

Town of Huntington v American Mfrs. Mut. Ins. Co.

2007 NY Slip Op 33658(U)

October 20, 2007

Supreme Court, Suffolk County

Docket Number: 0027910/2005

Judge: Peter Fox Cohalan

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INDEX # 27910-05
 RETURN DATE: 5-22-06 (001)
 7-5-06 (002 & 003)
 9-20-06 (004)
 MOT. SEQ. #001, 002, 003 & 004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
 THE TOWN OF HUNTINGTON,

Plaintiff,

-against-

AMERICAN MANUFACTURERS MUTUAL
 INSURANCE COMPANY, XL SPECIALTY
 INSURANCE COMPANY, S.B.J. ASSOCIATES, LLC,
 GREENS AT HALF HOLLOW, LLC and HALF
 HOLLOW CONSTRUCTION CO., LLC.,

Defendants.
 -----x

CALENDAR DATE: April 4, 2007
 MNEMONIC: MD; XMG; MWDN; MWDN

PLTF'S/PET'S ATTORNEY:

Town Attorney - Town of Huntington
 Town Hall
 100 Main Street
 Huntington, NY11743

DEFT'S/RESP ATTORNEY:

Harras Bloom & Archer
 445 Broad Hollow Road
 Melville, NY 11747

Upon the following papers numbered 1 to 128 read on this motion to dismiss and to amend complaint _____; Notice of Motion/Order to Show Cause and supporting papers 1-15; 46-51; 59-78; 85-111 ; Notice of Cross-Motion and supporting papers _____; Answering Affidavits and supporting papers 16-33; 52-58; 79-84; 112-115 ; Replying Affidavits and supporting papers 34-41; 116-122 ; Other 42-45; 123-128 ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that these motions by the defendants to dismiss the plaintiff's complaint pursuant to CPLR §3211 (a)(1) and (7), a motion by the plaintiff to amend its complaint pursuant to CPLR §3025(b), a motion by the plaintiff, Town of Huntington, (hereinafter Town), for summary judgment pursuant to CPLR §3212 and motion by the petitioner Country Pointe at Dix Hills Homeowners Association (hereinafter Country Pointe), seeking to intervene in this action pursuant to CPLR §1012(a)(2) and (3) are hereby decided as follows:

ORDERED that the defendants, American Manufacturers Mutual Insurance Company, XL Specialty Insurance Company, SBJ Associates, LLC, Greens at Half Hollow, LLC, and Half Hollow Construction Co., LLC's (hereinafter The Greens), motion to dismiss the plaintiff Town's complaint (seq. #001) pursuant to CPLR §3211 (a)(1) and (7) on documentary evidence and for failure to state a cause of action upon which relief may be granted is hereby denied;

ORDERED that the Town's motion (seq. #002) pursuant to CPLR §3025(b) seeking to amend the supplemental summons and amended verified complaint to assert a fifth cause of action as against the performance bond #SB0084196 executed by the defendant, XL Specialty Insurance Company, in the amount of \$625,000.00 is hereby granted. The second amended complaint annexed to the moving papers (exhibit B) is deemed served upon service of a copy of this Court's order on the defendants;

ORDERED that the motion by the Town for summary judgment pursuant to CPLR §3212 on its complaint (seq. #003) seeking to seize the performance bonds executed by the defendants for the defendants' failure to complete work on the project know as "The Greens at Half Hollow" is hereby withdrawn at this time without prejudice to renew at a later date;

ORDERED that the motion by the petitioner, Country Pointe at Dix Hills Homeowner's Association, pursuant to CPLR §1012(a)(2) and (3) to intervene in this action (seq. #004) on the grounds that it has a real and substantial interest in the outcome of this action on the performance bonds is hereby withdrawn.

The Greens is a planned unit development constituting the largest residential development project in the Town. The Greens consists of a 1,144 unit residential development for occupancy by persons fifty five (55) years and older located in Melville, Suffolk County on Long Island, New York. This action (Index #27910-05) is one of a number of related actions presently pending before this Court under Index #14517-06, #17515-06, #24804-06 and #20446-06 which all involve issues surrounding the planned development of The Greens housing complex. The Town instituted this lawsuit seeking to seize the performance bonds posted by the defendants for non-compliance with approved site plans and a failure to complete required site plan improvements called for within the development plans. The underlying reason for the numerous lawsuits and motions [seventeen pending motions at this point on five actions] in this case and related matters is The Greens project which has encountered a significant number of problems and complaints centering on drainage, grading, construction of a community center and other site plan improvements not successfully completed in accordance with the approved site plan.

In this action, the Town's complaint alleges four causes of action. The first cause of action seeks to seize performance bond #3SE01217900, executed by American Manufacturers Mutual Insurance Company as surety and SBJ Associates in the amount of \$115,000.00 to insure removal of the foundations for model homes at The Greens. The second cause of action is against performance bond #3SE01219500 executed by American Manufacturers Mutual Insurance Company as surety for The Greens in the amount of \$8,889,160.00 plus a cash bond of \$274,922.00 to guarantee completion of certain on site plan improvements involving phase 1 of the project, inter alia, curbs, sidewalks, basins, manholes and other improvements. The third cause of action seeks to levy on performance bond #3SE030755 executed by American Manufacturers Mutual Insurance Company as surety for The Greens in the amount of \$2,589,952.00 plus a cash bond of \$80,102.00 for on site improvements involving phase 2 of the project, inter alia, curbs, sidewalks, basins, manholes and other improvements. The fourth cause of action seeks to levy on performance bond #SB0084614 executed by XL Specialty Insurance Company as surety and SBJ Associates in the amount of \$1,000,000.00 to guarantee performance and completion of a related project called the "Sanctuary Project" on Ruland Road consisting of approximately 120 one bedroom, non-age restricted affordable homes for lower income families.

The Town also seeks permission by way of motion (seq. #002) to serve a second amended complaint containing a fifth cause of action to levy on performance bond #SB0084196 executed by XL Specialty Insurance Company as surety and SBJ Associates in the amount of \$625,000.00 which bond was posted to guarantee the performance and construction of 100 units of low income rental housing to be located on lot 74 (273.31 acres) of The Greens.

The defendants initially move to dismiss the Town's complaint pursuant to CPLR §3211 (a)(1) and (7) on documentary evidence and for failure to state a cause of action upon which relief (seq. #001) may be granted arguing that the Town's right to sue on the performance bonds in the first three causes of action does not lie because The Town has issued Certificates of Occupancy, (hereinafter COs), to the homeowners of over 1,044 homes located in The Greens and the Town Code expressly provides that a CO can only be issued if the required on site improvements have been completed. The Greens also argue that as to the performance bond issued on the "Sanctuary Project" under the fourth cause of action, the right to sue has not yet arisen because the Town has failed to grant final site plan approval for the "Sanctuary Project". The Town argues in opposition that on this motion to dismiss it has alleged non-compliance with the approved site plans and failures to complete required site plan improvements and submits the affidavits of the Town's Civil Engineer, Peter Wolpensinger and its Environmental Planner, Charles Mangano, to document numerous construction deficiencies involving drainage, pooling of water, grading issues, berms, traffic signage in violation of New York State Law, a failure to construct the community center/clubhouse and other dangerous slopes and land use deficiencies posing hazards to the senior citizen population who reside at The Greens. The Town also argues that the "Sanctuary Project" has stalled because the defendants have failed to take any action to address the Town Planning Department's communications on the last map submission and not because of a failure of the Town to act on the site plan approval.

There were two additional motions by the Town for summary judgment pursuant to CPLR §3212 on its complaint seeking seizure of the performance bonds (seq. #003) and a motion to intervene by Country Pointe pursuant to CPLR §1012(a)(2) and (3) which motions have been withdrawn during the conference and oral argument of all the motions and related actions in this case on April 4, 2007. Those two motions (seq. #003 & 004) are marked withdrawn at this time without prejudice. Country Pointe has also sought to intervene in the related 2006 action under Index #14517-06 as a result of certain lot development claims common to both Country Pointe and The Greens, i.e. the community center/clubhouse and pool.

For the following reasons outlined below, The Greens' motion to dismiss the Town's complaint (seq. #001) pursuant to CPLR §3211 (a)(1) and (7) on documentary evidence and for failure to state a cause of action upon which relief may be granted is hereby

denied in its entirety. The Town's motion (seq. #002), pursuant to CPLR §3025(b) seeking to amend the supplemental summons and amended verified complaint to assert a fifth cause of action as against the performance bond #SB0084196 executed by the defendant, XL Specialty Insurance Company, in the amount of \$625,000.00, is hereby granted. The second amended complaint annexed to the moving papers (exhibit B) is deemed served upon service of a copy of this Court's order on the defendants.

Upon a motion to dismiss a complaint for legal insufficiency, the test to be applied is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action know to our law can be discerned from its averments. **Frank v. Daimler Chrysler Corp.**, 292 AD2d 118, 741 NYS2d 9 (1st Dept. 2002); **Gruen v. County of Suffolk**, 187 AD2d 560, 590 NYS2d 217 (2nd Dept. 1992); **Moore v. Johnson**, 147 AD2d 621, 538 NYS2d 28 (2nd Dept. 1989); **Conroy v. Cadillac Fairview Shopping Center Properties**, 143 AD2d 726, 533 NYS2d 446 (2nd Dept. 1988). Furthermore, the complaint should be liberally construed in the plaintiff's favor and the facts alleged in the complaint should be assumed to be true. **P.T. Bank Central Asai v. ABN Amro Bank N.V.**, 301 AD2d 373, 754 NYS2d 245 (1st Dept. 2003); **Palazzolo v. Herrick, Feinstein, LLP**, 298 AD2d 372, 751 NYS2d 401 (2nd Dept. 2002); **Holly v. Pennysaver Corp.**, 98 AD2d 570, 471 NYS2d 611 (2nd Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. **McGill v. Parker**, 179 AD2d 98, 582 NYS2d 91 (1st Dept. 1992); **Marini v. D'Atolito**, 162 AD2d 391, 557 NYS2d 45 (1st Dept. 1990).

As noted by the Court in **Pace v. Perk**, 81 AD2d 444, 440 NYS2d 710 (2nd Dept. 1981) with regard to a motion to dismiss pursuant to CPLR 3211

“ Upon such a motion to dismiss a complaint for legal insufficiency, the court must assume that the allegations are true (**Denihan Enterprises v. O'Dwyer**, 302 NY 451, 458, 99 NE2d 235), and must deem the complaint to allege whatever can be imputed from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein (**Condon v. Associated Hosp. Service of New York**, 287 NY 411, 40 NE2d 230). In making its analysis, the court is not bound by the constructions and theories of the parties (see, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:24). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action know to our law can be discerned from its averments (CPLR 3013; **Foley v. D'Agostino**, 21 AD2d 60, 62-65, 248 NYS2d 121; **Guggenheimer**

v. Ginzberg, 43 NY2d 268, 274-275, 401 NYS2d 182, 372 NE2d 17). Where the motion to dismiss for failure to state a cause of action is made under CPLR 3211, the plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of his complaint (Rovello v. Orofino Realty Co., 40 NY2d 633, 389 NYS2d 314, 357 NE2d 970)."

The rules governing the court's review of a motion to dismiss pursuant to CPLR 3211 (a)(7) are both simple and straight forward. The court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. Guggenheimer v. Ginzburg, 43 NY2d 268, 401 NYS2d 182 (1978); One Acre Inc. V. Town of Hempstead, 215 AD2d 359, 626 NYS2d 226 (2nd Dept. 1995). Although as the court noted the plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint, nevertheless, if submitted by the plaintiff, they "may be used freely to preserve inartfully pleaded, but potentially meritorious claims" (Rovello v. Orofino Realty Co., supra, 635, 389 NYS2d 314, 316).

With these general principles in mind, the Court, upon review of the Town's complaint and the allegations contained therein, finds that the Town has set forth sufficient claims to withstand a motion to dismiss on both documentary evidence grounds and the failure to state a cause of action upon which relief may be granted. The Greens' narrow argument that the Town's issuance of COs to the homeowners to occupy their homes somehow entitles the Greens to assert that all site plan improvements or non-improvements are acceptable to the Town is flawed and ignores the status of this problem plagued residential development. The Town Code §87-29 for the issuance of Cos, provides:

"Upon completion, under a permit, of any building or structure..., the Director shall issue a 'certificate of occupancy' for habitable or non-habitable space, stating that the work has been completed substantially in accordance with the permit approved..."

Clearly the issuance of a CO to the homeowner in one particular residence to occupy his/her residence in a planned development under construction does not translate to a "carte blanche" approval of the defendants' work product. To suggest otherwise would prevent the completion of any development project and prevent the sale of any homes in a piecemeal fashion, requiring instead a massive house closing and the issuance of COs by the Town on a project all at once, a near impossibility. The issuance of a homeowner's CO to occupy his/her home does not translate into an approval of the complete site plan project so as to foreclose the Town's right to move against the performance bonds filed for failure to complete site plan improvements required by the Town.

The defendants' reading of the Town Code §87-29 E is too narrow and is tailored to support their position and fails to appreciate that the very purpose of the performance bonds is to ensure that all site plan improvements are not only completed but are done correctly. The gravamen of the Town's complaint is that the work performed by The Greens was shoddy and caused massive drainage problems, grading difficulties and surface water runoff and ponding and all of these complaints need to be addressed. The completion of the residential units and the providing of COs so homeowners could occupy their residences does not translate into approval of site plan improvements not yet completed or signed off by the Town's engineers. Since the Town need only allege a cause of action to warrant denial of the defendants' motion to dismiss and the causes of action alleged by the Town state that The Greens has failed to make needed site plan improvements as required by the site and development plans approved by the Town, the causes of action appear valid. The Greens' citation to ***Murname Associates Inc. v. Harrison Garage Parking Corp.***, 239 AD2d 882, 659 NYS2d 655 (4th Dept) for the proposition that COs constitute admissions requiring dismissal of the Town's claims is factual inapposite and inapplicable to the present circumstances.

The Town has also sought to move against the performance bond for the "Sanctuary Project" which consists of one hundred affordable homes to be developed as part of the overall development of The Greens. The Town alleges that The Greens has developed the main project selling the higher priced homes in the golf resort at the market price while allowing the one hundred affordable homes to languish. In this regard, the Town alleges that, Charles Mangano, its Environmental Planner, in his affidavit, noted that "there has been no apparent action on the part of the applicant to address the Planning Department's communications since the last map submission of August 25, 2004." The Greens argue that, since there are no zoning approvals for the construction of the "Sanctuary Project", the Town's attempt to seize the performance obligation of this project is premature.

The Court disagrees. The Town has made out a cause of action that The Greens has walked away from the "Sanctuary Project" because the one hundred affordable homes were not commercially feasible or cost efficient, preferring instead to concentrate on building the maximum profit venture at the cost of the lower income housing submitted as part of the whole project. The Greens failure to follow up with the Town Planning Department or submit plans to the Town to initiate the zoning approvals to start the "Sanctuary Project" is the very reason for the requirement of the posting of the performance bond, i.e. to ensure site plan development of the "Sanctuary Project" as part and parcel of the overall project known as The Greens at Half Hollow in Melville. The Court refuses to look at each piece of the project as separate and distinct since each piece is part and parcel of the overall project and plan submitted to the Town when it granted site plan approval.

The Court when assessing a motion pursuant to CPLR §3211 (a)(7) may freely consider the plaintiff's affidavit to remedy any defects which may be apparent in the

complaint. The criterion is not whether the proponent has pleaded a cause of action but whether, in fact, the proponent has a cause of action and affidavits and other evidence may be considered in support of it. Fay Estates v. Toys "r" Us, Inc., 22 AD3rd 712, 803 NYS2d 135 (2nd Dept. 2005); Pechko v. Gendelman, 20 AD3rd 404, 799 NYS2d 80 (2nd Dept. 2005). As the Court in Scott v. Cooper, 215 AD2d 368, 625 NYS2d 661 (2nd Dept. 1995) app. dis. 86 NY2d 812, 632 NYS2d 497, aptly noted:

" The criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits (see, Stukuls v. State of New York, 42 NY2d 272, 275; Detmer v. Acampora, 207 AD2d 475; Greenview Trading Co. V. Hershman & Leicher, 108 AD2d 468, 470)."

