

Mindel Residential Props., L.P. v Dello Russo
2009 NY Slip Op 33359(U)
January 11, 2009
Supreme Court, New York County
Docket Number: 104947/06
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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MINDEL RESIDENTIAL PROPERTIES, L.P.,

Plaintiff,

Index No: 104947/06

-against-

Decision and Order

STEPHANIE DELLO RUSSO, BOGA GENERAL
CONTRACTORS, INC., ANTHONY BOGA d/b/a
BOGA GENERAL CONTRACTORS, ANTHONY
BOGA, HAROLD S. SPITZER ARCHITECT, P.C.,
HAROLD S. SPITZER, "ABC, INC.," and "JOHN
DOE",

Defendants.
-----X

FILED
JAN 15 2010
COUNTY OF NEW YORK

SHULMAN, MARTIN, J.S.C.:

In motion sequence number 003, plaintiff Mindel Residential Properties, L.P. ("Mindel LP" or "plaintiff") moves to amend its amended complaint to assert two new causes of action for declaratory relief against defendant Stephanie Dello Russo ("SDR" or "defendant"). Defendant opposes the motion to amend and brings a separate motion (sequence number 004) by order to show cause ("OSC") to dismiss the action based upon plaintiff's status as a foreign limited partnership¹ not authorized to do business in the State of New York, and therefore unauthorized to commence this action (see New

¹ Mindel LP's Limited Partnership Agreement ("LPA") indicates that it is a Delaware limited partnership comprised of a general partner, Mindel Family Holdings, LLC ("Mindel LLC"), and three limited partners, to wit, Joel Mindel, Susan Mindel and MMG Residence Trust, and having a business address at 185 East 64th St., New York, New York. Mindel LLC is also a Delaware limited liability company having the same business address as Mindel LP. In accordance with the parties' confidentiality agreement, the LPA (as well as the trust agreement for MMG Residence Trust) was submitted to the court for *in camera* review and is being returned to the moving defendant simultaneously with a courtesy copy of this decision and order.

York Partnership Law §121-907). Mindel LP opposes the OSC, which is consolidated for disposition with motion sequence number 003.

As detailed in this court's prior decision and order dated February 11, 2008, plaintiff owns combined properties located at 183-185 East 64th Street, New York, New York ("183/185 Property"). Defendant owns an adjoining townhouse at 181 East 64th Street, New York, New York ("181 Property"). Mindel LP commenced this action seeking injunctive and other relief arising from renovations SDR performed on the 181 Property which allegedly encroach upon the 183/185 Property.² For her part, defendant has asserted counterclaims against plaintiff alleging adverse possession, easement, nuisance, trespass and negligence and cross-claims against the remaining co-defendants for contribution and indemnification.

Defendant's OSC to Dismiss

The court first addresses defendant's OSC seeking to dismiss the amended complaint. In addition to basing her motion to dismiss on the fact that Mindel LP is a foreign partnership not authorized to do business in New York, SDR also claims that Mindel LLC similarly is an unauthorized foreign limited liability corporation. Further, since Delaware Department of State, Division of Corporations records (Exh. D to OSC) indicate Mindel LLC's status as "cancelled-voided" due to non-payment of taxes, Mindel LP has been operating without a general partner and prosecuting this action without authority.

² The remaining defendants are SDR's general contractor, Boga Contractors, Inc. and Anthony Boga, individually, and SDR's architect, Harold S. Spitzer, P.C. and Harold S. Spitzer, individually.

Defendant argues that Mindel LP was doing business in New York based upon its ownership of the 183/185 Property and its business address thereat. Mindel LLC is alleged to be doing business in New York by virtue of its operation and control of Mindel LP.

In opposition, plaintiff asserts: 1) the "ministerial issues" raised in this motion are moot since they were subsequently cured;³ 2) the OSC was brought in bad faith as a delay tactic to avoid responding to plaintiff's motion to amend; and 3) Partnership Law §121-907(a) does not compel dismissal as the failure to obtain authorization to do business is curable during an action's pendency. Via sur-reply permitted by this court, plaintiff *inter alia* disputes that Mindel LP and Mindel LLC are doing business in New York and as such are not required to obtain certificates of authority. Notwithstanding the foregoing claim, Mindel LP applied for and obtained a certificate of authority to avoid litigating the issue.⁴

In reply, SDR's counterclaim counsel⁵ denies that the OSC is mooted by plaintiff's belated filings and theorizes that Mindel LP's failure to file for permission to do

³ Specifically, plaintiff filed an Application for Authority with the New York State Department of State, Division of Corporations, which has been granted, and filed a Certificate of Revival for Mindel LLC with the Delaware Department of State, Division of Corporations, thus restoring Mindel LLC's good standing status. See Segal Aff. in Opp. at Exhs. 1 through 4.

⁴ By letter dated October 23, 2009, defendant *inter alia* objects to plaintiff raising this argument for the first time in reply papers and attempts to submit her own sur-reply for the court's consideration in connection with both the OSC and the motion to amend. By letter dated October 27, 2009, plaintiff urged the court to disregard defendant's unauthorized sur-reply. The court has disregarded defendant's proposed sur-reply as it is irrelevant in light of the court's analysis *infra*.

⁵ Defendant has separate counsel for her defense of plaintiff's claims.

business in New York was not inadvertent, but rather was part of a scheme to avoid various tax payments,⁶ thus warranting dismissal. Defendant's counsel notes that Mindel LLC still lacks authority to do business in New York and further disputes that Dr. Joel Mindel was authorized to sign documents and appear to be deposed in this action on plaintiff's behalf since he is merely a limited partner of Mindel LP and Susan Mindel is the managing member of general partner Mindel LLC.

