

Corona Realty Holdings, LLC v 28 Stirrup Lane LLC
2008 NY Slip Op 30583(U)
February 19, 2008
Supreme Court, Nassau County
Docket Number: 0972-06/
Judge: Edward W. McCarty
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(hereinafter, "Action No. 2"); (2) an order pursuant to CPLR 3212 granting summary judgment to defendants dismissing plaintiff's complaints with prejudice; (3) a declaratory judgment in favor of defendants declaring plaintiff has no right, in law or equity, to seek reimbursement of its costs, or payment of a guaranteed profit, from the homeowners who possess judicially declared easements; and (4) an order pursuant to Rule 130 awarding sanctions against plaintiff and its attorneys; and cross motion (#005) by plaintiff for an order pursuant to CPLR 3212(e) granting plaintiff partial summary judgment setting aside the settlement agreement dated May 4, 2004, are decided as set forth herein.

At the outset, it should be noted that by order of this Court (Warshawsky, J.) dated September 10, 2007, Action No. 1 and Action No. 2 have been consolidated, pursuant to a "so ordered" stipulation, thus rendering so much of defendants' cross motions (#003, #006 and #007) as sought consolidation of those actions moot.

This Court would also note that there is another related action, *Corona Realty Holdings LLC v Nektalov, et.al.*, Supreme Court, Nassau County, Index No. 11458/07. However, apparently, none of the parties have either stipulated or moved for consolidation of that action with the instant action. Unfortunately, CPLR 602(a) does not authorize this Court to consolidate these actions *sua sponte*. The parties, if they be so advised, may stipulate or move for that relief in order to obviate the possibility of inconsistent results. (See, *New York Annual Conference of the Methodist Church v Nam Un Cho*, 156 AD2d 511, 514; *AIU Insurance Co. v ELRAC, Inc.*, 269 AD2d 412.)

With regard to additional counterclaim defendant Malekan's motions (#002 and #008) to dismiss defendants' counterclaims against him, he argues that such counterclaims should be dismissed pursuant to CPLR 3211 because as an individual, Malekan may not be held liable for the actions of plaintiff Corona Realty Holdings LLC, (hereinafter, "Corona"). He further argues for dismissal pursuant to CPLR 3016(b) claiming that the counterclaims fail to plead fraud with particularity.

Both of these arguments ignore the fact that defendants have pled only a single counterclaim against Malekan individually, that is the "eighth" counterclaim, which alleges that Malekan himself violated GBL 349. The particularity requirements regarding a claim of fraud, do not apply to a claim made pursuant to GBL 349. However, to state a claim under GBL 349, a party must allege with some specificity the allegedly deceptive acts or practices that form the basis for the claim. (See, *Lava Trading Inc. v Hartford Fire Insurance Co.*, 326 F.Supp.2d 434.) The only "deceptive acts or practices" alleged by defendants in their "eighth" counterclaim against Malekan are "false statements" made "in

this action and otherwise.” Any statements made within this litigation would be protected as absolutely privileged. (See, *Wiener v Weintraub*, 22 NY2d 330; *Mosesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381; *Sexter & Warmflash, P.C. v Margrave*, 38 AD3d 163.)

Moreover, the defendants base their counterclaim against Malekan on a private agreement that is unique to the parties, rather than upon conduct that affects consumers at large. A claim made under GBL 349 must charge conduct that has a broad impact on consumers at large. (See, *New York University v Continental Insurance Co.*, 87 NY2d 308; *Biancone v Bossi*, 24 AD3d 582.) Defendants in their counterclaim against Malekan have failed to allege the requisite broad impact on consumers.

Therefore, motions (#002 and #008) by additional counterclaim defendant Malekan for an order dismissing the counterclaim against him is granted. With no remaining claims against him, Malekan is no longer a party to this action.

Turning next to so much of defendants’ cross motions (#003, #006 and #007) as seek summary judgment dismissing plaintiff’s complaints as precluded by the parties’ settlement agreement dated May 4, 2004, and plaintiff’s cross motion (#005) which seeks partial summary judgment setting aside said settlement agreement, a review of the terms of the settlement agreement clearly indicates that it bars plaintiff’s complaints herein for claims through December 31, 2007. While plaintiff alleges that it was not represented by counsel when the settlement agreement was entered into, such allegations are solidly refuted by the documentary evidence presented by defendants, which establishes that plaintiff was represented by counsel at the time of the negotiation and consummation of the parties’ settlement agreement. Stipulations of settlement are favored by the courts and are not lightly cast aside, particularly when the parties are represented by attorneys. (*Nigro v Nigro*, 44 AD3d 831.)

Plaintiff’s allegation that defendants made misrepresentations to plaintiff in order to induce plaintiff into entering the settlement agreement is unsupported by any evidence. Moreover, plaintiff had a full opportunity to negotiate the settlement agreement and could have included additional language regarding minimum membership requirements for defendants, yet plaintiff failed to do so. Plaintiff has failed to present evidence that the settlement agreement was the result of fraud, collusion, mistake or accident and thus may not be relieved from the consequences of the agreement which it made. (See, *Hallock v State of New York*, 64 NY2d 224, 230.)

It is also noteworthy that while plaintiff entered into the subject settlement agreement on May 4, 2004, no allegations of misrepresentation were raised by plaintiff until September 2007, when plaintiff cross moved herein to invalidate the agreement. Moreover, it is interesting to note that in his affidavit in support of the cross motion to invalidate the settlement agreement, Mr. Malekan, plaintiff's principal, states that he was aware of the low level of membership as far back as 2002.

Plaintiff has failed to establish sufficient grounds for setting aside the settlement agreement and its cross motion (#005) for partial summary judgment seeking such relief is denied. Since the terms of the settlement agreement clearly preclude plaintiff's claims herein for the period through December 31, 2007, so much of defendants' cross motions (#003, #006 and #007) as seek summary judgment dismissing plaintiff's complaints, is granted to the extent that all such claims for the period through December 31, 2007 are dismissed. This specifically includes, but is not limited to, dismissal of any claims plaintiff makes for costs incurred or fair profit for the period from November 4, 2001 through December 31, 2007.

Regarding the remainder of defendants' cross motions (#003, #006 and #007) as seek declaratory judgment, the only viable claim which plaintiff has against defendants is for an increase in dues, upon proof of their inadequacy, for the period subsequent to December 31, 2007. (*Civic Association at Roslyn Country Club, Inc. v Levitt and Sons, Inc.*, 7 AD2d 992, aff'd. 7 NY2d 894.) Plaintiff's complaints, as written, do not appear to state such a claim and are therefore dismissed.

With regard to so much of any motion or cross motion herein as seeks sanctions, said requests are denied.

While plaintiff's complaints have been dismissed, defendants' counterclaims, except counterclaim denominated "eighth" as against Malekan, may proceed.

Date 2-19-08

EDWARD W. McCARTY III

J.S.C.

ENTERED

FEB 26 2008

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