces that had been expressly reserved for plaintiff and its shareholders. The amended complaint also sets forth allegations concerning improper billing of steam, water, and electricity.

Causes of Action at Issue

The amended complaint contains twenty-three causes of action. The causes of action at issue in this motion are as follows:

first cause of action -- breach of contract for construction defects

eighth cause of action -- breach of contract for improper billing of steam charges

ninth cause of action -- breach of contract for improper billing of water charges

tenth cause of action -- breach of contract for improper billing of electricity

twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth causes of action seek various declaratory judgments and injunctions

twenty-third cause of action alleges breach of fiduciary duty

Discussion

Plaintiff argues that defendants' denials of material allegations set forth in their answer are belied by defendants' admissions, by the offering plan, other documentary evidence, and affidavits plaintiff proffers on this motion. Plaintiff further contends that defendants' answer contains general denials of certain facts alleged in the amended complaint that are sham denials of facts which defendants may not legitimately deny.

In support of this motion, plaintiff relies on CPLR 3018(a) which deals with denials in responsive pleadings and provides:

A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no

responsive pleading is permitted they are deemed denied or avoided.

Plaintiff argues that defendants' sham denials should be deemed admissions of the material facts alleged in each of the causes of action at issue (Gilberg v Lennon, 193 AD2d 646 [2nd Dept 1993]) thereby warranting summary judgment in plaintiff's favor (Kirschbaum v Eschmann, 205 NY 127 [1912]). Plaintiff also refers to the Practice Commentaries to CPLR 3018(a) which provide:

When a denial of knowledge of information is obviously phony, it may invoke a dispositive motion, such as a motion for summary judgment under CPLR 3212. That will happen when the phony denial goes to the crux of the case, giving the responsive pleader's posture in the litigation a pervasive aura of frivolity or sham.

(C3018:3). The Practice Commentaries also provide, however, that "if the court can discern any possible basis on which to justify such a denial, it will -- as a matter of pleading -- be sustained"

(Id.).

To begin, defendants' answer to the amended complaint is dated June 14, 2012. Plaintiff's motion papers are dated September 3, 2015. Plaintiff does not explain why it took over three years to take issue with defendants' answer. In any event, plaintiff raises arguments concerning defendants' answer to

paragraphs 19, 20, 26, 73, 146, 147, 148, and 149 of the amended complaint.

After a review of these paragraphs in the amended complaint, the answer, and the corresponding portions of the offering plan, I find that defendants have not asserted improper denials to the allegations contained in these paragraphs of the amended complaint. Indeed, I find that defendants' argument in opposition -- that these allegations assert not only language quoted in the offering plan, but also legal conclusions -- persuasive and thus find a basis for which defendants were justified in denying the allegations in part. For instance, paragraphs 19 and 20 fall under the section of the amended complaint entitled "Representations and Promises Made in the Offering Plan." The quotations contained in paragraphs 19 and 20 of the amended complaint, however, are taken from a multi-paragraphed section of the offering plan entitled "Sponsor's Obligations With Respect to the Building." Thus, while the language quoted in the amended complaint may include sponsor's obligations under the offering plan, it mischaracterizes these provisions solely as sponsor's "representation[s]."

Similarly paragraph 73 of the amended complaint, found in the first cause of action for breach of contract based on construction defects, quotes selected portions of the purchase

agreements while asserting that the quoted language contains certain representations made by sponsor. Paragraph 73 refers to paragraphs 17.1 and 17.2 of the purchase agreements which concern certain obligations of sponsor. Paragraph 73 of the amended complaint, provides, however, that "the Sponsor represented" the items contained in sections 17.1 and 17.2 of the purchase agreements. As such, defendants' denial of these allegations in part is not an improper denial.

