

**Board of Mgrs. of 60 Greene Condominium
v Acacia Soho, LLC**

2008 NY Slip Op 30600(U)

February 25, 2008

Supreme Court, New York County

Docket Number: 0601158/2007

Judge: Jane S. Solomon

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

PRESENT: **JANE S. SOLOMON**

PART **55**

Index Number : 601158/2007
THE 60 GREENE CONDOMINIUM
vs.
ACACIA SOHO, LLC
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

Justice

INDEX NO. **60115807**
MOTION DATE **2/2/08**
MOTION SEQ. NO. **#001**
MOTION CAL. NO. _____

ere read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Notice of Motion
Answering Affidavits — Exhibits

PAPERS NUMBERED

1-4
5-8
9-14

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is* decided in accordance with the *attached memorandum* decision and order.

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

FILED
FEB 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: **2/25/08**

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
THE BOARD OF MANAGERS OF THE 60 GREENE
CONDOMINIUM, on behalf of all the Unit Owners,

INDEX No. 601158/07

Plaintiff,

-against-

ACACIA SOHO, LLC,

Defendant,

FILED

DECISION AND ORDER

FEB 28 2008

NEW YORK
COUNTY CLERK

-----X
JANE S. SOLOMON, J:

In this action seeking the payment of allegedly delinquent common charges, defendant, Acacia Soho, LLC (“Acacia” or “defendant”) moves pursuant to CPLR 3212 to dismiss the complaint and for judgment on its first counterclaim in the amount of \$37,500. Plaintiff, The Board of Managers of the 60 Greene Condominium (“Board of Managers” or “plaintiff”) cross moves for summary judgment on its cause of action for common charges. In addition, plaintiff moves pursuant to CPLR 3025(b) to amend the complaint and for an inquest for the assessment of attorney’s fees.

60 Greene Condominium, a six story condominium residence¹ located at 60 Greene Street in New York City was established pursuant to a Declaration of Condominium recorded in December, 1999. At the time the offering plan was accepted for filing, the sponsor had applied for, but had not yet gotten, approval from New York City to erect a penthouse on the sixth floor. Because approval for the penthouse was not immediately forthcoming, the sponsor filed a first amendment to the condominium offering plan that, *inter alia*, reapportioned the common charges

¹ The condominium has six residential units and one commercial unit.

that had been allocated to the proposed penthouse to the remaining units in the building. The First Amendment provides, in Exhibit B to the First Amendment, Article 12(a)(iv)(A) and (B):

within sixty (60) days after obtaining authority from appropriate governmental authorities for the erection of the Penthouse Unit, Sponsor shall amend this Declaration . . . to reflect the addition of the penthouse Unit to the building and the apportionment to the penthouse Unit of a 10.2275% share of the Condominium's Common Interest, all as reflected in the Schedule A to the Plan existing on the date the Plan was first accepted for filing by the office of the Attorney General of the State of New York.

simultaneously with the apportionment of the Penthouse Unit of its proportionate share of the Common Interest in the Condominium, the allocations of the Common Interests among the remaining Units shall be reduced to the apportionments reflected on Schedule A

(10/22/07 Burden Aff, Ex. B)

In addition, pursuant to Article 12(a)(iv)(C) of the First Amendment, each of the unit owners gave the sponsor a power of attorney, to be used once the sponsor received approval, expressly consenting to the sponsor's amendment of the by-laws to reflect the addition of the penthouse and the reapportionment of the common interests in accordance with Schedule A.

In May, 2000, Acacia signed an agreement with the sponsor to purchase the sponsor's right to develop the penthouse. (10/22/07 Burden Aff., Ex. D). In December, 2000, the Department of Buildings ("DOB") issued its approval for the penthouse. In April, 2001, before Acacia closed on its purchase of the Penthouse rights, the sponsor filed the Fifth Amendment to the Offering Plan that states in pertinent part:

Pursuant to the First Amendment to the Plan, upon completion of the Penthouse Unit, the allocation of

Common charges among the Units in the Condominium shall revert to the allocation set forth in Schedule A to the Plan as first accepted by the Attorney General. (Emphasis added)

(Burden Aff, Ex. C)

The Fifth Amendment also incorporates a copy of the Penthouse Escrow Agreement that restates, in Paragraph 4, the mandate in the First Amendment that the reapportionment of the common charges shall occur within 60 days after the condominium obtains authority from the appropriate government authority to erect the penthouse.

Defendant closed on its purchase of the penthouse development rights in November, 2001² and construction of the penthouse unit commenced in 2004. In July of that year, the parties entered into a Contribution Agreement wherein the condominium agreed to contribute the sum of \$37,500 to the cost of construction of the penthouse unit floor, "so that the Penthouse Unit Owner will install certain waterproofing on such Penthouse Unit Floor to reduce the amount of water, rain, snow and other moisture that will flow through the Penthouse Unit Floor to the Roof Membrane and to thus reduce the likelihood that the Roof Membrane will leak." The contribution agreement also acknowledged that it was not defendant's responsibility to create a roof membrane or waterproof membrane to protect the building from leaks. The roof work was substantially completed in November, 2005.

