

Feeser v Greene House Condominium

2008 NY Slip Op 31560(U)

June 5, 2008

Supreme Court, New York County

Docket Number: 0120240/2003

Judge: Walter Tolub

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

PRESENT: TOLUB
Justice

PART 15

FESER, ANGELA

INDEX NO. 120240/03

MOTION DATE _____

MOTION SEQ. NO. 06

MOTION CAL. NO. _____

- v -
GREENE HOUSE CONDOMINIUM,
ET AL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 06 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/1/08

WALTER B. TOLUB
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
ANGELA FEESER,

Plaintiff,

Index No. 120240/03
Mtn Seq. 006, ~~007~~

-against-

GREENE HOUSE CONDOMINIUM, THE BOARD OF
MANAGERS OF GREENE HOUSE CONDOMINIUM and
KENNETH NAHOUM, individually and as
President of the Board of Managers of
GREENE HOUSE CONDOMINIUM

Defendants.

-----x

WALTER B. TOLUB, J.:

FILED
JUN 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

Motion Sequences 006 and 007¹ are consolidated for
disposition and disposed of in accordance with the following
memorandum decision.

This is a motion to restore the instant action (Action #1)
to the calender and to join this matter for trial with Greene
House v. Nahoum and Milewicz, Index No. 108303/06 (Action #2).

Facts

The Plaintiff, Angela Feeser, is the owner of a condominium
apartment known as Penthouse D located at 95 Greene Street, New
York, NY (the "Building").

The Defendant, Kenneth Nahoum, is the owner of Penthouse

¹Motion sequence 007 is the same as motion sequence 006, with the exception of the
request for an inspection. Service on motion sequence 006 was not effectuated within the time
provided by the Court and accordingly the papers were resubmitted as motion sequence 007.

units A and E located in the Building.

Mr. Nahoum and Basia Milewicz, Mr. Nahoum's wife, own Penthouse C together. Ms. Milewicz is also the owner of Penthouse B.

The "Board" is the Board of Directors of the Building.

In this action, Action #1, Plaintiff sued the Condominium Defendants and Mr. Nahoum, individually and as President of the Board, for a declaratory judgment and injunctive relief. Plaintiff sought a declaration that she had the right to build out roof space she controlled pursuant to the lease of her Penthouse unit. Plaintiff claimed that the Board and Mr. Nahoum prevented her from building out the roof space and that she was therefore entitled to monetary damages.

Defendant Greene House cross-claimed against Mr. Nahoum seeking a declaration that the roof space transfer, which took place in 2002, was void. Mr. Nahoum cross-claimed against the Plaintiff and the Board for a declaration that Plaintiff's lease for the roof space was void.

In Action #2, the Condominium brought an action against Mr. Nahoum and Ms. Milewicz seeking injunctive relief and monetary damages based upon the Defendants' violations of the Condominium's by-laws, rules and policies.

On the eve of Action #1's trial, the parties entered into a Memorandum of Understanding which provided for the ultimate

settlement of the case, pending the completion of certain items. (Board Ex. B). These items included an inspection of Penthouses A, B and E, which had been combined into a single unit. The inspection would be conducted to determine whether construction work was performed in accordance with plans filed with the Buildings Department. According to the Memorandum of Understanding, the inspection was to take place prior to December 18, 2007. The inspection eventually took place on March 20, 2008, however the Building's inspector has not issued his report.

The Board brings this motion to restore the action to the calendar arguing that the Memorandum of Understanding has not been complied with and therefore the claims should be reinstated and the matter set for trial. The Board also argues that Action #1 should be tried with Action #2 because both matters involve common questions of law and fact.

Both Mr. Nahoum and Ms. Feeser argue that, pursuant to the Memorandum of Understanding and the Stipulation of Discontinuance, issues may be litigated only by commencing a new plenary action and that Action #1 should not be restored. Additionally, Mr. Nahoum and Ms. Feeser argue that Action #1 and Action #2 do not have sufficiently common questions of law and fact and therefore should not be joined for trial.

Discussion

Restoration of Action #1

Where an action has not been unequivocally terminated, the court retains jurisdiction. (Teitlbaum v. Gould, 48 NY2d 51 [1978]). "A settlement agreement entered into by the parties to a lawsuit does not terminate the action unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement. Absent such termination, the court retains its supervisory power. . ." (Id. at 53).

The power of a trial court to exercise supervisory control over all phases of pending actions and proceedings has long been recognized. Incident to this general authority, a court possesses discretionary power to relieve parties from the consequences of a stipulation effected during the litigation. (Id. 54). Such relief may be sought by commencing a plenary action or by motion interposed in the underlying action. Motions are the favored method because of their relative simplicity and the lighter burden on the litigants and the court. (Id. 55).

Although Yonkers Fur Dressing Co. v. Royal Ins. Co., 274 NY 435 [1928], held that a plenary suit is required where the stipulation relates to an action which has previously been terminated, the Yonkers case has been criticized as a "vestige of

the past which is not in harmony with modern procedural tenets." (Teitlbaum v. Gould, 48 NY2d 51 at 55 [1979]).

Here, the parties entered into a stipulation of discontinuance without prejudice. Additionally, the parties recognized conditions, several steps were required to take place in order for the matter to settle. Since not all of the steps required in the Memorandum of Understanding and the Stipulation have taken place and since there would be no prejudice to any party by restoring Action #1 to the trial calender and not requiring the commencement of a plenary action, the motion to restore Action #1 to the trial calender is granted.

Joinder

In order to eliminate unnecessary costs and delays, CPLR § 602 provides for joinder where two or more actions involve common questions of law or fact. (CPLR §602).

Action #2 seeks (1) a declaration that Mr. Nahoum and Ms. Milewicz performed construction work in their units in violation of the Condominium's by-laws, rules and policies; (2) an injunction with regard to construction by Mr. Nahoum and Ms. Milewicz for Penthouses A, B and E; and (3) attorneys fees.

Both Action #1 and Action #2 involve the issue of Mr. Nahoum's construction and his authority, or lack thereof, to proceed. Additionally, both actions concern Mr. Nahoum, and/or

[*7]
his wife Ms. Milewicz's, ownership interest in certain portions of the Building.

Since Action #1 and Action #2 arise out of the same facts and circumstances and involve similar parties, the motion for joinder is granted.

Inspection

Although the inspection required in the Memorandum of Understanding was conducted, such inspection is of no value without the inspector's report. Therefore the inspector is ordered to issue a report to be served on all parties within 20 days of service of a copy of this order with notice of entry.

Accordingly it is;

ORDERED that this action is be restored to the calender; and it is further

ORDERED that this action is joined for trial with the action entitled Greene House v. Nahoum and Milewicz, Index No. 108303/06; and it is further

ORDERED that the new caption for this matter is to read as follows:

-----x

ANGELA FEESER,

Plaintiff,

Index No. 120240/03
Action No. 1

-against-

GREENE HOUSE CONDOMINIUM, THE BOARD OF MANAGERS OF GREENE HOUSE CONDOMINIUM and KENNETH NAHOUM, individually and as President of the Board of Managers of GREENE HOUSE CONDOMINIUM

Defendants.

-----x

-----x
THE BOARD OF MANAGERS OF THE GREENE HOUSE CONDOMINIUM, on behalf of ALL UNIT OWNERS

Index No. 108303/06
Action No. 2

Plaintiffs

-against-

KENNETH NAHOUM and BASIA MILEWICZ
a/k/a BARBARA MILEWICZ

Defendants

-----x

and it is further

ORDERED that the Building is to direct the engineer who performed the inspection of the units to issue his report, to be served on all parties within 20 days of service of a copy of this order with notice of entry; and it is further

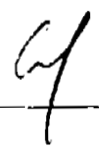
ORDERED that the Clerk of the Court enter judgment accordingly.

Counsel for the parties are directed to appear for a pre-trial conference on August 1, 2008 at 11:00 AM in room 335 at 60 Centre Street.

This motion is to be restored to the calender and Motion Support is directed to put this matter on for argument in Part 15 on June 13, 2008.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/13/08



HON. WALTER B. TOLUB, J.S.C.

FILED
JUN 04 2008
COUNTY CLERK'S OFFICE
NEW YORK