Partnership Law §121-907(a) provides in relevant part:

A foreign limited partnership doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such partnership shall have received a certificate of authority in this state . . .

In interpreting the foregoing statute, courts generally look to Business Corporation Law §1312, which imposes a similar requirement upon foreign corporations doing business in New York. *See, e.g., CadleRock Joint Venture, L.P. v. Klar*, 278 A.D.2d 39, 39-40 (1st Dept. 2000), citing *Alicanto, S.A. v. Woolverton*, 129 A.D.2d 601, 602 (2d Dept. 1987).

SDR's motion to dismiss must be denied. As plaintiff notes, the failure to obtain authorization to do business in New York is a defect that may be cured during the pendency of an action. *Fine Arts Enters., N.V. v. Levy*, 149 A.D.2d 795, 796 (3d Dept.

⁶ Defense counsel's reply affirmation goes into extensive detail analyzing the transaction(s) whereby plaintiff acquired and combined the 183/185 Property, concluding that the Mindels have set up an elaborate scheme to avoid paying transfer and other taxes. Counsel's speculative and inflammatory allegations, clearly proffered to cast plaintiff and its partners in a negative light, are not relevant to the court's determination of the issue at bar and improperly required plaintiff's preparation and submission of a painstaking sur-reply to refute defendant's conjecture regarding what appears to be a legitimate estate planning strategy.

1989, citing *Intermar Overseas, Inc. v. Argocean S.A.*, 117 A.D.2d 492, 497 (1st Dept. 1986). Here, Mindel LP has cured this defect by obtaining a certificate of authority, whether required or not. As to Mindel LLC, defendant cites no authority, nor can the court find any, mandating that an authorized foreign limited partnership's general partner be authorized to do business in New York. *See also, Tri-Terminal Corp. v. CITC Indust., Inc.*, 78 A.D.2d 609 (failure to qualify to do business in New York is not a jurisdictional impediment; appropriate remedy is not outright dismissal but conditional dismissal or stay to permit plaintiff to obtain authority).

Given the foregoing, the court need not address whether plaintiff is doing business in New York. Finally, as to the issue concerning Mindel LLC's temporary lack of good standing in its state of incorporation, this has also been cured and, in any event, this "defect" existed only from June 1, 2009 through August 24, 2009, a minor period of time considering the commencement of this action in 2006.

Plaintiff's Motion to Amend

Leave to amend a pleading pursuant to CPLR §3025(b) should be freely granted absent prejudice or surprise resulting from the delay (see *Edenwald Contr. Co. v City of New York*, 60 N.Y.2d 957, 959 [1983]; *Probst v. Cacoulidis*, 295 A.D.2d 331 [2nd Dept., 2002]). While the decision to allow or disallow an amendment is left to the court's sound discretion (see *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d at 959), a court need not grant leave to amend a pleading where the proposed amendment is palpably without merit (see *Probst v. Cacoulidis*, 295 A.D.2d at 332; *Reuter v Haag*, 224 A.D.2d 603 [2nd Dept., 1996]).

Here, plaintiff seeks to further amend its amended complaint to allege two new causes of action for declaratory relief, declaring as follows: 1) that a concrete wall separating the rear of the 181 Property from that of the 183/185 Property is the boundary line between said properties, and plaintiff and defendant are each entitled to exclusive use of the land on their side and up to one half of the wall; and 2) that plaintiff adversely possessed a portion of the land on which the concrete wall sits. SDR opposes the motion, contending that plaintiff offers no explanation for its three year delay in bringing this motion, reiterating the OSC's argument that plaintiff lacks authority to utilize New York courts and charging plaintiff with various discovery defaults.

As plaintiff notes, the proposed new causes of action arise from SDR's assertion of a counterclaim for a declaration that she adversely possessed the land covered by the entire wall. As evidenced by its verified reply, plaintiff at all times has denied defendant's allegations in this regard, clearly indicating plaintiff's belief that it owns a portion of the land on which the wall is located. Under these circumstances, the court concludes SDR cannot claim surprise or prejudice and the proposed amendment should be granted. Accordingly, for the foregoing reasons it is

ORDERED, that plaintiff's motion for leave to amend the amended complaint is granted, and the Second Amended Complaint in the proposed form annexed to the moving papers at Exhibit H shall be deemed served upon service of a copy of this decision and order with notice of entry thereof; and it is further

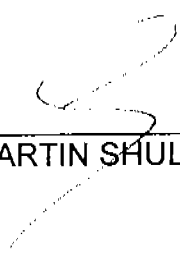
ORDERED that defendants shall serve their answer(s) to the Second Amended Complaint within 20 days from the date of said service; and it is further

ORDERED, that SDR's OSC to dismiss the complaint is denied in its entirety.

Counsel for the parties are directed to appear for a status conference on February 23, 2010 at 9:30 a.m. at I.A.S. Part 1, Room 1127B, 111 Centre Street, New York, New York. **Plaintiff's counsel shall notify the remaining defendants of this conference date forthwith.**

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for plaintiff and defendant Dello Russo.

Dated: New York, New York
January 11, 2009



HON. MARTIN SHULMAN, J.S.C.

FILED
JAN 15 2010
NEW YORK
COUNTY CLERK'S OFFICE