The construction of the penthouse was completed in the fall of 2006, and a Temporary Certificate of Occupancy issued in February, 2007. (10/22/07 Burden Aff., Ex. F)

On March 26, 2007, Acacia sent plaintiff a copy of the new roof warranty and requested payment of \$37,500, pursuant to the contribution agreement. (10/22/07 Burden Aff., Ex. G) On

² Defendant also owns the residential unit on the fifth floor of the building.

April 13, 2007, plaintiff sent Acacia a letter demanding common charges and late fees, pursuant to Section 12(a)(iv)(A) of the Declaration of the Condominium that were allegedly due and owing from February 19, 2001 through December 31, 2006 in the amount of \$51,320.76. (Burden Aff., Ex. H) Acacia had not been billed for common charges prior to receiving the April 13 letter.

In a letter dated April 25, 2007, Acacia took the position, pursuant to the Fifth Amendment to the Declaration of Condominium, that common charges were not due until the Temporary Certificate of Occupancy issued. (Burden Aff., Ex. I) Thereafter, on May 24, 2007, plaintiff commenced this action by service of the Summons and Complaint on the Secretary of State seeking allegedly delinquent common charges. Acacia answered and in its first counterclaim demanded \$37,500 allegedly due to it under the Contribution Agreement.

CONTENTIONS

Acacia argues that it had no liability for the payment of common charges until February 2007 when the temporary certificate of occupancy was issued because the Fifth Amendment to the Condominium Plan states that it had no responsibility to pay common charges until the “completion of the Penthouse Unit”. It contends “completion” is defined in the Fifth Amendment as, “the occurrence of: (a) recordation of a First Amended and Restated Declaration of Condominium and (b) issuance by the New York City Department of Buildings of a temporary certificate of occupancy for the Penthouse Unit [the ‘Reallocation Conditions’].” (10/22/07 Burden Aff, Ex. C, para. 4) Acacia claims that it relied on the Fifth Amendment when it entered into the purchase agreement with the sponsor.

In a January 9, 2008 letter to the court, following oral argument and submission of the motion, Acacia raised a new argument regarding the common charges. It contends that if the First Amendment is the controlling provision, then plaintiff's demand for delinquent common charges is barred by the six year statute of limitations.

As to the counterclaim, Acacia argues that summary judgment is warranted because: (1) it met all of the preconditions for payment under the contribution agreement; (2) it has demanded payment, and (3) that plaintiff has failed to make payment according to the terms of the contribution agreement.

Plaintiff argues that the First Amendment to the Offering Plan establishes that the reallocation of common charges to the penthouse unit was triggered by the DOB's approval of the application to build the penthouse; that the Fifth Amendment upon which Acacia relies, inadvertently and erroneously describes what the First Amendment says and that the Fifth Amendment cannot change the trigger event described in the First Amendment because the remaining unit owners relied on the First Amendment when they purchased their units and granted their powers of attorney.

In addition, plaintiff argues that Acacia could not have relied on the Fifth Amendment dated April 3, 2001 when it entered into the May, 2000 purchase agreement with the sponsor.

In a letter dated January 10, 2008, plaintiff responded to Acacia's statute of limitation argument. It contends that the statute of limitations is not a bar to the cause of action for common charges because that cause of action accrued on November 15, 2001, the date that Acacia closed on the penthouse unit, and the complaint was filed with the Secretary of State on April 9, 2007, less than six years from the accrual date.

As to Acacia's counterclaim, plaintiff argues that summary judgment must be denied because there is a dispute about whether defendant performed its contractual obligations. Plaintiff has submitted an affidavit from its expert in which he opines that the work on the penthouse roof was shoddy, defective, dangerous and does not meet industry standards.

In addition, plaintiff claims that the court should grant it leave to file an amended complaint in the form annexed to the cross motion so that it can add causes of action for damages it sustained and fees it paid as a result of the renovations to the penthouse and the shoddy waterproofing work on the penthouse roof which must now be corrected.

C. Acacia claims that the proposed amendment is unnecessary because: (1) it is willing to pay common charges from May, 2007 into escrow and to continue paying proper common charges, *pendente lite*; (2) the new claims for defective construction are premature because plaintiff has not submitted such claims to its insurance carrier and (3) that Acacia did not agree to reimburse plaintiff for its costs to hire experts to review the construction plans for the penthouse.

DISCUSSION

The well established law of contract interpretation provides that:

In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give meaning and effect to all its provisions. Words and phrases are given their plain meaning Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. *On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.*

(American Express Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d 275, 277 [1st Dept 1990], lv denied 77 N.Y.2d 807 [1991] [internal citations omitted] [emphasis added]); South Rd. Assocs. v. IBM Corp., 4 N.Y.3d 272 [2005])

A. Common Charges

In this case, the court is unable to determine the intent of the non-party sponsor, who drafted both the First and Fifth Amendments to the Condominium Declaration, regarding when the reapportionment of common charges to the penthouse unit occurred. The First Amendment states that within 60 days after receiving appropriate DOB approval to construct the penthouse, the Condominium shall amend the declaration to reflect the addition of the penthouse and the apportionment of the share of the common charges that was allocated to the penthouse in schedule A of the original declaration. However, the Fifth Amendment states that, in accordance with the First Amendment, upon completion of the penthouse, which is defined in part as receipt of the temporary certificate of occupancy, “the allocation of the common charges among the Units in the Condominium shall revert to the schedule set forth in the Schedule A to the plan as first accepted by the Attorney General.” (Burden Aff, Ex. C, p.2, Section 4).

Because the Fifth Amendment and the First Amendment provide different trigger events for the reapportionment, it is not clear whether the reference to “completion of the penthouse unit” as the trigger event in the Fifth Amendment was an inadvertent misstatement or whether, in the Fifth Amendment, the sponsor intended to change the First Amendment’s triggering event for reapportionment from “approval” for the construction to “completion”. On its face, the Fifth Amendment does not indicate an intention to alter the triggering event, but it so clearly states a

different triggering event than the one stated in the First Amendment that the intent to change the terms of the declaration cannot be disregarded.

Neither party has submitted evidence, in admissible form, from the sponsor or other sources, regarding what the sponsor intended, so there is a question of fact that cannot be resolved on the papers before the court. (*See, Mallad Construction Corp. v. County Fed. Savings & Loan Assoc.*, 32 N.Y.2d 285, 291 [1973][it is a question of fact when “intent must be determined by disputed evidence or inferences outside written words.”])

Acacia’s statute of limitations argument is without merit. Even though it was not formally raised on the motions, counsel raised it with the court in written submissions made in connection with the motions, so it is considered as part of the motion. Plaintiff persuasively argues that the claim for the common charges did not arise until the November 2001 closing, and therefore it was timely made in this action commenced in April 2007. Because the court is denying plaintiff’s motion for summary judgment on its cause of action for common charges, it need not address the issue of attorney’s fees at this time.

B. Contribution Agreement

The contribution agreement provides that the condominium will contribute \$37,500 to the cost of construction of the penthouse for Acacia to install “certain waterproofing . . . to reduce the amount of water, rain, snow and other moisture that will flow through the Penthouse Unit Floor to the Roof Membrane” The agreement does not define the meaning of “certain waterproofing” except to state that the penthouse floor installation shall carry at least a 15 year warranty naming both parties as beneficiaries of the warranty.

Plaintiff has submitted an expert affidavit that, in essence, describes the work and the materials as substandard. Defendant's expert, president of the general contractor hired to do the construction on the penthouse, contends that the penthouse deck was properly constructed to prevent moisture from getting into the old roof membrane and that plaintiff's claims regarding an inadequate membrane are "specious at best, and thoroughly insulting." (Ponzio Aff, para. 17).

This sharp factual dispute between the experts, together with the ambiguity regarding the meaning of the term "certain waterproofing" in the contribution agreement, preclude summary judgment on Acacia's counterclaim. (See, *Munoz v. Poretz*, 302 A.D.2d 382 [1st Dept 2003] [Given the conflicting affidavits, the issue of the adequacy of the materials is a question of fact for the jury to decide]; *Grullon v. City of New York*, 297 A.D.2d 261 [1st Dept 2002][“The grant of summary judgment requires, as a precondition, that the movant eliminate from the case any material question of fact.”]; see also, *Winegrad v. New York Univ. Med. Ctr.* 64 N.Y.2d 854 [1985])

C. Amend Complaint

CPLR 3025 (b) permits a party to amend a pleading, setting forth additional or subsequent transactions or occurrences, at any time by leave of court and the statute states that leave shall be freely given on such terms as may be just. Moreover, it is well settled that a motion to amend a complaint should be freely granted in the absence of prejudice or surprise, except in situations where the proposed amendment is wholly devoid of merit." (*Strook Strook & Lavan v. Belltramini*, 157 A.D.2d 590 [1st Dept 1992])

Here, plaintiff seeks to add causes of action for: 1)breach of the contribution agreement; 2) damages allegedly caused by Acacia's construction and maintenance of the penthouse, and (3) an injunction requiring Acacia to correct allegedly dangerous and illegal conditions.

These claims are supported by the affidavit of plaintiff's expert, and, at this early stage of the litigation, it cannot be said the amendment lacks merit or would needlessly complicate discovery and trial (*See, Centrifugal Assocs., Inc. v. Highland Metal Industries*, 193 A.D.2d 385 [1st Dept 1993]). Accordingly, it hereby is

ORDERED that defendants motion for summary judgment dismissing the complaint and for judgment on its counterclaim is denied ; and it is further


ORDERED that the branch of plaintiff's cross motion seeking summary judgment on its cause of action for allegedly delinquent common charges and an inquest on attorney's fees is denied; and it is further

ORDERED that the branch of plaintiff's cross motion seeking leave to serve an amended complaint in the form annexed to the moving papers is granted and the amended complaint is deemed served.

This decision constitutes the order of the court.

DATE: February 25, 2008

FILED
FEB 28 2008
NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.
JANE S. SOLOMON