

Salnikova v S&P Assoc. of N.Y. LLC

2009 NY Slip Op 32389(U)

October 13, 2009

Supreme Court, New York County

Docket Number: 106905/2008

Judge: Louis B. York

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

PRESENT: L. York
Justice

PART 2
106905/2008
~~105181/08~~

Salkikova

INDEX NO. _____

MOTION DATE _____

- v -
S & P Assoc's of NY, et al.

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED
OCT 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/13/09

Ley
LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 2

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VERA SALNIKOVA,

Plaintiff,

-against-

S&P ASSOCIATES OF NEW YORK LLC, and
MILFORD MANAGEMENT CORP.,
Defendants.

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Plaintiff is a tenant in Apartment 32BCD ("the apartment") in the building located at 30 Lincoln Plaza in Manhattan ("the building"). Defendants S & P Associates of New York LLC and Milford Management Corp., as Sponsor and the Selling Agent, have commenced a non-eviction Condominium Offering Plan ("the Offering Plan") for the Building. The Offering Plan allows a current tenant of the Building to purchase his or her apartment at an insider price offered in the Plan. If the current tenant chooses not to purchase the apartment, it is offered for sale to the public at higher prices which also are determined in the Plan. However, if a tenant is rent stabilized, as plaintiff claims to be, the tenant can choose to remain in his or her apartment as a rent stabilized tenant, and will not be forced to purchase the apartment or leave so that another purchaser can move in. Tenants had to make their decisions during what the parties refer to as the Exclusive Purchase Period.

In the action before this Court, plaintiff claims that she is a rent-stabilized tenant in the apartment and therefore has the option to remain in her apartment as a stabilized tenant or to purchase her apartment at the insider price. Defendants challenge this contention and state that plaintiff must purchase the apartment at the insider price or evacuate it. The causes of action most relevant to this motion are the fifth, sixth and

seventh. The fifth and sixth causes of action seek a determination of plaintiff's rent stabilized status and a tolling of the Exclusive Purchase Period pending that determination. The seventh cause of action seek attorney's fees, costs and disbursements under Real Property Law § 234.

Plaintiff sought, and initially the Court granted, a temporary restraining order tolling the Exclusive Purchase Period pending a determination as to whether plaintiff is a rent-stabilized tenant in the building. However around January 13, 2009, in its decision in motion sequence number 1, the Court determined that (1) plaintiff was not likely to prevail on her fifth cause of action, which seeks a declaration that she is a rent-stabilized tenant; and (2) for this reason among others, the equities weighed in favor of defendants' interests. Accordingly, the Court denied the motion for a preliminary injunction. The Court refers the parties to the decision in motion sequence number 1 for a more detailed discussion of the background of this case and for the analysis and conclusions of the Court.

Around March 11, 2009, defendants brought this motion for an order of partial summary judgment dismissing the fifth, sixth and seventh causes of action and for a declaratory judgment that the apartment is not subject to rent stabilization. Defendants relied heavily on this Court's prior decision, which leaned strongly in favor of the conclusion that plaintiff does not have rent-stabilized status. They also submitted a supporting memorandum of law. Moreover, as Real Property Law § 234 allows for the award of attorney's fees when defendants fail to comply with their lease obligations, they state, even were plaintiff to prevail the Complaint would not support the award of attorney's fees.

The initial return date for this motion was April 3, 2009. Subsequently, the motion was adjourned twice – first to May 28, 2009, and second to June 19, 2009. Apparently plaintiff requested a third adjournment and defendants challenged the application, for the motion file sets forth a mediated schedule for the submission of additional papers. In particular, plaintiff agreed to serve the cross-motion she intended to make by Tuesday July 28, 2009. Defendants were to serve their opposition to the cross-motion by September 3, 2009. The motion submission date was adjourned to September 4, 2009, and this adjournment was deemed final against plaintiff. On that date the motion was submitted without opposition or a cross-motion. Following the submission of the motion, defendants' counsel wrote to the Court on notice, noting that plaintiff did not oppose the motion or cross-move despite her numerous adjournments for that purpose, accusing plaintiff of engaging in delay tactics, and requesting sanctions against plaintiff due to this conduct.

First the Court turns to the portion of the motion which seeks to sever and dismiss the fifth and sixth causes of action. For the reasons stated in the Court's decision in motion sequence number 1 at pages 6-8 and based on the evidence submitted by defendants in connection with both motions, the Court concludes that plaintiff is not a rent-stabilized tenant. As indicated in the earlier order, in support of her motion for a preliminary injunction plaintiff did not present sufficient evidence to show that she is a rent stabilized tenant. Moreover, she did not submit any evidence in opposition to the current motion of defendants. Accordingly, the fifth and sixth causes of action are severed and dismissed.

Second, the Court turns to the prong of the motion requesting dismissal of plaintiff's Real Property Law § 234 claim. Under that provision, when a residential lease entitles a landlord to recover attorney's fees and/or expenses based on a tenant's failure to perform a covenant or agreement in the lease or to pay rent, there is a reciprocal "covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part" Plaintiff does not specify which of her causes of action allow her the right to attorney's fees and costs under the statute.

As defendants correctly point out, the fifth and sixth causes of action do not relate to either parties' obligations under the lease itself but relate to plaintiff's rights under the Offering Plan. Therefore, she is not entitled to attorney's fees and costs based on those causes of action. However, the Court notes that there are four other causes of action in the Complaint. Accordingly, the Court reviews them as well. The first two causes of action assert that the building may be "over-built" in violation of zoning regulations and variances and the building's certificate of occupancy, and the fourth cause of action relates to a shift in the financial burden for certain maintenance from the building to the condominium owners for various repairs and maintenance costs. None of these seem to trigger Real Property Law § 234.

The fourth cause of action asserts that waste and plumbing line problems, coupled with problems relating to the improper installation of the concrete between each floor of the building, caused the ceiling of the apartment to collapse prior to plaintiff's residence in the apartment and that the underlying problems remain. The cause of action asserts these structural and other flaws violate certain building and housing code provisions.

Although plaintiff does not state this violates defendants' obligations under the lease and/or say this claim is the basis for plaintiff's right to attorney's fees, defendants also have failed to address the issue. Moreover, as neither party has addressed the issue, it is not clear whether this is a proper basis for Real Property Law § 234 recovery. The Court errs on the side of caution and does not dismiss the claim at this time.

Third, the Court notes that defendants cannot request sanctions by letter. Instead, they must follow the guidelines set forth in the CPLR for making a motion for sanctions. Therefore, as there is no proper application before it and the letter is not part of the motion file, the Court denies this request without consideration. However, it notes that plaintiff's failure to oppose a motion after requesting three adjournments in order to prepare opposition is unlikely to be deemed sanctionable conduct unless there are additional allegations of misconduct.

Accordingly, it is

ORDERED that the motion is granted to the extent of severing and dismissing plaintiff's fifth and sixth causes of action and these causes of action are severed and dismissed; and it is further

ORDERED that the motion is denied to the extent that it seeks to dismiss the seventh cause of action.

DATED: 10/13/09

SO ORDERED:



Louis B. York, J.S.C.

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NEW YORK