

Gerald Gardner Wright, P.C. & Assoc. v Champion Prop. Mgt., LLC
2010 NY Slip Op 31410(U)
May 27, 2010
Sup Ct, Nassau County
Docket Number: 004354-08
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**GERALD GARDNER WRIGHT, P.C.
& ASSOCIATES,**

Plaintiff,

-against-

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 004354-08
Motion Seq. No: 3
Submission Date: 4/23/10**

**CHAMPION PROPERTY MANAGEMENT, LLC
AS SUCCESSOR OF 50 CLINTON STREET
ASSOCIATES MANAGEMENT CO., INC.,**

Defendant.

-----x

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition and Exhibit.....x**
- Affidavit in Opposition.....x**
- Reply Affirmation in Further Support and Exhibit.....x**

This matter is before the court on the motion by Plaintiff Gerald Gardner Wright, P.C. & Associates (“Wright” or “Plaintiff”) filed on February 1, 2010 and submitted on April 23, 2010. For the reasons set forth below, the Court directs that this motion shall be the subject of oral argument before the Court on June 30, 2010 at 10:30 a.m. to address, *inter alia*, the issue of whether Plaintiff’s application to join Steven Cohn, Esq., the Receiver in a related foreclosure action, as a party defendant in this action is more properly made before the judge presiding over that related foreclosure action.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, 1) pursuant to CPLR § 1001, directing the joinder of Sovereign Bank; and 2) pursuant to CPLR § 1017 and/or § 1001, directing the substitution

and/or joinder of Steven Cohn, Receiver of 50 Clinton Street, and Majestic Property Management Corp., as party defendants in this action in place of Defendant Champion Property Management, LLC and the amendment of the caption to reflect that joinder and substitution.

B. The Parties' History

In the Verified Complaint ("Complaint") filed December 26, 2008 (Ex. B to P's motion), Plaintiff alleges as follows:

Plaintiff is a law firm that has rented space at 50 Clinton Street, Hempstead, New York 11550 ("Building") since 1986. Defendant Champion Property Management, LLC ("Champion") purchased the Building in or about 2003 from 50 Clinton Street Associates Management Co., Inc. ("50 Clinton Street Associates"). Defendant KND Management Co., Inc. ("KND") was 50 Clinton Street Associates' managing agent with respect to the Building.

In 2001, 50 Clinton Street Associates and Wright entered into a Second Amendment to Lease ("Second Lease Amendment") which provided that 50 Clinton Street Associates was renting Wright 3,516 square feet of rentable space in the Building in Suite 601 ("Suite") at the rate of 415 per square foot. The Second Lease Amendment also provided that 50 Clinton Street Associates would provide Wright with 15 parking spaces identical to those that had been provided to it previously, and would perform the following work: 1) change existing light fixtures in Tenant's suite; 2) install wall plates and covers; 3) re-paint, re-carpet and re-wallpaper Tenant's suite; 4) maintain all equipment installed by Landlord, including lighting fixtures, at no cost to Tenant; and 5) shampoo the carpet in the Suite at least three (3) times per year.

In violation of the Second Lease Amendment, 50 Clinton Street Associates 1) "partially evicted" (Complaint at ¶ 7) Wright by reassigning to other tenants parking spaces to which Wright was entitled; 2) failed to complete certain work; and 3) provided Wright with only 2, 910 square feet of rentable space, resulting in Wright being overcharged for rent and taxes, the latter of which were based on an erroneous calculation of square footage.

In 2003, Wright commenced an action against 50 Clinton Street Associates titled *Gerald Gardner Wright, P.C. & Associates v. 50 Clinton Street Associates Management Co., et al.*, Nassau County Index Number 008320/2003 ("2003 Action"). In settlement of the 2003 Action, Wright and 50 Clinton Street Associates entered into a stipulation ("Stipulation") (Ex. B to

Complaint) that was so-ordered by the Court (Austin, J.) on February 6, 2004. Paragraph 8(b) of the Stipulation provided, in pertinent part:

Within sixty (60 days) of the date of this Stipulation and confirming, in writing, whichever is later, Defendants shall stencil "GERALD GARDNER WRIGHT RESERVED" on each of the existing 15 parking spaces assigned on the lower level of the complex. ¹ If some of Plaintiff's original spaces had been reassigned to other tenants, the parties will cooperate to re-secure them for the Plaintiff.

The Stipulation also contained provisions regarding, *inter alia*, 1) the replacement of carpet, and 2) the installation of air conditioning and heating ducts..

In or about January of 2006, 50 Clinton Street Associates sold the Building to Champion. Prior to that sale, Champion approached Gerald G. Wright ("Mr. Wright"), president of Wright, and asked him to sign an "Estoppel Certificate" reflecting that there were no outstanding legal issues between Wright and 50 Clinton Street Associates. Mr. Wright refused to sign that Certificate on the grounds that 50 Clinton Street Associates had violated the Stipulation by, *inter alia*, failing to label and provide Wright with the designated parking spaces. Despite Mr. Wright's refusal to sign the Certificate, Champion completed its purchase of the Building. Champion has failed to perform certain of the items set forth in the Stipulation. Moreover, Champion has failed to maintain the Building properly, including but not limited to 1) its failure to clean the women's restroom near the Suite, and 2) its failure to ensure that the elevators in the Building are working properly.

Wright advised Champion on numerous occasions of its improper calculation of the square footage and concomitant overcharging of Wright for rent and taxes, and its violation of the Stipulation. On or about March 4, 2008, Wright was served with a District Court Notice of Petition (Ex. C to P's motion) demanding judgment for purported nonpayment of real estate taxes in the amount of \$12,096.25. Wright posted an undertaking in that amount as instructed by the court. In the Petition that it filed in that District Court action, Champion characterized itself as the landlord of the Building.

¹ The left margin of the Stipulation is cut off so that not all the words are legible. The Court has set forth the applicable provision of the Stipulation as accurately as possible based on the legible portions.

The Complaint contains four (4) causes of action sounding in fraud, breach of contract (two counts) and partial actual eviction. Plaintiff also seeks attorney's fees, costs, disbursements and interest.

Plaintiff's counsel provides an Affirmation in Support dated January 29, 2010 in which he affirms as follows:

The instant action involves issues including Wright's alleged overpayment of rent due to a misrepresentation regarding the square footage of the Building, and the landlord's breach of certain agreements. In the matter of *Sovereign Bank v. 2701 Associates LLC, Dina Ekstein, David Ekstein et al.*, Nassau County Supreme Court Index Number 2669-09, a foreclosure action commenced by Sovereign Bank ("Sovereign") against the owner of the Building, Justice Anthony Parga issued an Order dated July 30, 2009 (Ex. A to P's motion) appointing Steven Cohn ("Cohn") as Receiver of the Building.

Plaintiff's counsel further affirms that Sovereign is on notice of Wright's claim that the landlord breached the Stipulation. Prior to issuing a mortgage to the landlord, Sovereign requested that the landlord obtain an estoppel certificate from each of the tenants of the Building, reflecting that there were no outstanding claims against the landlord. Wright refused to sign the estoppel certificate, and advised the landlord of the Stipulation and its ongoing disputes with the prior landlord regarding the Building.

Plaintiff's counsel submits that, as the foreclosing bank, Sovereign may be held liable for the claims that Wright has asserted in this action. Thus, joinder of Sovereign is appropriate to afford Wright complete relief.

With respect to Plaintiff's application to substitute Cohn and Majestic Property Management Corp. ("Majestic") as defendants in place of Champion, or to join them in this action, Plaintiff's counsel affirms as follows:

Champion has participated in this action as the agent and representative of the landlord and owner of the Building, as reflected by the Petition that it filed in the District Court action in which it characterized itself as the landlord. During several conferences with the Court, counsel for Champion represented that Champion had the authority to act for Cohn in this action, and that Champion was in the process of being appointed managing agent of the Building by Cohn. Recently, however, Champion's counsel advised the Court that Cohn had not appointed

Champion as managing agent of the Building and, therefore, Champion no longer has the authority to participate in this action on behalf of Cohn. Cohn and Majestic now collect the rent and are in control of all aspects of the Building. Accordingly, Plaintiff submits that joinder of Cohn and Majestic as necessary parties is appropriate because, without that joinder, Wright may not obtain complete relief for the claims asserted in this action. Moreover, as Sovereign, Cohn and Majestic would be adversely affected by any judgment entered in Wright's favor, joinder is also appropriate on that basis.

In her Affirmation in Opposition, counsel for Sovereign affirms that, based on a Mortgage Foreclosure Guarantee ("Mortgage Guarantee") obtained by Sovereign in connection with the foreclosure action (Ex. A to Aff. in Opp.), title to the relevant premises ("Premises") is vested in 2701 Associates LLC ("2701 Associates") "which appears to have acquired title by deed dated February 28, 2006" (Aff. in Opp. at ¶ 6). Sovereign's counsel submits that, as Sovereign is neither a successor to Champion nor 2701 Associates and has no ownership interest in the Premises, any claims that Plaintiff has regarding its tenancy are against Champion and/or 2701 Associates, and not against Sovereign. As Sovereign's only interest in the Premises is that of a mortgagee, it is not a necessary party in this action, and the Court should deny Plaintiff's motion for joinder.

In his Affidavit in Opposition, Cohn submits that he is not a proper party to this action and that Plaintiff should be seeking instead to join 2701 Associates, the owner of the Premises. Cohn contends, further, that the fact that he has been appointed as a Receiver in the foreclosure action before Justice Parga ("Related Foreclosure Action") does not mean that he is necessarily liable on any cause of action that Plaintiff has against the Premises' owner. Moreover, Champion, as the party with whom Plaintiff entered into the initial agreement, continues to be a proper party in this action.

Cohn also argues that his powers as Receiver are limited to those in the Order of Justice Parga in the Related Foreclosure Action. That Order only empowered Cohn to collect and pay over rents, enter into leases and maintain the building; it did not authorize Cohn to defend an action. Thus, if the Court were to join Cohn as a party in this action, it would be necessary to expand his powers, resulting in additional expense to the mortgagee and a result arguably inconsistent with Justice Parga's intent as reflected in his Order.

In its Reply Affirmation, Plaintiff makes reference to Schedule C of the Mortgage Guarantee, titled "Necessary Parties Defendant." Pursuant to paragraph 2 of the first page of that Guarantee, the parties set forth in Schedule C are "[t]he necessary parties defendant to foreclose the mortgage set forth in Schedule 'B' [referring to property located at 50 Clinton Street]." Schedule C lists Sovereign Bank as the fourth (4th) necessary party and describes its interest in the Premises as "(1) Assignee of Assignment of Leases and Rents dated 02/28/2006 and recorded 03/10/2006 in Liber 30192 Page 569 and (2) Secured Party of UCC-1 recorded 03/24/2006 as Control #2262." Schedule B contains documentation regarding eight (8) mortgages on the Premises. The Schedule B document referring to the eighth mortgage, of which 2701 Associates is the Mortgagor, contains the sentence "Consolidated Mortgages 1, 2, 3, 4, 5, 6, 7 & 8 to form a single lien of \$10,125,000.00."

Plaintiff submits that, as assignee of the leases and rents of the Premises, Sovereign is "undeniably a necessary party to this action who would be affected by the outcome of this proceeding in which Plaintiff seeks, among other things, reimbursement for overpayment of rent made as the result of a misrepresentation in its lease of the square footage of the space rented" (Reply Aff. at ¶ 6). Plaintiff contends, further, that Cohn is a necessary party in this action because it involves the issue of rents due or owed, which is within Cohn's powers as set forth in Justice Parga's Order.

C. The Parties' Positions

Plaintiff submits that Sovereign, as the foreclosing bank, may be held liable for the claims that Wright has asserted in this action and, therefore, joinder of Sovereign is appropriate. Plaintiff contends, further, that joinder of Cohn and Majestic is appropriate because they now collect the rent and are in control of all aspects of the Building, and this action necessarily involves issues related to the payment of rent.

Sovereign submits that, as Sovereign is neither a successor to Champion nor 2701 Associates and has no ownership interest in the Premises, any claims that Plaintiff has regarding its tenancy are against Champion and/or 2701 Associates, and not against Sovereign. As Sovereign's only interest in the Premises is that of a mortgagee, it is not a necessary party in this action, and the Court should deny Plaintiff's motion for joinder.

Cohn submits that he is not a proper party to this action and that Plaintiff should be seeking instead to join 2701 Associates, the owner of the Premises. Cohn contends that the fact that he has been appointed as a Receiver does not mean that he is necessarily liable on any cause of action that Plaintiff has against the Premises' owner. Cohn also argues that his powers as Receiver are limited to those in the Order of Justice Parga, specifically to collect and pay over rents, enter into leases and maintain the building, and that Justice Parga's Order did not authorize Cohn to defend an action. Cohn also submits that Champion, as the party with whom Plaintiff entered into the initial agreement, should continue to be a party in this action.

RULING OF THE COURT

In *Schwartz v. Kurlander*, 279 A.D.2d 465 (2d Dept. 2001), the Second Department held that leave of the court must be obtained to sue a receiver in his or her representative, as opposed to individual, capacity. *Id.*, citing, *inter alia*, *Copeland v. Salomon*, 56 N.Y.2d 222 (1982). This rule is based on a concern for the protection of the assets in receivership, from which any judgment obtained against a receiver in his or her representative capacity would be paid. *Id.* See also *Blanchard v. Landis*, 2007 U.S. Dist. LEXIS 15415 (S.D.N.Y. 2002) in which the Court reaffirmed the principle that, under New York State law, the general rule is that a plaintiff must obtain leave of the appointing court in the original foreclosure action to sue a temporary receiver. *Id.* at p. 5 citing, *inter alia*, *Copeland v. Salmon*, 56 N.Y.2d 222 (1982).

In light of the foregoing principles, and the Related Foreclosure Action, this motion will be the subject of oral argument before the Court on June 30, 2010 at 10:30 a.m. That oral argument will address, *inter alia*, the issue of whether Plaintiff's application to join Steven Cohn in this action is more properly made before Justice Parga, the presiding judge in the Related Foreclosure Action.

All matters not decided herein are hereby denied.

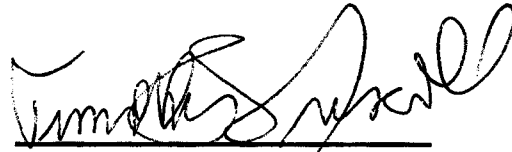
This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court on June 30, 2010 at 10:30 a.m. for oral argument as directed herein.

ENTER

DATED: Mineola, NY

May 27, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUN 01 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE