

Decker Assoc., LLC v Silver

2008 NY Slip Op 32603(U)

September 23, 2008

Supreme Court, New York County

Docket Number: 0105551/2007

Judge: Joan A. Madden

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

PRESENT: HON JOSEPH A. M. DEW

PART 11

Index Number : 105551/2007
DECKER ASSOCIATES LLC
VS.
SILVER, RICHARD
SEQUENCE NUMBER : 003
STRIKE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

this motion to/for strike bill
of pphw

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed Memorandum Decision and order transferring this matter to the Civil Court of the City of New York

FILED
SEP 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Sept. 23, 2008

[Signature]
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 11

Index No. 105551/07

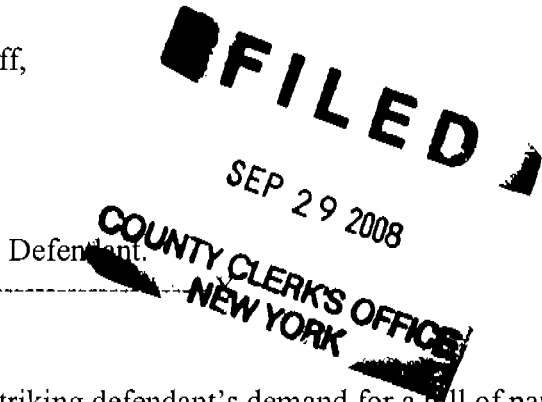
-----X
DECKER ASSOCIATES, LLC,
Plaintiff,

-against-

RICHARD SILVER,

Defendant.

JOAN A. MADDEN, J.:



Plaintiff moves for an order striking defendant's demand for a bill of particulars and defendant cross moves, inter alia, to dismiss the complaint or to preclude certain evidence based on plaintiff's failure to respond to the demand for a bill of particulars and for leave to serve an amended answer and for sanctions¹.

In this action, plaintiff alleges that defendant, who leased an apartment from it located at 33 Union Square West, New York, NY, owes three months rent totaling \$31,500 (i.e. \$10,500 per month), plus two months use and occupancy for a holdover period, at the alleged market rate of \$12,400 per month. Defendant asserts various affirmative defenses and counterclaims based on plaintiff's construction of a sidewalk shed with scaffolding which blocked plaintiff's view through two full-length windows facing Union Square.

A preliminary conference was held on December 12, 2007 and a January 4, 2008 date was set for service of a demand for a bill of particulars. On January 7, 2008, defendant sent, via facsimile, a 7-page demand for a bill of particulars. By letter dated January 18, 2008, plaintiff objected to the demand as overbroad and evidentiary in nature.

¹The court notes that this the third discovery motion in this action.

Plaintiff's argument that the demand should be rejected as untimely based on the de minimis delay of three days is denied. Moreover, after a compliance conference attended by counsel for both parties, the court issued an order dated May 1, 2008, which limited the demand to the period for which plaintiff was seeking to recover rent and/or use and occupancy, i.e. from October 1, 2006 to March 15, 2007, and directed plaintiff to provide a bill of particulars within thirty days. Plaintiff has not complied with the May 1, 2008 order.

That being said, however, defendant's motion to dismiss the complaint or to preclude certain evidence based on plaintiff's failure to comply with the May 1, 2008 order is denied. It appears that the attorney attending the conference on behalf of plaintiff was unaware of plaintiff's prior objection to the bill of particulars, and while the court admonishes plaintiff that attorneys appearing at conferences must be familiar with all aspects of the action, in the interest of justice, the May 1, 2008 order is vacated.

"A bill of particulars is not a form of disclosure...rather '[t]he purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial.'" Blank v. Schafrann, 180 AD2d 886, 887 (3d Dept 1992), quoting Twiddy v. Standard Marine Transport Servs., 162 AD2d 264, 265 (1st Dept 1990)(internal citations omitted). In accordance with CPLR 3042(e), "[i]f the court concludes that the demand for particulars, or a part thereof, is improper or unduly burdensome, in addition to vacating or modifying the demand, the court may make such order with regard to the improper or unduly burdensome demand as is just."

Here, a review of the demand indicates that it seeks matters evidentiary in nature, and beyond the scope of a proper demand for a bill of particulars. Accordingly, defendant shall serve a new demand for a bill of particulars by October 10, 2008, limited to the period between

October 1, 2006 and March 15, 2007 and devoid of demands of an evidentiary nature, and plaintiff shall respond to the demand by October 30, 2008.

Defendant also seeks leave to serve an amended answer. The original answer contains counterclaims alleging (i) breach of contract and actual and partial constructive eviction, (ii) negligence, (iii) conversion of security deposit, (iv) right to recover attorneys' fees, (v) actual and partial evictions and statutory violations, (vi) unjust enrichment and trespass. The proposed amended answer seeks to add counterclaims alleging fraud in the inducement, fraud, and violation of Administrative Code provisions of the City of New York requiring a minimum standard of light and air in apartments. The proposed counterclaim for fraud in the inducement alleges that plaintiff "willfully and intentionally" failed to disclose material facts related to defects and required construction and renovation plans that would deprive the apartment of air and light and diminish the value of the leased premises prior to defendant signing the lease. The other proposed fraud claim alleges that plaintiff intentionally authorized additional and untimely construction for the purpose of procuring advertising revenues from billboards on scaffolding and other devices that obstructed defendant's view. In support of the second fraud claim, defendant relies on documents from the Department of Buildings and a report from plaintiff's architect which purportedly shows that the renovation project was delayed without explanation from July 2006 to February 2007.

It is well settled that "leave to amend should be freely granted in the absence of prejudice or surprise, upon a showing that the proposed amendment has merit." Centrifugal Associates, Inc. v Highland Metal Industries, Inc., 193 AD2d 385 (1st Dept. 1993); Murray v City of New York, 43 NY2d 400, 404-405, reargument dismissed, 45 NY2d 966 (1977). Here, there is no

claim of prejudice or surprise, so that the only issue is whether the proposed amendments are of sufficient merit to permit their addition.

To demonstrate merit of a proposed amendment the “proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as matter of law.” Daniels v. Empire-Orr, Inc., 151 AD2d 370, 371 (1st Dept. 1989)(citations omitted). When the proponent meets this initial burden, “the merit of the alleged pleading must be sustained ...unless the alleged insufficiency or lack of merit is clear and free from doubt.” Id.

In this case, defendant has adequately demonstrated the prima facie merit of the proposed fraud claims to permit their addition. However, the proposed ninth counterclaim alleging a violation of an unspecified Administrative Code relating to light and air is duplicative of allegations asserted in the fifth counterclaim for actual and partial evictions and statutory violations, and thus leave to add this counterclaim is denied.

Finally, given the nature of this dispute and the limited value of the parties’ claims, this action is being transferred to the Civil Court of the City of New York.

Conclusion

In view of the above, it is

ORDERED that cross motion for leave to amend the answer is granted, and the proposed amended answer annexed to the cross motion, with the exception of the proposed ninth counterclaim which is stricken, shall be deemed served within five days of the date of this decision and order a copy of which is being mailed by my chambers to counsel for the parties;

and it is further

ORDERED that the plaintiff shall serve a reply to the amended answer on or before October 17, 2008; and it is further

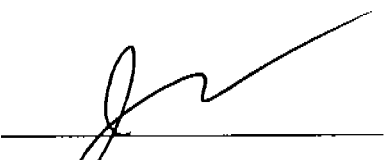
ORDERED that the remainder of this action, bearing Index No. 105551/07 be, and it hereby is, removed from this Court and transferred to the Civil Court of the City of New York, County of New York; and it is further

ORDERED that the Clerk of New York County shall transfer to the Clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the Clerk of the Civil Court of the City of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the Clerk of the County of New York, shall issue to this action a Civil Court Index Number; and it is further

ORDERED that the above-entitled action be, and is hereby, transferred to said Court, to be heard, tried, and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: September 23, 2008



FILED
 SEP 29 2008
 COUNTY CLERK'S OFFICE
 NEW YORK