

**Windy Ridge Inc . v Windham Ridge Homeowners
Assn.**

2009 NY Slip Op 32733(U)

September 24, 2009

Supreme Court, Greene County

Docket Number: 02-288

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

WINDY RIDGE INC.,

Plaintiff,

-against-

WINDHAM RIDGE HOMEOWNERS ASSOCIATION.

Defendant.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

RJI: 19-02-0137 Index No. 02-288

Appearances: The Krupnick Firm, P.C.
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DECISION/ORDER

The plaintiff, Windy Ridge Corp. is the owner of the undeveloped portion of a phased residential real estate development located in the Town of Windham, Greene County, New York, which has the potential to accommodate a total of forty-two residential units¹. The defendant homeowners association represents the owners of one hundred fourteen existing (fully constructed) residences erected in an earlier phase of the project.

¹Thirty lots, located in Section IV of the development, are designated for construction of single family residences. Six lots, located in Section III, are intended for construction of duplex town houses. Significantly, the complaint filed by the plaintiff in 2002 only sought relief with respect to the six townhouse parcels. No mention was made at that time with regard to the thirty single family residences.

The defendant owns and controls a communal waste water treatment facility, which provides waste water sewage disposal for the one hundred fourteen existing dwellings. The plaintiff maintains that under a Declaration of Covenants, Restrictions, Easements, Charges and Liens (hereinafter “Declaration”) filed in the Greene County Clerk’s Office in 1982, it is entitled to connect into (and make use of) defendant’s communal waste water treatment facility, in order to provide sewage disposal service to the forty-two undeveloped residential units. The defendant takes the position that the plaintiff is not entitled to access or use its waste water treatment facility. In the instant action the plaintiff seeks, inter alia, a declaratory judgment that it is entitled to membership in the defendant homeowners association, with full rights to use the existing waste treatment facility and/or with full rights to utilize a proposed but un-constructed sewer line which would run from defendant’s sewage disposal system to the Town of Windham Waste Water Treatment Facility.

The original complaint² contained a single cause of action for a declaratory judgment, and only sought relief with respect to plaintiff’s twelve townhouse units. By order to show cause dated October 13, 2008 the plaintiff made a motion, as relevant here, to amend plaintiff’s complaint to add two more causes of action. Plaintiff also sought to expand the complaint to include the thirty lots designated for construction of single family residences; and to add four more parties. The additional parties included the New York City Environmental Protection Agency, New York State Department of Environmental

²Plaintiff initially commenced the instant matter as a CPLR Article 78 proceeding limited to twelve townhouse units on six building lots. The Court, as a part of the relief granted in an order dated April 9, 2009, converted the CPLR Article 78 proceeding to a plenary action.

Conservation, the Town of Windham and the law firm of Young Sommer, LLP. The Court, by order dated April 9, 2009, partially granted and partially denied the motion to amend the complaint.

On April 29, 2009 the plaintiff served its amended complaint. On May 8, 2009 the defendant, by fax transmission, rejected the amended complaint as being beyond the scope of the order dated April 9, 2009. Defendant has now, by order to show cause dated May 12, 2009, applied for, *inter alia*, an order vacating the amended complaint. Plaintiff opposes the motion.

Turning to a threshold issue, the plaintiff, citing CPLR 2101 (f) maintains that the defendant waived its objection to the amended complaint by not promptly rejecting plaintiff's amended complaint. The amended complaint dated April 28, 2009 was received on April 30, 2009, and returned by the defendant on May 8, 2009. Plaintiff cites CPLR 2101, entitled "Form of papers", which recites in paragraph (f):

"Defects in form; waiver. A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within two days after receipt thereof, he returns the papers to the party serving it with a statement of particular objections" (CPLR 2101 [f]).

The Court is of the view that CPLR 2101 (f) is not applicable to the instant situation since the defendant's objections do not relate to the form of the amended answer, but rather its content. In addition, for the reasons set forth below, the Court further finds that service of the amended complaint prejudiced a substantial right of the defendant (as embodied in the

Court's order dated April 9, 2009) by containing allegations far beyond the scope of those authorized by the Court. While it is true that a failure to promptly reject a pleading may result in a waiver of any objection relating thereto (see Dime Savings Bank, FSB v Halo, 210 AD2d 572 [3d Dept., 1994]), in this instance the delay (eight days) was not protracted. The Court finds that the defendant did not waive its rights to object to plaintiff's amended complaint (Manhattan King David Restaurant, Inc. v Nathanson, 269 AD2d 297 [1 Dept. 2000] Held, three week delay in moving to dismiss plaintiff's complaint not found to be excessive).

Turning to the merits, as noted, the original complaint (denominated a "petition") contained a single cause of action for a declaratory judgment with respect to plaintiff's rights to connect six two-unit townhouse parcels into defendant's waste water treatment facility. The proposed complaint submitted in support of plaintiff's motion to amend contained three causes of action, summarized as follows: (1) a first cause of action for a declaratory judgment with respect to its rights to connect to defendant's current or future waste water treatment facility, now expanded to include forty-two residential units; (2) a second cause of action for a permanent injunction to prevent defendant from connecting its waste water sewage system to the Town of Windham waste water treatment facility, and to prevent the defendant from decommissioning its existing waste treatment facility; and (3) a third cause of action against the law firm of Young, Sommer, LLC for money damages. The proposed amended complaint, as noted, also sought to add new parties. The Court denied the motion with respect to plaintiff's request to add new parties, and denied the motion with respect to defendant's third cause of action against Young, Sommer, LLC. Left

remaining were plaintiff's first and second causes of action, expanded to include "the cause of action based on the sewer connection contract and to expand the scope of this action to include the thirty parcels in Section IV".

Notably, the first two causes of action of the proposed amended complaint on the prior motion contained confusing, duplicative and overlapping allegations, intermingled with claims against other parties. This being said, the Court is of the view that it could have done a better job of clarifying what amendments were being permitted. When the Court indicated that it would permit the amendment to add the cause of action based upon the proposed sewer connection contract between the defendant and the Town of Windham, the Court intended that this claim be included in the first cause of action for a declaratory judgment, and in the second cause of action for a permanent injunction. It also intended that the second cause of action for a permanent injunction include plaintiff's request for relief with regard to the decommissioning of the present waste water treatment facility.

With regard to the issue concerning the grant of money damages, such relief has been found to be proper in an action for a declaratory judgment in order to award complete relief in one action (see Silverstein v Continental Casualty Company, 23 AD2d 801, aff'd 17 NY2d 845 [4th Dept., 1965]; see also Siegel, Practice Commentaries, Mc Kinney's Cons Laws of NY, Book 7B, CPLR C3001:5, Main Volume at 435; Siegel, NY Prac § 441, at 745 [Fourth Ed.]). For this reason, the Court is of the view that a declaration with regard to plaintiff's right to money damages may properly be included as a part of the relief requested on the first cause of action for a declaratory judgment.

Paragraph 27 of the proposed amended complaint (in plaintiff's first cause of action).

requested that if the plaintiff does not receive a declaratory judgment authorizing it to connect into the defendant's waste water treatment system, that a deed dated December 20, 1990 from an entity known as Windham Ridge Club, Inc. (which conveyed the common areas in the development to the defendant) be rescinded and the lands transferred "back" to the plaintiff. In the Court's view, the grant of such relief was not shown to have merit, since the plaintiff never owned the common areas at any time. While plaintiff is the successor owner of the remaining land in the forty-two unit development, it did not demonstrate that it was the successor in interest of Windham Ridge Club, Inc., the grantor of the common areas. More importantly, such relief would infringe upon the vested rights of the individual members of the defendant homeowners association (with regard to use of the common areas), none of whom have been made parties to the instant action.

With respect to plaintiff's constitutional claims, the Fifth Amendment of the federal constitution prohibits the federal government from depriving individuals of their property without due process of law (see US Const., Amend. V). This amendment is made applicable to states by operation of the 14th Amendment of the federal constitution. Additionally, NY Const. Art. I, § 6 provides that "no person shall be deprived of life, liberty or property without due process of law". Notably however, the foregoing provisions relate to *governmental* action or interference (see generally 20 NY Jur 2d, Constitutional Law § 276 at 411, and § 387 at 546). As such, the Court is of the view that plaintiff's constitutional claims have not been shown to have merit. In essence, what plaintiff denominates as a "deprivation" claim is, in reality, a cause of action to determine whether the defendant violated certain real property covenants alleged to be applicable to the common areas. This

is not a constitutional issue. For this reason, amendment of the complaint to add such a claim was not permitted.