Upon review of the basic allegations contained within the complaint as well as the affidavits submitted along with the pictures of drainage problems, sign difficulties (with the one sign depicted as a ridiculous two feet tall sign sitting at a road intersection) (exhibit "signage" attached to an affidavit by Bruce Creamer, Assistant Town Civil Engineer), the failure to complete Lot 74 improvements, the community center site unfilled and incomplete substantiates the complaint and makes out causes of action, if proven, upon which the Town may move against the performance bonds provided to ensure complete site plan development in accordance with the plans submitted and approved by the Town.

The Town also cross-moves for permission to amend its complaint pursuant to CPLR §3025(b) to add a fifth cause of action against performance bond #SB0084196 executed by the defendant, XL Specialty Insurance Company, in the amount of \$625,000.00 for failure to complete the one hundred units of low income rental housing sited to be completed on Lot 74, an area consisting of 273.31 acres. The Greens opposes this motion claiming the bond is not yet due and that The Greens is not in default of the project underlying the performance for which the bond was purchased.

A party may amend its pleadings at any time by permission of the Court and leave is to be freely given. CPLR §3025 (b). While a Court has broad discretion in deciding whether leave to amend should be granted, it is considered an improvident exercise of discretion to deny leave to amend in the absence of inordinate delay and a showing of prejudice to the opposing party. Cannon v. Milone, 157 AD2d 695, 549 NYS2d 793 (2nd Dept. 1990); Williams v. Ludlow's Sand & Gravel Co. Inc., 122 AD2d 612, 504 NYS2d 901 (4th Dept. 1986); Pignataro v. Balsamo, 108 AD2d 1086, 485 NYS2d 656 (3rd Dept. 1985).

In exercising its discretion in determining whether to grant leave to amend the complaint, the Court should consider how long the amending party was aware of the facts upon which the motion to amend is predicated, whether a reasonable excuse for the delay is offered and whether prejudice would result from the granting of the motion. Haller v. Lopane, 305 AD2d 370, 759 NYS2d 504 (2nd Dept. 2003). In Joyce v. McKenna, 2 AD3d 592, 768

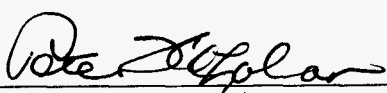
NYS2d 353 (2nd Dept. 2003), the Court finding that "it is incumbent upon the movant to make 'some evidentiary showing that the claim can be supported'." requires a party to set forth some basis for such amendment and should be denied on the mere request of a party. See also, ***Johnson v. Allstate Insurance Co.***, 33 AD3d 665, 823 NYS2d 415 (2nd Dept. 2006); McKinney's Commentaries CPLR §3211, C3211:64.

Here, in the case at bar, the Town argues that the New York State Town Law §277(9)(e) provides that the continued extension of a bond or its continued existence does not support the conclusion that the levy against the bond can never occur. The Town alleges that as with the affordable housing which was to be built on The Greens project, the defendants have "dragged their feet" in building these less costly housing areas in favor of building the housing providing a more economically feasible profit at the golf condominium. At a minimum, the Town presents a valid argument to assert an amendment to its pleadings to plead a fifth cause of action against The Greens as to performance bond #SB0084196 executed by the defendant, XL Specialty Insurance Company, in the amount of \$625,000.00. The performance bond was conditioned on the completion of certain site plan improvements and building one hundred units of low income rentals still incomplete at this time. The amendment to the complaint should not be denied at this early stage of the proceedings as the plaintiff's motion seeking to amend its complaint has not unduly prejudiced or surprised the defendants and therefore should be freely granted. ***Crystal House Manor, Inc. v Totura***, 5 AD3d 425, 772 NYS2d 603 (2nd Dept. 2003).

Accordingly, the defendants The Greens' motion to dismiss the Town's complaint (seq. #001), pursuant to CPLR §3211 (a)(1) and (7), on documentary evidence and for failure to state a cause of action upon which relief may be granted is hereby denied in its entirety and the Town's motion (seq. #002) pursuant to CPLR §3025(b), seeking to amend the supplemental summons and amended verified complaint to assert a fifth cause of action as against the performance bond #SB0084196 executed by the defendant, XL Specialty Insurance Company, in the amount of \$625,000.00 is hereby granted and the second amended complaint annexed to the moving papers (exhibit B) is deemed served upon service of a copy of this court's order on all of the defendants.

The foregoing constitutes the decision of the Court.

Dated: OCT 20 2007



J.S.C.