

**Matter of Bauer v Board of Mgrs. of the Beekman
Regent Condominium**

2010 NY Slip Op 31668(U)

June 28, 2010

Supreme Court, New York County

Docket Number: 114859/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 114859/2009

BAUER, GERI

vs
BOARD OF MANAGERS

Sequence Number : 001

ART78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. (001, 002, 004)

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
JUL 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

Status conference 8/5/10
NOI extended to 11/19/10

Dated: JUN 28 2010

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

FILED

JUL 01 2009

**COUNTY CLERK'S OFFICE
ELECTIONS NEW YORK**

Index No.: 114859/09
Seq. No.: 001 002 004

-----X
In the Matter of the Application of GERI BAUER,

Petitioner,

-against-

BOARD OF MANAGERS OF THE BEEKMAN
REGENT CONDOMINIUM,

Respondent.
-----X

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Seq #001	
Petitioner's n/m (Art 78), exhs	1
Seq #002	
Respondent's n/m (dismiss) w/CEK affirm, DH affid, exhs	2
Petitioner's opp w/RSL affirm, exhs	3
Respondent's reply w/CEK affirm	4
Seq #004	
Petitioner's n/m (consolidate) w/ RSL affirm, exhs	5
Respondent's opp w/DBK affirm	6
Petitioner's reply w/RSL affirm, exhs	7

Upon the foregoing papers, the decision and order of the court is as follows:

The within petition seeks a judgment pursuant to Article 78 of the CPLR (Seq. No. 001). Respondent filed a motion to dismiss the petition in lieu of an answer (Seq. No. 002). Petitioner, thereafter, moved to consolidate the Article 78 petition with a plenary action (Index No. 108432/09) (Seq. No. 004) (Seq. No. 001, 002, 004 collectively referred to as "Action 2"). The petition, motion to dismiss, and motion to

consolidate are considered collectively by this court in a single decision.

Background and Facts

Petitioner, Geri Bauer, is the owner of a residential condominium unit, located at 351 East 51st Street, New York, New York, Unit 10D (the "unit"). Respondent, Board of Managers of the Beekman Regent Condominium (the "Board"), is the elected governing body of the condominium, having authority to administer the affairs of the condominium. Petitioner is the defendant in a plenary action brought by the Board (Board of Managers of the Beekman Regent Condominium, acting on behalf of the unit owners of the Beekman Regent Condominium v. Geri Bauer, Palisades Collection LLC, et al., Supreme Court, N.Y. Co., Index No. 108432/09) ("plenary action" or "Action 1"). This Article 78 proceeding was filed on October 21, 2009, shortly after the plenary action was commenced on June 12, 2009.

In the plenary action, the Board brings seven causes of action against petitioner seeking, *inter alia*, a declaratory judgment, injunctive relief, monetary damages, and foreclosure of a lien (RPL § 339-aa), due to petitioner's alleged failure to comply with the rules and regulations of the by-laws. Specifically, the Board argues that petitioner has failed to provide the Board or its managing agent with a key to petitioner's unit and/or access to her unit. The Board contends that petitioner's failure to allow maintenance staff into her apartment so they can repair a water leak from an air conditioning unit resulted in the shut-down of air conditioning to other units in the condominium. The Board further contends that, on another occasion, there was a "running water noise" emanating from her unit because petitioner changed the locks

without providing management with a key, and the noise continued unabated for two weeks. The Board contends that petitioner still refuses to supply a key to her unit.

Petitioner has asserted multiple affirmative defenses and counterclaims in the plenary action, some of which overlap with the relief sought in this petition, as addressed later in this decision.

Petitioner's Article 78 (Seq. No. 001) seeks a judgment, pursuant to CPLR § 7801, annulling the Board's by-laws and all other actions taken by the Board at its 2009 annual meeting of owners; and a judgment compelling the Board to allow petitioner to inspect certain books and records. Petitioner contends that the newly-adopted by-laws are invalid, were not adopted in good faith, and do not advance any legitimate interest of the condominium.

The Board moves to dismiss the petition in lieu of an answer (Seq. No. 002), on the grounds that petitioner has failed to state a cause of action. [CPLR §§ 404 (a), 3211 (a) (7)]. The Board contends, *inter alia*, that the petition is barred because the plenary action is still pending and the gravamen of the petition and of the counterclaims in the plenary action are identical.

Petitioner argues that the Board's motion dismiss is untimely under CPLR § 7804 (c), which provides that "an answer and supporting affidavits, if any, shall be served at least five days before" the time at which the petition is noticed to be heard. Respondent's motion was brought on December 24, 2009, 14 days after the adjourned return date of notice of petition.

The Board argues that petitioner's motion to consolidate the petition with the plenary action, pursuant to CPLR § 602 (a) (Seq. No. 004), is not warranted because

petitioner's counterclaims in the plenary action are duplicative of the petition and the Article 78 action should, therefore, be dismissed.

Discussion

The court has the discretion to order the consolidation of actions where common questions of law or fact exist. CPLR 602 [a]; Bradford v. John A. Coleman Catholic High School, 110 AD2d 965 (3d Dept 1985). It is unnecessary that all the facts and issues be the same, but there must be "at least some important rules of law and fact in common to both actions." Id at 966. Thus, while Action 1 and Action 2 do not need to be identical in every respect, individual issues should not predominate. Bender v. Underwood, 93 AD2d 747 (1st Dept 1983). Where the actions arise from the same incident, have substantially the same facts and issues of law, and the same witnesses would testify at both trials if actions were tried separately, consolidation is appropriate. Burger v. Long Island Rail Road Company, 24 AD2d 509 (2d 1965) [different damages, but same collision, same witnesses].

Here, the two actions involve the same parties, arise out of the same operative set of facts and will require legal analysis of the same causes of action, thus warranting consolidation. It is undisputed by the parties that the claims are identical.

Petitioner's counterclaims in the plenary action state, in relevant part, as follows:

AS AND FOR A NINTH COUNTERCLAIM

80. Counterclaimant requested Counterdefendant produce the books and records of Condominium by letter of April 24, 2009.

81. To date, Counterdefendant has failed to comply with Counterclaimant's request.

82. Such refusal constitutes a breach of the governing documents and actionable as such.

81. Because of said breach, Counterclaimant is damaged.

...
WHEREFORE, Counterclaimant demands judgment against Counterdefendant as follows:

...
9. On the Ninth Counterclaim, for an amount to be determined at trial.

However, the actions are not so similar as to require dismissal of the petition altogether. While petitioner's counterclaim in the plenary action is identical to her petition, the relief afforded for each is different. Petitioner's counterclaim seeks money damages, which is not available under Article 78 relief. The court is also persuaded by petitioner's argument that there is a difference between requesting documents in the course of discovery and requesting documents as a matter of right. The two claims for documents are based upon different legal theories of entitlement.

Furthermore, CPLR § 3211 (a) (7) does not provide a basis to dismiss this action. Accepting all of petitioner's facts as true, as the court must on a motion to dismiss, petitioner has stated a cause of action that withstands a pleading stage dismissal. Respondent's motion to dismiss on the basis of CPLR 3211 § (a) (7) is denied.

The court, therefore, denies respondent's motion to dismiss and grants leave to interpose an answer (Seq. No. 002). The motion to consolidate is granted and Action 1 and 2 are hereby consolidated under Index No. 108432/09 (Seq. No. 004). The merits of the Article 78 proceeding have not yet been reached, as this case is consolidated

under another action currently pending before this Court.

Conclusion

In accordance herewith, it is hereby:

ORDERED that respondent, Board of Managers of the Beekman Regent Condominium's, motion to dismiss the petition is denied without prejudice (Seq. No. 002) and the respondent may interpose an answer to the Article 78 petition 20 days after service of this order with notice of entry by petitioner; and it is further

ORDERED that petitioner's motion to consolidate is granted (Seq. No. 004); and it is further

ORDERED that the actions entitled In the Matter of the Application of Geri Bauer v. Board of Managers of the Beekman Regent Condominium, Index No. 114859/09 is hereby consolidated under Board of Managers of the Beekman Regent Condominium, acting on behalf of the unit owners of the Beekman Regent Condominium v. Geri Bauer, Palisades Collection LLC, et al., Index No. 108432/09, with the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

BOARD OF MANAGERS OF THE BEEKMAN
REGENT CONDOMINIUM, acting on behalf of the
unit owners of the Beekman Regent Condominium

Index No.: 108432/09

Plaintiff,

-against-

GERI BAUER, PALISADES COLLECTION LLC,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, "JOHN DOE" and "JANE DOE", the last two
names being fictitious and intended to be the persons or
corporations in possession of the mortgaged premises
herein under foreclosure and described in the Complaint
as tenants or occupants thereof, their true names being
unknown to Plaintiff,

Defendants,

-----X

In the Matter of the Application of GERI BAUER,

Plaintiff,

-against-

BOARD OF MANAGERS OF THE BEEKMAN
REGENT CONDOMINIUM,

Defendant.

-----X

and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this Order
with Notice of Entry, the Clerk shall consolidate the papers in the actions hereby
consolidated, and shall mark this consolidation in the Court's files; and it is further

ORDERED that a copy of this order with notice of entry shall also be served
upon the Clerk of the Trial Support Office, who is hereby directed to mark the Court's

records to reflect the consolidation; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further


ORDERED that a **Status Conference** is scheduled for **August 5, 2010 at 9:30 a.m.**, in Part 10 at 60 Centre St. and the time to file the **Note of Issue** is extended to **November 19, 2010**; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is hereby expressly denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
June 28, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
JUL 31 2010
COUNTY CLERK'S OFFICE
NEW YORK