Trajbar v Garafola
2007 NY Slip Op 33721(U)
November 13, 2007
Supreme Court, Suffolk County
Docket Number: 0029512/2004
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 04-29512
CAL. No. 07-01344-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-6-07
ADJ. DATE 9-27-07
Mot. Seq. # 003 - MG
004 - XMD; CASEDISP

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MARIA TRAJBAR,

Plaintiff,

- against -

DOMINICK GARAFOLA, ROSALIE GARAFOLA and STRATHMORE GATE COMMUNITY ASSOCIATION, INC.,

Defendants.

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 13 - 22 ; Answering Affidavits and supporting papers 23 - 27 ; Replying Affidavits and supporting papers 28 - 29 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Garafola for summary judgment is granted; and it is further

ORDERED that the cross motion for an order permitting plaintiff to amend her verified complaint is denied.

This lawsuit is the result of a dispute between neighbors residing at Strathmore Gate Community Association, Inc.("Strathmore"), a condominium complex in Stony Brook, N.Y. Defendant, Dominick Garafola owns 7 Strathmore Gate Drive. His mother, defendant Rosalie Garafola, resides there but has no ownership interest in the property. Plaintiff, Maria Trajbar, owns 5 Strathmore Gate Drive , and has brought an action for damages against defendants as a result of injuries she allegedly sustained as a result of the Garofolas installation of a heat pump on their premises.

Defendants, Dominick Garafola and Rosalie Garafola have moved for summary judgment on the grounds the pump does not violate any bylaws of Strathmore Gate Community Association, Inc., nor

does it violate any other municipal code or ordinance. In support of the motion, they offer, *inter alia*, the pleadings, plaintiff's deposition testimony, defendants' deposition testimony, the affidavit and report of defendants' expert William Marletta, and the deposition testimony of Anita Sieklucki, on behalf of The Strathmore Gate Community Association, Inc.

Plaintiff Maria Trajbar has cross-moved for an order permitting her to amend her verified complaint to include the Strathmore Gate Community Association, Inc. and to serve upon them an amended complaint. In support, plaintiff offers her deposition testimony as well as that of Dominick Garafola, copies of excerpts of plaintiff's diaries, a copy of the condominium board's written approval for installation of the heat pump, and a copy of the Declarations pages of Strathmore Gate's certificate of incorporation.

Plaintiff avers that her condominium unit shares a common wall containing plumbing lines with defendants' unit. Prior to defendant Dominick Garafola purchasing Unit 7 in September 2003, all the units were heated by electric only. The heating system was very quiet and did not generate any noise whatsoever. Plaintiff claims that in May 2003, defendant installed a heat pump without first submitting plans, drawings, or making an application to the Board of Directors of the condominium complex. Immediately thereafter plaintiff claims, the noises emanating from the heat pump and plumbing throughout the day and night were so loud, she was unable to sleep. Her bedroom abuts the common wall. During discovery, plaintiff learned that defendant had also relocated the washing machine to a small storage room which also abuts her bedroom; significantly contributing to the noise. Plaintiff claims defendant Rosalie Garafola uses the washing machine at all hours of the day and night.

Dominick Garafola testified he bought the condominium unit for his mother in the spring of 2003. He does not recall getting a copy of the homeowners association by-laws at the time of the closing. When he bought the unit it was heated by electric baseboards; essentially units about three feet long and six inches high with a dial to set the heat from low to high and which were plugged into the wall. Some of the heating units were not working prior to closing. Defendant hired a general contractor to renovate the entire unit. He had a washing machine installed in the storage room, and a heat pump installed since he was informed by the contractor that the heating units were inadequate to heat the entire unit. Prior to installation of the heat pump, defendant did not make application to either the Town of Brookhaven or the condominium association. The heat pump is a three-dimensional object situated outside the unit. Defendant testified he recalled receiving a complaint from the condominium board sometime in the fall of 2003. As a result, he met with a member of the board, and thereafter members of the board inspected the premises on two occasions. He then received a letter approving the heat pump. He disconnected the pump for about three weeks after receiving the letter of complaint. At some point, it was moved to a location further from plaintiff's unit.

Rosalie Garafola testified that plaintiff first complained to her about noise in the winter of 2003. She testified that her washer and dryer did not make any unusual sounds. She noted that she has been outside while the heat pump or air conditioner is working and that it is not unreasonably loud.

Defendants' expert, Leo J. DeBobes of William Marletta Safety Consultants ,Inc., conducted an onsite inspection of the premises at 5 Strathmore Gate Drive. In his professional opinion, defendants

did not depart from codes, standards and generally accepted safe practice with respect to either the installation of an outdoor heat pump or with respect to noise or sound levels.

According to defendants, their expert was present on site on March 26, 2007. Also present was plaintiff's expert, Normal Dotti of Russell Acoustics, LLC. Plaintiff's counsel has not exchanged any expert witness report to date.

Anita Sieklucki, a member of the board of the Homeowner's Association, testified that she and two other members of the board inspected the heat pump about one month after a complaint was filed. She did not believe the Garafolas received prior approval from the board to install the heat pump. The Homeowners' Association approved the installation of the heat pump in September 2004.

Defendants Dominick Garafola and Rosalie Garafola have demonstrated their entitlement to summary judgment. The installation of the heat pump was approved by Strathmore Gate's Homeowners' Association. Defendants' expert avers that the installation, maintenance, and use of the outside heat pump does not violate the Brookhaven Town Code. Additionally, the sound levels were measures in accordance with Chapter 50 of the Brookhaven Town Code and found to be within permissible levels. In opposition, plaintiff has failed to raise a triable issue of fact.

With respect to plaintiff's cross-motion, CPLR 3025(b) provides that leave to serve an amended pleading should be freely given upon such terms as are just. Leave to amend will generally be granted as long as the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious (*see*, ***Holchendler v We Transp., Inc.,*** 292 AD2d 568, 739 NYS2d 621 [2002]; ***Leszczynski v Kelly & McGlynn,*** 281 AD2d 519, 722 NYS2d 254 [2001]; ***Charleson v City of Long Beach***, 297 AD2d 777, 747 NYS2d 802 [2002]). Although the courts are reluctant to allow amendments where there is lengthy delay, even where the case has been certified, courts are unlikely to deny the request if the proposed amendments do not prejudice the opponent by changing the basic issues of the action, or, by adding significant factual allegations of which the party is unaware (***Symphonic Electronic Corp., v Audio Devices, Inc***., 24 AD2d 746, 263 NYS2d 676 [1965]; ***Rogers v South Slope Holding Corp***., 255 AD2d 898, 680 NYS2d 772 [1998]; *see also,* ***Francis v Bein-Aime***, 4 Misc3d 1002A, 791 NYS2d 869 [2004]; ***Rodriguez v State***, 153 Misc2d 363, 581 NYS2d 972 [1992]). It is also the established rule that the legal sufficiency or merits of a proposed amendment of a pleading will not be examined on the motion to amend unless the insufficiency or lack of merit is clear and free from doubt (***Goldstein v Brogan Cadillac Oldsmobile Corp.,*** 90 AD2d 512, 455 NYS2d 19 [1982]). Thus, the party opposing the motion to amend, must overcome a presumption of validity in favor of the movant and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient (***Daniels v Empire-Orr, Inc.,*** 151 AD2d 370, 542 NYS2d 614 [1989]).

Plaintiff's cross-motion for an order permitting plaintiff to amend her verified complaint is denied. Plaintiff is attempting to bring a new cause of action which would otherwise be time-barred by the statute of limitations. Furthermore, plaintiff waited to assert the new allegation regarding contributory noise from the washing machine until defendants laid bare their proofs in the instant summary judgment motion. The newly proposed Amended Verified Complaint does not simply claim that it was the washing machine that caused the noise in plaintiff's unit. It also claims that it is the heat

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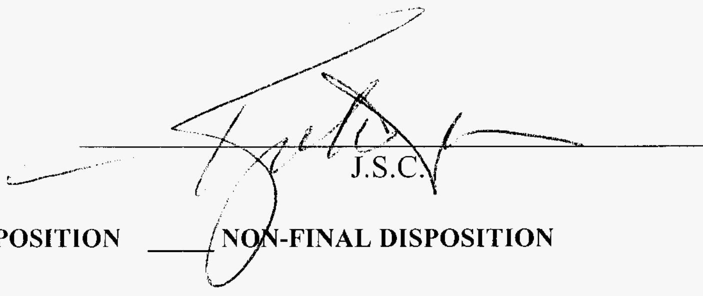
pump that caused the noise in the apartment, which is the issue currently being litigated in the instant summary judgment motion.

The proposed Amended Complaint also names Strathmore Gate Community Association, Inc., as a party, however, the submissions of demonstrate that the Association has never been served nor has it been joined in this action. Plaintiff's attorney commenced a second action against Strathmore under Index No. 15939/2005 in Suffolk County and discovery took place jointly with counsel appearing for Strathmore in the second action. Plaintiff's attorney attempted to consolidate the two actions but the motion was denied on technical grounds and never renewed.

Plaintiff's cross-motion is denied in its entirety. Leave to serve an amended complaint in this matter is denied.



Dated: NOV 1 3 2007 ______________ J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION