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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 115107/2008
CAMPANIELLO, THOMAS
VS.
GREEN STREET HOLDING CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 2/26/10

MOTION SEQ. NO. 001

MOTION CAL. NO.

n this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

FILED
MAY 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the portion of plaintiff's motion seeking summary judgment on the first two causes of action is denied; and it is further

ORDERED that the portion of defendant's cross motion seeking to dismiss the first two causes of action is denied; and it is further

ORDERED that the issues of: (1) the amount spent by defendant on professional fees and repair expenses incurred by reason of plaintiff's alterations of his cooperative unit; and (2) whether defendant is curing the violations placed on the building by the Department of Buildings, are referred to a Special Referee to hear and determine (CPLR 4317 [b]) (*see Keeney v Keeney*, 297 AD2d 606 [1st Dept 2002]); and it is further

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

Dated: _____ _____ J.S.C.

Check one: ~~FINAL DISPOSITION~~ ~~NON-FINAL DISPOSITION~~

Check if appropriate: DO NOT POST ☐ REFERENCE

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[2] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the portion of plaintiff's motion seeking summary judgment on his third cause of action for a mandatory injunction is denied; and it is further

ORDERED that the portion of defendant's cross motion seeking to dismiss the third cause of action is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated 5/7/10 **ENTER:** _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

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[2]Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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THOMAS CAMPANIELLO,

Plaintiff,

Index No.: 115107/08

-against-

DECISION

GREENE STREET HOLDING CORP.,

Defendant.

----------x

CAROL ROBINSON EDMEAD, J.:

FACTUAL BACKGROUND

Plaintiff moves, pursuant to CPLR 3212, for summary judgment on the first, second and third causes of action set forth in the complaint. Defendant cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, plus reasonable attorney's fees.

Plaintiff is a shareholder/proprietary lessee of certain commercial cooperative premises owned by defendant cooperative corporation. Initially, on April 24, 2006, plaintiff was not approved as a purchaser by the cooperative board because he and related entities had been involved in more than two dozen lawsuits. The cooperative board later reconsidered plaintiff's application, and he was finally approved on June 20, 2006. Plaintiff acquired his shares in the unit on or about August 30, 2006.

According to the proprietary lease, no lessee is allowed to

make any alterations without first obtaining the written consent of the cooperative board. Defendant asserts that, in November of 2006, plaintiff commenced a gut renovation of the unit without first obtaining the board's approval, and that such work caused a building-wide power outage. Aff. of Scott Cohen, President, Board of Directors. Defendant further states that, at first, plaintiff refused to stop work, but eventually agreed to cease the alterations when defendant threatened to obtain a court order.

On or about December 1, 2006, plaintiff executed an Alteration Agreement (Complaint, Ex. A), prepared by defendant, pursuant to which plaintiff posted a $15,000.00 security deposit. According to the complaint, the intended alterations had been previously approved by defendant when submitted by the prior owner of the unit, said plans having been given to plaintiff by the prior owner upon his purchase of the premises. However, neither side has provided a copy of the plans, and plaintiff does not dispute that he started work on the unit based on these earlier plans, and that he, himself, did not obtain prior written approval for the alterations from the board.

Clause 1 (d) of the Alteration Agreement states, in pertinent part:

> "1. Before any alterations commence, the Cooperative requires that you: ...
> (d) Submit to the Cooperative, along with this signed Agreement, a security deposit in the amount of

> $15,000.00. This deposit will be placed in an escrow account and will be used towards the cost of curing any violation resulting due to the alterations or for repairing any damages to the building or its systems. Any unused portion of this deposit will be returned upon final completion of the project."

Clause 8 of the Alteration Agreement states:

> "You shall take all precautions to prevent and assume all risks for and obligation to repair all damage to the Building and property of other shareholders which results from or may be attributable to the alterations. You assume all responsibility for the alterations, their future repair, and any adverse effect on Building services, equipment and common elements, and agree that neither the Cooperative nor any of its Shareholders will be responsible for the failure of efficient Building services resulting from the alterations. The Cooperative makes no representations as to the design, feasibility or efficiency of the alterations or whether you will be able to obtain any required permits or permissions therefore. If the operation of the Building is in any way adversely affected by reason of the alterations, you agree at your sole cost and expense to remove the cause promptly upon being advised by the Cooperative."

Clause 10 states that plaintiff agrees to indemnify and hold harmless defendant against any and all claims for damages to persons or property suffered as a result of the alterations.

Clause 12 states:

> "You [plaintiff] shall reimburse the Cooperative for architectural, engineering and legal expenses incurred in connection with the enforcement of this Agreement, the approval of the plans, and the review and completion of the alterations within ten (10) days of being billed for the same."

In addition to the foregoing, the Alteration Agreement grants defendant the right to inspect the ongoing alterations and, if as a result of those inspections, it is determined that

modifications of the plans are necessary, plaintiff is to make such changes at his expense.

According to plaintiff, by letter dated January 8, 2007, after the execution of the Alteration Agreement, defendant demanded an additional agreement from plaintiff (Complaint, Ex. B) and, allegedly, told plaintiff that if this subsequent agreement was not signed by plaintiff, defendant would halt plaintiff's construction. In this additional agreement, defendant required, among other things, that plaintiff not penetrate into the stairwell lobby of the building unless and until defendant had approved specific plans for the lobby restoration, and that the plans be approved by the Department of Buildings. In opposition, defendant avers that plaintiff was informed in November of 2006, after the board caused plaintiff to stop the alterations he had started without board approval, that his plans would require a redesign of the lobby area, specifically the mail room, and that plaintiff agreed to absorb such costs. Cross Motion, Exs. D and E.

On March 13, 2007, by letter from his attorney (Complaint Ex. C), plaintiff advised defendant that defendant had no right to demand an additional agreement and, according to the executed Alteration Agreement and approved construction plans, that plaintiff was entitled to create a second egress opening from his unit into the building's common vestibule, which contained

mailboxes for resident shareholders. Further, the letter states that the former owner of the unit had previously obtained both defendant's and the Department of Building's approval for the second egress. However, as indicated above, neither side has provided a copy of the alteration plans to substantiate whether this second egress had been approved and incorporated into the Alteration Agreement.

Plaintiff contends that defendant would not permit him to break through the wall to create the second egress unless and until he paid $6,268.00 to defendant, said sum representing one-half of the cost of constructing a new mail room in a different vestibule of the building (the other half of the cost was paid by another commercial tenant who also created an egress into the mail room). Plaintiff states that the construction has been completed, and that he has been issued a Temporary Certificate of Occupancy, but that he has been unable to obtain a Permanent Certificate of Occupancy because of building violations that defendant has failed to correct. In addition, defendant has failed to return his $15,000.00 security deposit.

In his complaint, plaintiff alleges three causes of action: (1) failure to return the $15,000.00 security deposit at the completion of the alterations on June 1, 2008; (2) return of the $6,268.00 that plaintiff paid for the construction of a new mail room; and (3) a mandatory injunction requiring defendant to cure

all violations in the building so that plaintiff may obtain a Permanent Certificate of Occupancy.

In its cross motion, defendant asserts that plaintiff is not entitled to the relief sought because: (1) the $15,000.00 security deposit has been consumed in defendant's costs that it incurred in connection with the renovations occasioned by plaintiff's alterations; (2) plaintiff agreed to pay for the mailbox relocation as a condition of defendant's approval of the alterations; and (3) plaintiff has failed to meet the requirements to obtain an injunction, defendant is not in breach of any obligation to plaintiff that relates to the legality of the use and occupancy of his unit, and defendant is working to correct all building violations.

In support of its contentions, defendant has provided a copy of plaintiff's shareholder ledger, which indicates an amount due, as of July 1, 2008, of $14,463.28, but has not provided copies of any of the underlying bills. In addition, defendant states that the cooperative has been undergoing two major renovations, and the implementation of new fire protection and security systems, as well as pursuing a facade restoration project. Defendant says that it has been working diligently to eliminate alleged building violations that were identified in the course of its renovation work. Defendant further maintains that, in correcting these violations, it is not in breach of any shareholder's proprietary

lease, as alleged by plaintiff.

Plaintiff, in his reply, asserts that many of the alleged legal fees demanded by defendant were incurred prior to the execution of the Alteration Agreement, and therefore are not his obligation, and that the allegation of fees incurred are not supported by actual bills, merely defendant's accounting ledger. However, plaintiff does not dispute that he is responsible for attorney and architectural fees as stated in the Alteration Agreement. Defendant states that those costs were incurred because plaintiff started the alterations prior to obtaining board approval, which necessitated professional fees to create the Alteration Agreement eventually executed, and so are owed to it by plaintiff pursuant to the Alteration Agreement.

Plaintiff also states that he did pay one-half the cost of constructing a new mail room, but that he did so under protest, and maintains that the board breached a fiduciary duty to him (and the other commercial tenant) by not having the residential shareholders contribute to such expense. Defendant counters this argument by stating that the expense was caused only by the alterations made by the two commercial tenants, and that the Alteration Agreement quoted above requires plaintiff to be solely responsible for such costs.

Lastly, defendant claims that plaintiff's third cause of action is defective because he has failed to allege recoverable

damages or injury, since a Temporary Certificate of Occupancy is in effect.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

At the outset, it is noted that neither party has supplied a legal memorandum to support his or its contentions.

That portion of plaintiff's motion for summary judgment on the first two causes of action is denied.

The Alteration Agreement specifies that plaintiff is obligated to defendant for all professional fees and repair expenses incurred by defendant as a result of plaintiff's alterations. In his reply papers, plaintiff does not dispute

this fact, but argues as to the amount defendant asserts has been spent pursuant to the Alteration Agreement, and defendant has failed to meet its burden of entitlement to dismissal of these causes of action because it has not provided copies of any actual bills. As a consequence, the court is referring this matter to a Special Referee to hear and determine the actual amount disbursed by defendant pursuant to the Alteration Agreement.

Additionally, as quoted above, the Alteration Agreement specifies that it is plaintiff's sole responsibility to repair damage to the common elements of the building, which would include the mail room and lobby. However, as previously noted, defendant has not provided proof of the cost of such repair, and, therefore, this matter is also referred to a Special Referee for to hear and determine.

Based on the foregoing, that portion of defendant's motion seeking to dismiss the first two causes of action is denied, because, at this time, questions of fact exist as to the amount that may be owed to each party based on actual receipts.

That portion of plaintiff's motion seeking summary judgment on his third cause of action requesting a mandatory injunction is denied.

A mandatory injunction, one mandating specific conduct, "should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive

the ultimate relief sought, pendente lite' [citation omitted]." *St. Paul Fire and Marine Insurance Company v York Claims Service, Inc.*, 308 AD2d 347, 349 (1st Dept 2003). Such relief is only to be granted in unusual circumstances. *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255 (1st Dept 2009).

> "The plaintiff has failed to satisfy [his] heavy burden of proving a clear right to mandatory injunctive relief, which, in effect, would grant the plaintiff the ultimate relief requested. The record reveals many unresolved issues, and therefore it cannot be determined whether there is a likelihood that the plaintiff will succeed on the merits."

Rosa Hair Stylists, Inc. v Jaber Food Corp., 218 AD2d 793, 794 (2d Dept 1995).

Defendant has asserted that it has been curing the building violations, but has not submitted proof of such curative action. In addition, plaintiff has not disputed defendant's assertions regarding its eliminating the violations. Moreover, there has been no showing that plaintiff cannot operate with his Temporary Certificate of Occupancy, nor that he will never be issued a Permanent Certificate of Occupancy. Consequently, plaintiff is not entitled to the injunctive relief requested.

However, a question of fact still exists as to whether defendant is actually curing the violations. Therefore, defendant is not entitled to have this cause of action dismissed, and it is hereby referred to a Special Referee to hear and determine on the issue of defendant's curing of the building

violations.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiff's motion seeking summary judgment on the first two causes of action is denied; and it is further

ORDERED that the portion of defendant's cross motion seeking to dismiss the first two causes of action is denied; and it is further

ORDERED that the issues of: (1) the amount spent by defendant on professional fees and repair expenses incurred by reason of plaintiff's alterations of his cooperative unit; and (2) whether defendant is curing the violations placed on the building by the Department of Buildings, are referred to a Special Referee to hear and determine (CPLR 4317 [b]) (*see Keeney v Keeney*, 297 AD2d 606 [1st Dept 2002]); and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the

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earliest convenient date; and it is further

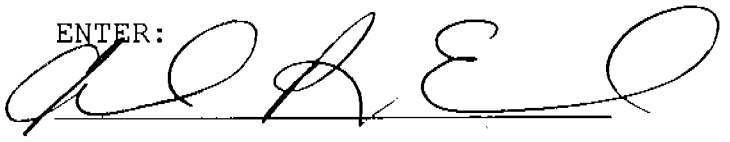
ORDERED that the portion of plaintiff's motion seeking summary judgment on his third cause of action for a mandatory injunction is denied; and it is further

ORDERED that the portion of defendant's cross motion seeking to dismiss the third cause of action is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: May 7, 2010

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD