Board of Mgrs. of Park Ave. Condominium v Charcoal Hill Family L.P.
2009 NY Slip Op 31856(U)
August 10, 2009
Supreme Court, New York County
Docket Number: 102964-09
Judge: Joan A. Madden
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SCANNED ON 8/19/2009

[* 1]

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

PRESENT: Hon Joan A. Madden

Justice

PART 11

Index Number : 102964/2009

PARK AVENUE CONDOMINIUM

VS.

CHARCOAL HILL FAMILY

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 102964-09

MOTION DATE 6-25-09

MOTION SEQ. NO. #001

MOTION CAL. NO. ________

were read on this motion to/for ________

	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 is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED
AUG 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Aug. 10, 2009

J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

[* 2]

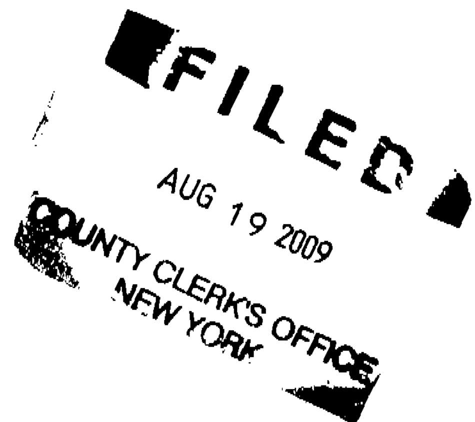
SUPREME COURT OF THE STATE OF NEW
YORK COUNTY OF NEW YORK: IAS PART 11
---X
BOARD OF MANAGERS OF THE PARK AVENUE
CONDOMINIUM,

Plaintiff,

-against-

CHARCOAL HILL FAMILY LIMITED PARTNERSHIP,
ALEXANDER GUREVICH and ELLA GUREVICH,

Defendants.
---X



JOAN A. MADDEN, J.:

Defendants Charcoal Hill Family Limited Partnership, Alexander Gurevich and Ella Gurevich (collectively the "Defendants"), move to dismiss the plaintiff's fourth and fifth causes of action for a failure to state a claim upon which relief can be granted. Plaintiff, Board of Managers of The Park Avenue Condominium (the "Condominium") opposes the motion and cross moves pursuant to CPLR 3025(b) for leave to serve an amended complaint asserting a seventh cause of action.

Background

The Condominium is an unincorporated association of the unit owners of a condominium apartment building located at 715 Park Avenue in Manhattan (the "Building"). The Building is situated in a district that is governed by the Landmarks Preservation Commission of the City of New York ("Landmarks Commission"). Defendants Alexander and Ella Gurevich (together the "Gurevichs") reside in Unit 18B ("18B") in the Building, which was purchased in 2005 by the Gurevichs' family entity, defendant Charcoal Hill Family Limited Partnership.

On or about January 29, 2007, Defendants submitted a written application and architectural plans to the Condominium for permission to make certain alterations to 18B, including, *inter alia*, the replacement of a window on the northeast corner of the Building, installation of new flooring, construction of new closets, and installation of new plumbing and electrical fixtures (the "Plans"). The Plans annexed to and incorporated in the Alteration Agreement provide that the window on the northeast corner of the Building will be replaced "to match existing" windows throughout the rest of the Building. The Condominium countersigned the application on January 29, 2007, thus granting Defendants permission to perform the alterations set forth in the Plans, subject to the terms and conditions set forth in the parties' written alteration agreement (the "Alteration Agreement").

After disputes arose concerning Defendants' renovation of their apartment, the Condominium commenced this action on March 3, 2009. The complaint contains six causes of action. The gravamen of the complaint is that Defendants installed a non-conforming window and washer and dryer, allegedly in violation of the Condominium by-laws and Defendant's Alteration Agreement.

The first cause of action asserts that Defendants breached Condominium by-laws by installing a non-conforming window. The second cause of action alleges that Defendants breached the Alteration Agreement by installing a window that does not match the windows in the rest of the building and without obtaining required permits and/or approvals or licenses from Landmarks Commission and by installing a washer and dryer that adversely affects the Building's plumbing system. The third cause of action alleges that the non-conforming window affects the structural integrity of the Building and seeks an injunction to compel replacement of

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the window. The fourth cause of action, which seeks injunctive relief compelling Defendants to replace the window, alleges that Defendants' failure to obtain approval/permits/licenses from Landmarks Commission will result in penalties and fines to the Condominium and "bar Landmarks Commission approval of any future applications by the Condominium" (Complaint ¶ 54). The fifth cause of action seeks indemnification under the Alteration Agreement "in the event the Landmarks Commission issues any fines, penalties, and/or violations to the Condominium and/or its unit owners." The sixth cause of action asserts that Defendants breached an alleged agreement to pay for a railing installed by the Condominium on Defendants' terrace. Defendants interposed an answer with affirmative defenses and counterclaims dated April 22, 2009.

Defendants now move to dismiss the fourth and fifth causes of action pursuant to CPLR 3211(a)(7) on ripeness grounds for failure to state a claim.[1] Defendants argue that the Condominium's fourth and fifth causes of action are purely theoretical and are based on future events which have not yet happened and likely never will occur and for which the Condominium has not suffered any concrete damages.

The Condominium counters that the fourth and fifth causes of action are not premature and that injunctive relief is necessary to avoid penalties by Landmarks Commission and to protect the Condominium from being barred from obtaining its approval of future applications. The Condominium also asserts that if it is required to wait until it is penalized by Landmarks Commission, it would be too late to prevent irreparable harm from occurring.

In support of its opposition, the Condominium submits an affidavit from Mr. Daniel Wollman, the assistant secretary of the Condominium and a member of the Condominium's

[1] As Defendants have already served an answer, its motion should have been labeled as one for summary judgment as opposed to a pre-answer motion to dismiss pursuant to CPLR 3211(a)(7).

board of managers. Mr. Wollman states that under the Alteration Agreement, Defendants are contractually required to indemnify and hold Plaintiff harmless from and against any such fines, penalties and/or violations (as well as associated attorney's fees and expenses).[2] Mr. Wollman further states that as a result of Defendants' actions, Defendants have subjected the Condominium and its unit owners to "the real possibility of substantial fines and penalties by Landmarks Commission, as well as violations that would bar Landmarks Commission approval of any future applications by the Condominium and/or its unit owners." (Wollman Affidavit, ¶ 12).

The Condominium also cross moves pursuant to CPLR 3025(b) for leave to amend the complaint to assert a seventh cause of action for a declaration based on Defendants' failure to obtain Landmarks Commission approval for the window. Specifically, the proposed cause of action seeks a judicial declaration that: (i) Defendants were required to obtain permits and/or approvals and/or licenses from Landmarks Commission for the window installed by Defendants in 18B; (ii) Defendants failed to obtain all required permits and/or approvals and/or licenses from Landmarks Commission for the window installed by Defendants in 18B; and (iii) Defendants must indemnify and hold Plaintiff harmless from and against any fines, penalties and/or

[2]Specifically he relies on paragraph 16 of the Alteration Agreement, which provides that:

> The Unit Owner hereby indemnifies and hold the Board, its Managing Agent, and all other owners of units in the building harmless from and against any and all claims, damages, expenses (including reasonable attorneys' fees and expenses) or liabilities arising out of or in any way relating to (i) the Alterations to the Unit or (ii) the Unit Owner's failure to perform in accordance with the Plans and the terms and conditions contained herein. This indemnification shall survive the completion of the Alterations.

violations issued, or to be issued, by Landmarks Commission to the Condominium and/or its unit owners arising out of in any way relating to the window installed by Defendants in 18B. The Condominium asserts that the proposed seventh cause of action is meritorious and is not prejudicial to Defendants as it does not assert any new or additional factual allegations.

Defendants counter that the proposed seventh cause of action should not be added as the Condominium seeks to secure an advisory opinion, since no fines, penalties and/or violations have been issued by Landmarks Commission.

Discussion

The issue of this motion is whether the claims at issue are premature as they are based on the future conduct of Landmarks Commission with respect to the window installed by Defendants. The Court of Appeals has written that:

> The courts of New York do not issue advisory opinions for the fundamental reason that in this State "[t]he giving of such opinions is not the exercise of the judicial function." Matter of State Indus. Commn., 224 N.Y. 13, 16 (1918). The role of the judiciary is to "give the rule or sentence" Matter of Richardson, 247 N.Y. 401, 410 (1928) and thus the courts may not issue judicial decisions that "can have no immediate effect and may never resolve anything." New York Pub. Interest Research Group (NYPIRG) v. Carey, 42 N.Y.2d 527, 531 (1977). It is therefore settled law that an action "may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur." E.g., American Ins. Assn. v. Chu, 64 N.Y.2d 379, 385 (1985); NYPIRG v. Carey, 42 N.Y.2d 527, 531 (1977); Matter of State Indus. Commn., 224 N.Y. 13, 16 (1918). This rule not only prevents dissipation of judicial resources, but more importantly, it prevents devaluation of the force of judicial decrees which decide concrete disputes.

Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988).

Applying these principles here, the court finds that the fourth and fifth causes of action, which are based on a future event beyond the parties control, i.e. whether Landmarks Commission issues penalties or fines or other sanctions based on Defendants' installation of an allegedly non-conforming window, are not actionable. In particular, the Landmarks Commission has not and may never issue penalties/fines or sanctions based on the subject window. For this reason, the fourth and fifth causes of action must be dismissed.

The remaining issue is whether the Condominium can amend its complaint to add the seventh cause of action for declaratory relief. The standard for a motion to amend 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 A.D.2d 385 (1st Dep't 1993); Murray v. City of New York, 43 N.Y.2d 400, 404-405, reargument dismissed, 45 N.Y. 2d 966 (1977).

There are no issues of prejudice here. "Prejudice" means the loss of a special right, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment. New York State Health Facilities Ass'n, Inc. v. Axelrod, 229 AD2d 864 (3d Dep't 1996). In this case, as the proposed additional cause of action is based on the same factual allegations as those set forth in the original complaint and the action is in its beginning stages, Defendants will not be prejudiced by its addition. The only issue is whether the proposed additional cause of action has merit.

Pursuant to CPLR 3001, "the supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "Whether a judicial determination of this nature will have this effect is generally for the court to decide in the

exercise of sound discretion." New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527 (1977). Moreover, "[t]he fact that the court may be required to determine the rights of the parties upon the happening of a future event, does not mean that the declaratory judgment will be merely advisory." Id. As the Court of Appeals has noted, "[i]n the typical case where a future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct." Id. 530-531. On the other hand, "a request for declaratory relief is premature if the future event is beyond the control of the parties." Id.

Here, the proposed cause of action consists of three parts, the first seeking judicial declaration that Defendants were required to obtain permits and/or approvals and/or licenses from Landmarks Commission for the window installed by Defendants in 18B. The second part seeks judicial declaration that Defendants failed to obtain all required permits and/or approvals and/or licenses from Landmarks Commission for the window installed by Defendants in 18B. The third part seeks a judicial declaration that Defendants must indemnify and hold the Condominium harmless from and against any fines, penalties and/or violations issued[3], or to be issued, by Landmarks Commission to the Condominium and/or its unit owners arising out of in any way relating to the window installed by Defendants in 18B.

The first two parts of the proposed cause of action do not depend on any future event, but rather seek a declaration as to the existing requirements of Landmarks Commission and Defendants' purported failure to comply with such requirements. Accordingly, the first two parts of the proposed cause of action have potential merit and may be added. However, the third part

[3]Despite this allegation there is no evidence, and the Condominium does not argue that, any fines, penalties or sanctions have been issued by the Landmarks Commission related to the subject window.

of the proposed cause of action, which seeks a declaration to enforce the indemnification clause of the Alteration Agreement in the event of the Condominium or its unit holders are held liable as a result of the alleged failure to obtain approval of Landmarks Commission, is premature as Landmarks Commission has not yet and may never issue fines or penalties or other sanctions related to the window. Accordingly, the motion to amend the complaint is granted only to the extent of permitting the Condominium to add the first two parts of the proposed seventh cause of action.

In view of the above, it is

ORDERED that the motion to dismiss is granted and the fourth and fifth causes of actions are dismissed; and it is further

ORDERED that the motion for leave to amend the complaint is granted to the extent of permitting the Condominium to add the first two parts of the seventh cause of action (i.e. ¶ 72(a) and (b) and ¶ 73(a) and (b)) and is otherwise denied; and it is further

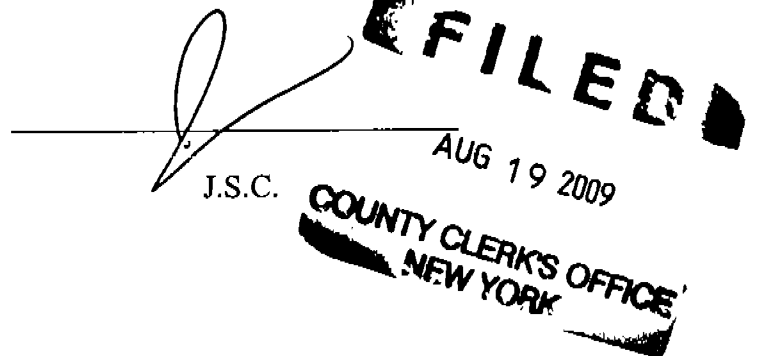
ORDERED that within 20 days of the date of this decision and order, the Condominium shall serve an amended complaint consistent with this decision and order; and it is further

ORDERED that Defendants shall serve an answer to the amended complaint within 20 days of service of the amended complaint; and it is further

ORDERED that a compliance conference shall be held in Part 11, room 351, 60 Centre Street on December 3, 2009 at 9:30 A.M.

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

Dated: August 18, 2009



J.S.C.