The proposed amended complaint submitted on the previous motion, as noted, contained three causes of action, only two of which were approved. It consisted of fifty paragraphs, and was twenty-eight pages long. On April 29, 2009 defendant served an amended complaint which contained *thirteen* causes of action (rather than the two authorized by the Court in the April 9, 2009 order). Many of the causes of action are repetitive, overlapping and redundant. The amended complaint contains three hundred twenty-eight paragraphs and is forty-four pages in length. For the first time, plaintiff interposes a cause of action sounding in breach of a condition subsequent under RPAPL 641, a cause of action sounding in nuisance, breach of covenant, and one for attorneys fees. These causes of action go far beyond anything requested in plaintiff's motion to amend the complaint.

As pointed out by the defendant, plaintiff's motion sought leave to serve an amended complaint "in the form presented herein". The Court reviewed and considered the motion in that light. Very clearly, the amended complaint served by the plaintiff is at great variance from that presented to the Court on plaintiff's original motion. In this respect, while the Court authorized service of an amended complaint in one form, the plaintiff elected to serve something quite different, without judicial leave. Under the circumstances, the Court finds that defendant's motion must be granted, and the amended complaint vacated. The Court will grant leave to the plaintiff to serve and file an amended complaint with respect to the first two proposed causes of action, but limited as set forth in this decision/order. The

plaintiff should, as far as practicable, track the language contained paragraphs one through forty-three of the proposed amended complaint. However, it should not add any new parties or causes of action; and should not request further relief beyond what is permitted herein.

As a part of the relief sought in the instant motion, the defendant seeks leave to serve a demand for a bill of particulars and notice for discovery and inspection as relevant to plaintiff's amended complaint. The Court finds that the motion should be granted, but limited to the amendments which have been authorized.

One final point should be made. In the Court's view the conduct of the plaintiff, in serving an amended complaint which materially deviated from what was permitted under the April 9, 2009 order (and which went far beyond what was even requested), could well be deemed frivolous within the meaning of 22 NYCRR Part 130. The Court further observes however that the defendant did not seek sanctions on the instant application. Under the circumstances, inasmuch as the issue of sanctions is not before the Court, it will not be considered. However, the plaintiff must be cautioned that such conduct will not be tolerated in the future.

Accordingly, it is

ORDERED, that defendant's motion to vacate plaintiff's amended complaint dated April 24, 2009 is granted in its entirety and said amended complaint be and hereby is vacated and set aside; and it is further

ORDERED, that plaintiff serve and file an amended complaint in keeping with this decision/order within twenty (20) days of the date hereof; and it is further

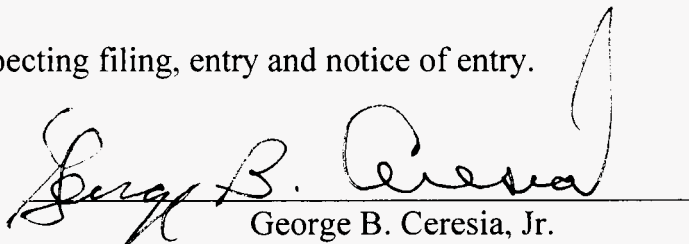
ORDERED, that the defendant serve and file an answer to the amended complaint

within twenty (20) days thereafter; and it is further

ORDERED, that the defendant be permitted to serve a supplemental demand for a bill of particulars and a supplemental demand for discovery and inspection within twenty (20) days of service of the amended complaint.

This shall constitute the decision and order the Court. The original decision/order is returned to the attorney for the defendant. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: Troy, New York
September 24, 2009


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Defendant's Order to Show Cause dated May 18, 2009, Supporting Papers and Exhibits
2. Affidavit In Opposition of Kevin P. Krupnick, Esq., sworn to June 1, 2009