

Lawrence v 217 Fifth Ave. Owners Corp.

2009 NY Slip Op 32830(U)

November 27, 2009

Supreme Court, New York County

Docket Number: 100020/09

Judge: Doris Ling-Cohan

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

Hon. Doris Ling-Cohan

PART 36

Index Number : 100020/2009

LAWRENCE, PAMELA

VS.

217 FIFTH AVENUE OWNERS CORP.,

SEQUENCE NUMBER : # 001

PARTIAL SUMMARY JUDGMENT

Justice

INDEX NO. 100020-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for summary judgment

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

Answering Affidavits — Exhibits (memo)

Replying Affidavits (memo)

PAPERS NUMBERED

1,2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for ~~summary~~ partial summary judgment is granted to you limited extent provided in the attached memorandum decision.

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

FILED
DEC 04 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated:

11/27/09

DORIS LING-COHAN

J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

----- X

PAMELA LAWRENCE,

Plaintiff,

INDEX NO.
100020/09

-against-

217 FIFTH AVENUE OWNERS CORP.,
THE BOARD OF DIRECTORS OF 217
FIFTH AVENUE OWNERS CORP., and
DAVID ADAM SMITH,

Motion Seq.
No.: 001

Defendants.

----- X

DORIS LING-COHAN, J.:

FILED
DEC 04 2009
NEW YORK
COUNTY CLERK'S OFFICE

Defendants move for an order pursuant to CPLR 3212 granting partial summary judgment in their favor.

Defendant 217 Fifth Avenue Owners Corp. (the "co-op") is a four-unit cooperative apartment building located at 217 Fifth Avenue in Brooklyn. Plaintiff, Pamela Lawrence, resided in the apartment on the top floor from 1982 until 2008.¹ In 1991 she renovated the apartment with the permission of the co-op's Board of Directors (the "Board"), after having provided the Board with an indemnification letter dated June 2, 1989 (the "1989 Indemnity") in which she agreed to indemnify the co-op and its residents for any damages caused by her renovations. The

¹ Since plaintiff is opposing a motion for summary judgment, her version of the underlying facts will be utilized herein and viewed in the light most favorable to her (see *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; see also, *Hotopp Associates, Ltd. v Victoria's Secret Stores, Inc.*, 256 AD2d 285, 286 [1st Dept 1998] [evidence presented by party opposing a motion for summary judgment accepted as true]).

renovations included replacing all of the original ceilings (except for the wood-beam ceiling in the living room) with standard insulated ceilings.

In the Fall of 2006, when plaintiff decided to put her apartment on the market, she started to experience problems with the heat in the apartment. In September 2006 plaintiff informed the president of the Board, defendant David Smith ("Smith"), that she was going to again renovate her apartment and put it up for sale. In October 2006 Smith moved the control for the heat for all the apartments into his apartment and started regulating the heat so that it was on for only two hours a day, from 5:30 a.m. to 6:30 a.m. and from 5:30 p.m. to 6:30 p.m. In December 2006 plaintiff complained to Smith that the new heating policy left her top-floor apartment, which had three walls that were exposed to the outside, unbearably cold. In late January 2007 plaintiff accepted a prospective purchaser's offer to buy her newly renovated apartment for \$717,259. Several days later she received a certified letter from the Board purporting to give her notice pursuant to her proprietary lease and the 1989 Indemnity that her "prior removal of the ceiling" and insulating material caused a significant loss of heat in the building (see defendants' exhibit E).

In February 2007 plaintiff hired a contractor to review the heat situation and prepare an alteration proposal. The Board, in turn, hired an engineering firm named Rand to inspect plaintiff's apartment and furnish a written report. Plaintiff then hired Heimer Engineering to review the Rand report and make recommendations on the heating issue. In early April 2007 plaintiff submitted the Heimer report to the Board. By letter dated April 26, 2007, the Board's attorney advised plaintiff that the Board would only approve a transfer of her apartment if all the ceilings had a "code appropriate fire rating" (see defendants' exhibit H); plaintiff's prospective

purchaser lost interest. In August 2007 plaintiff agreed to allow a contractor chosen by Smith to renovate her apartment and to pay half the cost of the renovation, which was completed in December 2007.

In early February 2008 plaintiff received an offer from a couple, David and Melissa Smith, to purchase her apartment for \$672,000. Several days thereafter plaintiff's real estate agent informed her that Smith had decided that the Smiths could not buy her apartment because David Smith, the prospective purchaser, had the same first and last name as Smith, the Board president. On March 17, 2008, the Board rejected the Smiths' application. In September 2008 plaintiff sold her apartment to someone else for \$595,000.

Plaintiff commenced this action in January 2009. The complaint (plaintiff's exhibit 1) asserts seven causes of action, labeled as follows: (1) breach of fiduciary duty (asserted against the Board); (2) breach of proprietary lease (asserted against the Board); (3) breach of fiduciary duty (asserted against Smith); (4) breach of proprietary lease (asserted against the co-op); (5) breach of implied warranty of habitability; (6) Race, National Origin Discrimination;² and, (7) attorneys' fees. Plaintiff seeks compensatory damages which include the cost of maintaining a second residence, maintenance costs, unnecessary architectural, contractor, engineering and legal fees, diminution in value of her co-op shares, lost profit, and loss of interest on the proceeds of the sales that were not made. She also seeks punitive damages.

In support of their motion for summary judgment defendants argue that plaintiff's first, second and third causes of action, which are based on allegations that the Board and Smith

² This cause of action is predicated on the fact that David Smith (the prospective purchaser) is African American.

required plaintiff to undertake renovations that were not required of any other shareholder, are barred by the 1989 Indemnity (defendants' exhibit A) wherein plaintiff agreed that if an alteration made by her adversely affected the building or its equipment, she would bear sole responsibility for ameliorating the situation. According to defendants, since plaintiff's removal of the insulated dropped ceiling in the living room in 1991 was the cause of the heat loss in her apartment, she is barred from suing the co-op for damages allegedly incurred as a result of her alteration.

Defendants then argue that plaintiff's first and third causes of action for breach of fiduciary duty are also barred by the business judgment rule because the Board and Smith acted in good faith in furtherance of the interests of the co-op and on advice of counsel. Next, defendants argue that plaintiff's fourth cause of action, which alleges that the co-op breached plaintiff's proprietary lease by failing to provide her apartment with sufficient heat, fails to state a claim against the co-op because any heat loss was due to plaintiff's failure to keep her ceilings in good repair and her removal of the insulated dropped ceiling in the living room. Defendants argue further that plaintiff's fifth cause of action for breach of the implied warranty of habitability, which is based on the allegation that the co-op intentionally failed to provide her with adequate heat, is duplicative of her claim for breach of her proprietary lease and cannot be sustained because plaintiff fails to allege that her apartment was uninhabitable, unfit for use, or subject to dangerous conditions. Defendants then contend that plaintiff's sixth cause of action, which alleges that Smith caused her to suffer damages by rejecting Mr. and Mrs. Smith on racial grounds must be dismissed for the following reasons: Smith, acting alone, does not have the power to reject a potential purchaser; the Board, which has the right to withhold its approval for any reason or no reason absent illegal discrimination, unanimously voted against plaintiff's sale to the Smiths

because David Smith, the prospective purchaser, and Smith, the Board president, shared the same first and last names; plaintiff's "wild speculation" that the Board's rejection of the Smiths as purchasers was based on improper racial considerations is an insufficient basis for sustaining her claim; plaintiff has no standing under the state Human Rights Law to bring a racial discrimination claim because she does not fall within the class of persons the Law was enacted to protect; and, Smith is an improper defendant because the Human Rights Law does not include the members of a co-op's board of directors as potential defendants. Defendants conclude that plaintiff's seventh cause of action for attorneys' fees is limited to the fees incurred in bringing, pursuing, and succeeding on her second and fourth causes of action for breach of the proprietary lease and that plaintiff is not entitled to punitive damages because such damages are not recoverable for ordinary breach of contract and because she has failed to allege that defendants' actions involved a high degree of moral turpitude or conduct directed against the public generally.

In opposition to defendants' motion plaintiff makes the following arguments: the 1989 Indemnity does not apply to her first three causes of action because she never agreed that she would be precluded from making her own claims against the co-op or Board for breach of fiduciary duty or breach of the proprietary lease; at the very least, triable issues exist as to whether plaintiff's 1991 renovations or Smith's October 2006 heating policy caused the loss of heat in her apartment; the business judgment rule does not apply to her first and third causes of action because, *inter alia*, the Board and Smith acted in bad faith; her fourth cause of action represents a legitimate breach of contract claim against the co-op because it failed to provide sufficient heat to her apartment as required by section 3.1.2 of her proprietary lease; her fifth

cause of action should not be dismissed because a co-op's failure to provide adequate heat and hot water has been recognized as a breach of the implied warranty of habitability; her sixth cause of action should not be dismissed because an issue exists as to whether defendants denied the sale of her apartment to the Smiths because the prospective purchaser, David Smith, was African American; she has standing to assert a discrimination claim because she was affected by the alleged discrimination; she is entitled to attorneys' fees on all of her causes of action, not just the second and fourth, because her allegations that the co-op breached the proprietary lease support an inference of a violation of the obligation of good faith implicit in any contract; her request for punitive damages should be sustained because the complaint alleges that defendants acted intentionally and willfully and that they engaged in racial discrimination; and, defendants' motion should be denied as premature because no discovery has been provided and a preliminary conference has yet to be held.

Summary judgment is a drastic remedy which is properly denied if there is any doubt as to the existence of a factual issue (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Furthermore, as stated above, the facts must be viewed in the light most favorable to the non-moving party (see *McLaughlin v Thaima Realty Corp.*, *supra*, 161 AD2d at 384). Here, there has been no discovery, although the parties recently appeared before the court for a preliminary discovery conference. Further, the following issues have been raised by defendants' motion, and have been resolved by the submissions: whether the 1989 Indemnity applies to plaintiff's first three causes of action; whether defendants failed to furnish adequate heat to plaintiff's apartment; whether the loss of heat plaintiff claims she suffered in 2006 was caused by her renovations in 1991, otherwise caused by her, or caused by Smith; whether Smith and/or the

Board acted in good faith throughout; whether plaintiff's failure to sell her apartment to the Smiths was attributable to unlawful conduct on defendants' part (plaintiff's sixth cause of action [see plaintiff's exhibit 1, ¶¶ 87-89] does not invoke the state Human Rights Law on which defendants base their argument for its dismissal); and, whether Smith controlled the Board. As there are clearly factual issues with respect to the above, at this juncture, plaintiff's claims will not be dismissed, except as indicated below.

Plaintiff's seventh cause of action for attorneys' fees should be limited to the fees incurred should she prevail on her fourth cause of action against the co-op for breach of her proprietary lease. Under the American rule, a prevailing party may not collect legal fees from the loser unless such award is authorized by agreement between the parties, statute or court rule (see *Chapel v Mitchell*, 84 NY2d 345, 349 [1994]). Plaintiff's proprietary lease provides that the co-op is entitled to recover legal fees incurred in successfully prosecuting an action against her for its breach (see defendants' exhibit EE, ¶ 2.6). The relevant statute is Real Property Law § 234, which grants a reciprocal right to plaintiff. However, plaintiff's second cause of action for breach of her lease asserted against the Board will be dismissed because the Board is not a party to the lease.

Plaintiff's demand for punitive damages will be stricken. There is nothing in the papers before the court to support a finding that defendants' conduct was so malicious, wanton or outrageous as to justify an award of punitive damages to plaintiff (see *Walker v Sheldon*, 10 NY2d 401 [1961]; *Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]).³

³ Such damages, if proven, might be available to the Smiths by statute (see *Sherwood Terrace Apartments v New York State Div. of Human Rights*, 61 AD3d 1333, 1334 [4th Dept 2009]; Executive Law § 297 [4][c][iv]).

Accordingly, defendants' motion for partial summary judgment is granted to the extent that it is

ORDERED that plaintiff's recovery of legal fees shall be limited to the fees incurred in the successful prosecution of her fourth cause of action against the co-op for breach of her proprietary lease, and it is further

ORDERED that plaintiff's request for punitive damages is hereby stricken.

In all other respects the motion is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

This constitutes the decision and order of the court.

DATED: November 27, 2009

DORIS LING-COHAN
J.S.C.
Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Lawrence.217 fifth ave.wpd

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