

44-46 W. 65th Apt. Corp. v Stvan

2004 NY Slip Op 30325(U)

February 27, 2004

Supreme Court, New York County

Docket Number: 122519/00

Judge: Alice Schlesinger

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

PRESENT:

~~ALICE SCHLESINGER~~

Justice

PART 16

JA Part 16

44-46 West 65th

INDEX NO.

12259/00

MOTION DATE

MOTION SEQ. NO.

12

MOTION CAL. NO.

Stuen

- v -

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

FILED

MAR 18 2004

**MOTION IS DECIDED IN ACCORDANCE WITH
NEW YORK COUNTY CLERKS OFFICE
ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: FEB 27 2004

Alice Schlesinger

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

ALICE SCHLESINGER, S.S.E.

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 16

..... X
44-46 WEST 65TH APARTMENT CORP.,

Plaintiff.

Index No. 122519/00

- against -

Motion Seq. 011

THOMAS STVAN and PAIGE TAYLOR,

Defendants.

X

SCHLESINGER, J:

This controversy among shareholders of a cooperative corporation, located on West 65th Street, is finally ready to proceed to trial. The dispute, an extremely acrimonious one, began in 2000, when the plaintiff corporation alleged that the defendants, recent purchasers of shares for units 1F and 1R, which they were combining, were violating the contract they had signed. The contract involved major renovations to the units and the corporation alleged that defendants' breach of the contract was endangering the building's structure. As it turned out, when the matter was first heard, there was no threat of imminent danger to the building, and the requested injunctive relief by the plaintiff being unnecessary, was denied.

Unfortunately the dispute exacerbated with angry charges exchanged by both sides. In March of 2003, this Court heard and decided competing motions for summary judgment. I dismissed the plaintiffs second cause of action sounding in fraud and allowed the first and third, for breach of contract and attorneys' fees, to continue. With regard to the counterclaims asserted by the defendants, I dismissed only the seventh, the last, which sought an injunction vis-a-vis a separate apartment, an issue which had become moot.

However, almost a year before these motions and most significantly for the latest application now before me, one by the plaintiff, on virtually the eve of trial, the corporation filed a note of issue, on April 16, 2002 and within that document requested a trial by jury. Defendants, who appear to be extremely well-informed parties as to this litigation, were undoubtedly aware of the jury waiver clause but chose not to object to the plaintiff's choice.

In the instant motion, pursuant to §4102(a) and (e) of the CPLR, plaintiff asks permission to now withdraw that choice and have the matter proceed to trial in March, before a judge. No reasons are put forward for this change of position. Rather, counsel points to the waiver clause in the leases, signed by the defendants, states that the defendants had interposed an equitable counterclaim, and argues that this relief should be granted since it would result in no undue prejudice to the defendants.

But the defendants see it otherwise. In their strenuous opposition, they emphatically declare that they do not consent to this application. They then go on to explain that because of the acrimony of the parties and the history of the action, they would have greater trust and confidence in a trial before a jury, particularly since that is what they had been preparing for these last two years.

CPLR §4102(a), the controlling rule here, emphatically establishes that a party who wishes to withdraw its jury demand, as the plaintiff does here, may not do so "without the consent of the other parties, regardless of whether another party previously filed a note of issue without a demand for trial by jury."

CPLR §4102 concerns itself with how the right to a trial by jury is implemented. It is a right that must be affirmatively demanded. Because of that requirement and the possibility of error in making such a demand or inadvertently failing to make such a

demand, there is a provision for obtaining relief from the court which “may relieve a party from the effect of failing to comply with this section if no undue prejudice to the rights of another party would result.” [Subdivision (e) of 4102].

But here, the movant wishes to stand the statute on its head and use the relief exception to overcome the thrust of the rule, which requires consent from the adversary when a party changes its position, and by so doing may deny that adversary a trial by jury. The exception, as is pointed out in McKinney’s Commentaries, seeks to excuse, for the most part “inadvertent waivers.” Professor David Siegel specifically says in this regard, “If a waiver of trial by jury is contained in a contract for example, and a jury is nevertheless demanded by one party without objection by any other, trial by jury may proceed.” In other words, a jury waiver may be waived, as it was here, and a trial by jury may proceed as it will here. Waivers that appear in leases can be waived if not timely objected to. (*Import Alley of Mid-Island, Inc. v. Mid-Island Shopping Plaza, Inc.*, 103 AD2d, 2d Dep’t, 1984). What is particularly egregious here is that the plaintiff did not just wait to move to strike an improper jury demand, but itself made the jury demand, which it now chooses to withdraw.

This is a bitterly fought dispute over whether or not a contract for major renovations to two apartment units was violated and if it was, whether those were material violations and whether damages were suffered. The resolution of these issues is fraught with considerations involving the credibility and motives of the parties and their witnesses. Thus, it is a type of action commonly tried before a jury, with each side making accusations against the other and asking for compensation.

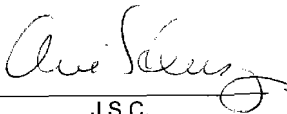
Under these circumstances, the burden should not fall on the defendants to show explicit prejudice and perhaps reveal their trial strategy, but rather on the moving plaintiff,

who after two years has reversed its position and seeks to deprive its adversary of a right to a jury trial. The movant has failed to do that and thus has failed to convince me to use my discretion and undo the consequences of its original choice.

Finally, since no equitable counterclaims remain, the defendants emphatically do not consent to the application, and at this late stage I find prejudice would inure to the non-moving parties, I decline to grant the motion and it is denied. See *Freidus v. Eisenberg*, 110 AD2d 800 (2nd Dep't, 1985).

Dated: February 27, 2004

FEB 27 2004



J.S.C.
ALICE SCHLESINGER

FILED
MAR 08 2004
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COUNTY CLERK'S OFFICE