In addition, paragraph 26 provides that the "Sponsor and Principals of Sponsor (all Defendants herein) jointly and severally certified" pursuant to certain regulations or provisions of the Department of Law and General Business Law. The certification of the sponsor and principals shows, however, that defendant Overington was not a signatory. As such, defendants' denial in part to the allegations contained in paragraph 26 of the amended complaint is not improper.

Turning to the eighth cause of action for breach of contract for improper billing of steam charges, plaintiff focuses on paragraphs 146-149 of defendants' answer. A review of paragraphs 146-149 of the amended complaint and the answer fail to show that defendants' denials are improper. As defendants point out, paragraph 146 takes a quote from the offering plan, a document which is over 500 pages long, without indicating from where in

the offering plan the quote was taken. And paragraphs 147-149 flow from paragraph 146.

The ninth cause of action for breach of contract based on improper billing of water charges consists of, in relevant part, paragraphs 155 through 162. Plaintiff refers to pages 168 and 49 of the offering plan in support of its allegations contained in paragraphs 155 through 162 of the amended complaint. The language plaintiff relies upon at page 168 of the offering plan is "[h]otel spaces are provided with sub-meters." Plaintiffs argue that defendants' denial that "[t]he Offering Plan indicated that the Hotel was sub-metered to ascertain hot water charges" (Amended Complaint ¶ 155) is belied by the above quoted language from the offering plan, and, therefore, is an improper denial. In addition, plaintiffs refer to page 49 of the offering plan wherein it states "[w]ater consumption for the Cooperative will be measured by a single master water meter." Plaintiff also argues that this quote demonstrates that defendants' denial that "under the Offering Plan, therefore, the Cooperative would pay for its hotel water charges and the Hotel would pay for its hot water charges" (Amended Complaint ¶ 156), is belied by the offering plan. The arguments are unavailing.

Plaintiffs' allegations in the paragraphs at issue are not quoted directly from, and referred to, in the offering plan.

Accordingly, plaintiff fails to demonstrate that defendants' denial of these allegations was improper.

That branch of plaintiff's motion for summary judgment on the tenth cause of action for breach of contract based on improper billing of electricity is denied. The tenth cause of action consists of, in relevant part, paragraphs 164 through 171. Similar to plaintiff's argument on the ninth cause of action, plaintiff refers to page 172 of the offering plan wherein it states "[t]he Hotel and Restaurant Easement Areas are also furnished with their own independent Utility Company meter," and argues that defendants' denial that "the Offering Plan indicated that the Hotel and Restaurant will be furnished with their own independent Utility Company meter" (Amended Complaint ¶ 164) is belied by the language on page 172 of the offering plan. Paragraph 164 of the amended complaint, however, does not refer to exactly where in the offering plan these allegations were "indicated," nor does paragraph 164 directly quote the offering plan.

Additionally, plaintiff's argument that defendants' denial that "under the Offering Plan, therefore, the Cooperative would pay for its electricity charges and the Hotel would pay for its electricity charges" is belied by page 48 of the offering plan wherein it states "[t]he budget amount for electricity represents

the estimated consumption for the Common Areas of the Building" is equally unavailing. This Court declines to find defendants' denial of paragraph 165 of the amended complaint improper given the allegation does not refer to any particular provision of the offering plan, nor directly quotes the offering plan.

In the twelfth cause of action, plaintiff seeks a judgment declaring that two license agreements between the sponsor controlled board of directors and the hotel granting the hotel a license to use an annex bicycle room and install equipment in an annex compactor room are void (Amended Complaint ¶¶ 182, 183, and 191). Plaintiff argues that defendants' denials in response to paragraphs 181-191 of the amended complaint are improper given the license agreements, annexed as exhibits 6 and 7 to the Desiderio affidavit, contradict the offering plan representation regarding the annex compactor room and the annex bicycle room.

Plaintiff's motion for summary judgment on the twelfth cause of action based on defendants' allegedly improper denials is denied. The twelfth cause of action refers to the purchase agreements, which allegedly granted the shareholders exclusive use of the two annexes, without referring to any particular provision of the purchase agreements. Further, while plaintiff asserts that the license agreements violate the offering plan (Amended Complaint ¶ 189), that paragraph also alleges that the

license agreements "were made by self-interested directors who had the Sponsor Defendant's interests, and not the Plaintiff's, in mind" (Amended Complaint ¶ 189). Defendants' denial of plaintiff's allegation as to their motivation is not improper.

In the thirteenth cause of action, plaintiff seeks an injunction directing and compelling defendants to restore the annex bicycle room and annex compactor room to plaintiff and its shareholders (Amended Complaint ¶ 193). Defendants' response to this claim is "[d]efendants make no answer to Paragraph 193 of the Amended Complaint since this Paragraph makes not factual or legal allegations" and to the extent it could "be construed as containing factual allegations against the Defendants, same are denied" (Answer ¶ 193). Based on the determination that defendants' denials to the twelfth cause of action are not improper, defendants' answer to the thirteenth cause of action is also not improper.

The fourteenth and fifteenth causes of action for a declaratory judgment and an injunction concern an allegedly improper cooling tower installed by defendants. Plaintiff seeks a declaration, inter alia, that defendants violated the offering plan by installing a cooling tower that emits excessive noise, that defendants are responsible for the repair or replacement of the cooling tower, and that defendants are required to reimburse

plaintiff for all costs associated with the fines or legal fees incurred by plaintiff based on the cooling tower (Amended Complaint ¶ 199).

In the fifteenth cause of action, plaintiff also seeks to compel defendants to replace or repair the cooling tower to render it compliant with New York City codes and directing defendants to reimburse plaintiff for all costs and fees for any fines leveled against plaintiff for the cooling tower.

The denials plaintiff takes issue with concerning paragraphs 195 and 197 of the amended complaint are not improper. Paragraph 195 provides that while page 170 of the offering plan contains that the language "new 200 ton cooling tower (BAC Model VTL - 209-0 or equal) located on the roof of the elevator machine room," there is nothing on page 170 to indicate this was the "Sponsor's promise" to provide as alleged in paragraph 195 of the amended complaint. Thus, defendants' admission in part and denial in part is not improper. In addition, defendants' assertion that they "are without knowledge and information sufficient to form a response to the allegation" that the cooperative received fines from the Environmental Control Board of the City of New York as well as an October 2001 cease and desist order is not an improper response.

In the sixteenth and seventeenth causes of action for a declaratory judgment and injunction, plaintiff seeks a declaration that defendants have no entitlement to the exclusive use to certain areas designated as shared space between the parties. The injunction sought in the seventeenth cause of action is to compel defendants to cease their exclusive use of the areas designated as shared space. Plaintiff alleges in the amended complaint that page 153 of the offering plan "delineates that certain space will be shared by the Plaintiff and the Hotel" (Amended Complaint, ¶ 203). Given that page 153 of the offering plan provided in this record is a cover sheet, this Court cannot ascertain whether page 153 "delineates that certain space will be shared by Plaintiff and the Hotel" (Amended Complaint, ¶ 203). Accordingly, that branch of plaintiff's motion concerning the sixteenth and seventeenth causes of action is denied.

In the twenty-third claim for breach of fiduciary duty, plaintiff alleges that throughout the events outlined in the amended complaint defendants were fiduciaries to plaintiff and the individual shareholders, and that defendants breached their fiduciary duties to plaintiff and the individual shareholders (Amended Complaint, ¶ 233). Defendants properly responded in the answer as follows: "This paragraph contains conclusions of law and not allegations of operative fact. As such, no response is

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required. To the extent this paragraph can be construed as containing allegations of fact, the same are denied" (Answer, ¶ 233). Based on this proper denial, that branch for summary judgment on the twenty-third cause of action is denied.

Accordingly, the grounds upon which plaintiff bases its motion for summary judgment, i.e., improper denials contained in the answer, are rejected, and the motion is denied. Plaintiffs inclusion of various affidavits in support of this motion does not change the outcome. Plaintiff proffers the affidavit of Arthur Ostafin, who is the account executive at plaintiff's property management company. Ostafin is responsible for the property management and administration, including the day-to-day operations of the building for plaintiff and its shareholders. Ostafin's affidavit outlines the report of John Flynn, P.E., who was engaged by plaintiff to conduct an investigation of the interior and exterior of the building. Ostafin goes through Flynn's findings and the repairs and expenses plaintiff claims it incurred to remedy defective conditions. Ostafin also discusses the cooling tower issue and violations leveled against plaintiff as a result thereof, as well as the allegations that go to alleged improper billing of the hotel's utilities and the improper use of plaintiff's space.

Jonathan J. Miller, co-founder of Miller Samuel Inc., a real estate appraisal services firm, also provides an affidavit. Plaintiff engaged Miller to conduct an investigation and provide an opinion regarding the sales and rental value of the annex compactor room and annex bicycle storage room.

Plaintiff also includes an affidavit from Avdulah Al Deljanin, plaintiff's superintendent since March 16, 2009. Deljanin provides affidavit testimony on the bicycle storage room, compactor room, and the electrical room, as well as other shared spaces.

Flynn also provides an affidavit, as well as his "Engineering Survey," dated June 12, 2009. Flynn asserts that plaintiff engaged him to conduct an investigation into the interior and exterior of the residential cooperative building and render an opinion on the following:

- a. the apparent condition of the building, and its compliance with the offering plan dated March 29, 2005 ... and amended February 9, 2007, provided by Defendant Sponsor GPH Partners LLC;
- b. the Building's compliance with applicable rules of the City of New York, and
- c. the estimated costs to repair, replace and/or modify the existing systems of the Building found to be deficient relative to the Offering Plan

(Flynn Aff., 6/29/15, ¶ 8). Following the issuance of Flynn's June 2009 report, he claims "[p]laintiff directed [him] to

compile and report on a list of costs to address systemic issues and problems concerning the Building, which had been uncovered by Plaintiff during the three months following the issuance of the June 2009" report (Flynn Aff., ¶ 14). Flynn annexes both his June 2009 report and his September 2009 report to his affidavit.

Lastly, plaintiff proffers the affidavit of Douglas DiCeglio, the CEO and president of Utility Rate Analysis Consultants Urac Corp. Plaintiff engaged DiCeglio in March 2012 to conduct analysis and provide an opinion of the electric use and charges used by the hotel. DiCeglio provides a report of his analysis, dated March 6, 2012, and annexes the report to his affidavit.

In opposition, defendant proffers the affidavit of Michael Overington, who is the vice chairman of the Ian Schragger Company. He also claims that on January 1, 2007 and February 1, 2007, he was vice president of plaintiff and the authorized signatory for defendant sponsor. Overington executed the compactor room license agreement and the annex bicycle room license agreement at issue in plaintiff's amended complaint. Overington's affidavit disputes the claims set forth in the aforementioned affidavits provided by plaintiff. Overington also claims that he provided Flynn's 2009 report to defendants' "consultants who drafted a response, disputing and questioning the Co-op's engineer's

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findings and conclusions" (Overington Aff., ¶ 20). Overington claims defendants' consultants' "report was sent to the Co-op's attorney on or about January 4, 2010" (Overington Aff., ¶ 20).

Overington's affidavit sufficiently raises triable issues of fact, especially in light of the fact that discovery has not been completed. Defendants point out that inspection of the property has not been completed and there have been no depositions at this point. As such, plaintiff's motion is premature.

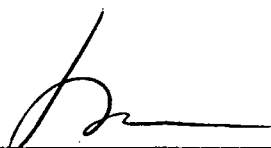
Accordingly, it is hereby

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that counsel are to appear for a status conference on Thursday, July 14, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/8/16


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.