Colonial Woods Condominium v Whispering Pines at Colonial Woods Condominium II
2007 NY Slip Op 32748(U)
September 4, 2007
Supreme Court, Suffolk County
Docket Number: 0010433/2005
Judge: Elizabeth H. Emerson
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SHORT FORM ORDER

INDEX
NO.: 10433-05

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 12-18-06
SUBMITTED: 4-25-07
MOTION NO.: 002-MG
003-MOT D

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COLONIAL WOODS CONDOMINIUM,

Plaintiff,

-against-

WHISPERING PINES AT COLONIAL WOODS CONDOMINIUM II and BOARD OF MANAGERS OF WHISPERING PINES AT COLONIAL WOODS CONDOMINIUM II, individually and on behalf of all homeowners of WHISPERING PINES AT COLONIAL WOODS CONDOMINIUM II,

Defendants.

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Upon the following papers numbered 1 to 36 read on this motion to amend and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-12 ; Notice of Cross Motion and supporting papers 13-25; Answering Affidavits and supporting papers 26-36 ; Replying Affidavits and supporting papers ___; it is,

ORDERED that the motion by the defendants for leave to serve a amended answer is granted, and the amended answer is deemed served as of the return date of this motion; and it is further

ORDERED that the cross motion by the plaintiff for partial summary judgment in its favor is granted on the issue of liability only; and it is further

ORDERED that the cross motion is otherwise denied, and the parties are directed to proceed to trial on the counterclaims and on the issue of damages.

This is a dispute between two adjoining condominiums over the cost of operating and maintaining shared recreational facilities located solely on the plaintiff's property. In their answer, the defendants asserted a counterclaim for an accounting of the funds allocated for the recreational facilities during the years 1999 through 2005. The defendants now seek to amend their counterclaim for an accounting to include the years 1985 through 2006. They also seek to add a

second counterclaim to recover damages due to the plaintiff's refusal to open the pool and other recreational facilities during the summer of 2006. The plaintiff opposes the motion on the grounds that it would be prejudiced by the defendants' delay in moving to amend the answer and that the defendants lack standing to assert the second counterclaim. The plaintiff also cross moves for partial summary judgment in the amount of $113,996.01.

It is well settled that leave to amend or supplement a pleading should be freely given absent a showing of prejudice or surprise to the opposing party (*see*, CPLR 3025 [b]; **Zacher v Oakdale Islandia Ltd. Partnership**, 211 AD2d 712; **O'Neal v Cohen**, 186 AD2d 639). Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine (**Edenwald Contracting Corp. v City of New York**, 60 NY2d 957). Prejudice may be found when a party has incurred some change in position or hindrance in the preparation of its case that could have been avoided had the original pleading contained the proposed amendment (*see*, **Whalen v Kawasaki Motors, Corp., U.S.A.**, 92 NY2d 288, 293).

The court finds that the original answer could not have contained the proposed amendments since they are based upon information obtained through discovery and on events that occurred during the summer of 2006. Morever, the plaintiff has failed to demonstrate some change in position or hindrance in the preparation of its case that could have been avoided. The plaintiff's argument that the amendments will delay the final resolution of this case and that it will be forced to bear the cost of operating and maintaining the shared recreational facilities for an indefinite period of time are insufficient. Any additional expenses that the plaintiff may be entitled to recover due to delay are recoverable as damages.

Real Property Law § 339-dd provides that actions may be brought by the board of managers on behalf of two or more of the unit owners with respect to any cause of action relating the common elements or more than one unit. The plaintiff contends that the defendants' board of managers does not have standing to maintain the second counterclaim because it does not relate to the common elements or more than one unit. The plaintiff argues that, although the pool and recreational facilities are common elements of the plaintiff condominium, they are not common elements of the defendant condominium.

Real Property Law § 339-e (3) (c) provides, in pertinent part, that the term "common elements" includes recreational or community facilities, unless otherwise provided in the declaration. Moreover, Real Property Law § 339 (3) (g) and (h) defines "common elements" as including facilities designated as such in the declaration and all other parts of the property necessary or convenient to its existence, maintenance, and safety, or normally in common use. Real Property Law § 339-e (11) defines "property" of a condominium as including all easements, rights, and appurtenances belonging thereto and all other property, personal or mixed, intended for use in connection therewith.

The plaintiff has failed to include in its papers in opposition to the defendants' motion a copy of the declaration for the defendant condominium. The court, therefore, finds that the plaintiff has failed to meet its burden of establishing that the pool and recreational facilities are

not common elements of the defendant condominium within the meaning of Real Property Law § 339-e (3) (c). Moreover, paragraph 12(a) of the 1984 agreement between the parties provides that all owners of the homes within the plaintiff condominium together with all owners of the homes within the defendant condominium, as well as their family members, guests, or lessees, shall have the right in common to use the recreational facilities. Paragraph 12(h) grants an easement of ingress and egress to and from the recreational facilities over all private streets, roads, walks, sidewalks, pathways and roadways of the plaintiff condominium for the benefit of the residents of the defendant condominium, their guests or lessees. Thus, the recreational facilities could be designated as common elements of the defendant condominium within the meaning of Real Property Law § 339 (3) (g) and (h), and the plaintiff's argument that the defendants lack standing to assert the second counterclaim is specious. Accordingly, the motion is granted.

A major issue in this action is whether the defendants possess a right to approve the annual budget for the recreational facilities. It is undisputed that the 1984 agreement between the parties provides for the plaintiff alone to determine the annual budget and to collect from the defendants their proportionate share thereof. It is also undisputed that, in 1985, the 1984 agreement was amended as follows:

> In order to further clarify the provisions of Paragraph 12 of the March 28, 1984 agreement, the parties agree to fix the annual budget of the recreational facilities on the basis of a calendar year commencing January 1 and ending December 31 of each year.

The defendants contend that this amendment gives them a right of approval over the budget.

The plaintiff moves for partial summary judgment in the amount of $113,996.01, which represents the defendants' proportionate share of the actual expenses for the recreational facilities for the year 2005. The plaintiff contends that the defendants' treasurer, Susan Lee, acknowledged the plaintiff's entitlement to such amount at her deposition. In opposition, the defendants contend that the plaintiff breached the 1985 amendment by unilaterally adopting the budget without their approval. Accordingly, the defendants contend that the plaintiff's breach relieves them of their obligation to perform and tender payment.

When, as here, the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms (*see,* **W.W.W. Assocs. v Gianconieri**, 77 NY2d 157, 162; **Automotive Mgmt. Group v SRB Mgmt. Co.,** 239 AD2d 450; **Matter of Ajar**, 237 AD2d 597). In the absence of any ambiguity, there are only documents to interpret, and the issue is one of law to be determined by the court (*see*, **Automotive Mgmt. Group v SRB Mgmt. Co.**, *supra*).

The court finds that the parties' 1985 amendment is not reasonably susceptible to more than one interpretation and is, therefore, unambiguous (*see*, **Chimart Assoc. v Paul** 66, NY2d 570). Paragraph 12 (b) of the parties' 1984 agreement provides that the plaintiff's board of managers shall from time to time, but at least annually, fix and determine the budget representing the sum or sums necessary and adequate for the continued operation of the recreational facilities

and shall send a copy of the budget to the defendants. Contrary to the defendants' interpretation thereof, the 1985 amendment simply establishes that the annual budget referred to in paragraph 12 (b) of the 1984 agreement will be fixed on the basis of a calendar year commencing January 1 and ending December 31 of each year. The defendants, in focusing on the phrase "the parties agree to fix the annual budget of the recreational facilities," ignore the remainder of that sentence. Courts should be extremely reluctant to interpret an agreement as impliedly stating something that the parties have neglected to specifically include. Hence, the courts may not by construction add or excise terms, nor distort the meaning of those used, and thereby make a new contract for the parties under the guise of interpreting the writing (*see*, **Vermont Teddy Bear Co. v 538 Madison Realty Co.**, 1 NY3d 470, 475; **Reiss v Financial Performance Corp.**, 97 NY2d 195, 199). Applying these principles to the case at bar, the court finds that the 1985 amendment does not give the defendants a right of approval over the annual budget for the recreational facilities. Thus, the plaintiff's cross motion for partial summary judgment is granted on the issue of liability.

The plaintiff's claim for damages in the amount of $113,996.01 is inseparable from and inextricably intertwined with the relief sought by the defendants on their counterclaim for an accounting (*see*, **Town of West Seneca v American Ref-Fuel Co. of Niagara**, 1 AD3d 944, 945). When, as here, a viable counterclaim arises from the same underlying transaction as is involved in the main action and is inseparable from or inextricably intertwined with the transaction, summary judgement should be denied (*see*, **Yoi-Lee Realty Corp. v 177th St. Realty Assoc.**, 208 AD2d 185, 189). Accordingly, the cross motion is denied insofar as the plaintiff seeks damages in the amount of $113,996.01, and the parties are directed to proceed to trial on the counterclaims and on the issue of damages.

HON. ELIZABETH HAZLITT EMERSON

DATED: **September 4, 2007**

____
J. S.C.