

Buoy Owners's Corp. v DeMott

2010 NY Slip Op 32476(U)

September 7, 2010

Supreme Court, Suffolk County

Docket Number: 36089-09

Judge: Peter Fox Cohalan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

INDEX # 36089-09
RETURN DATE: 11-20-09
MOT. SEQ. # 001 & 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER FOX COHALAN

-----x
THE BUOY OWNERS'S CORP.,

Plaintiff,

-against-

KENNETH J. DeMOTT and GAYLE ATLAS,

Defendants.
-----x

CALENDAR DATE: July 7, 2010

MNEMONIC: MD; XMG

PLTF'S/PET'S ATTORNEY:

Cohen & Warren
80 Maple Ave.
Smithtown, NY 11787

DEFT'S/RESP ATTORNEY:

Barbara A. Rasmussen, Esq.
11A Sunset Ave.
P.O. Box 883
Westhampton Beach, NY11978

Upon the following papers numbered 1 to 34 read on this motion to dismiss and cross-motion to amend ;
Notice of Motion/Order to Show Cause and supporting papers 1-10 ; Notice of Cross-Motion and
supporting papers 11-26 ; Answering Affidavits and supporting papers 27-32 ; Replying
Affidavits and supporting papers 33-34 ; Other _____ ; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion (001) by the defendants to dismiss the plaintiff's
action pursuant to CPLR §3211 (a)(1) on documentary evidence and 3211 (a)(7) for failure to
state a cause of action is denied and the cross-motion by the plaintiff (002) seeking to amend
its complaint pursuant to CPLR § 3025 (b) is granted and the amended complaint attached as
Exhibit J to the cross-motion is deemed served upon service of a copy of this order with
notice of entry thereon. The defendants shall have twenty (20) days from service of a copy of
the order with notice of entry within which to serve an amended answer.

The plaintiff instituted this action seeking the restoration of a cooperative
apartment, numbered unit #16, owned by the defendants which was the subject of certain
alterations and money damages in the nature of legal fees. The plaintiff is a residential
cooperative unit located at 221 Mill Road in Westhampton Beach, Suffolk County, Long
Island, New York and the defendants, who are proprietary shareholders, were residents of
unit #16. The plaintiff complains that the proprietary lease between the parties did not allow
alterations to the cooperative property without prior written consent of the plaintiff. The
plaintiff alleges that the defendants altered the existing vegetation by adding new plantings
and pruning existing plantings and erected a rock wall approximately one to two feet wide and
twenty feet long, all in violation of paragraph 21(a) of the proprietary lease requiring prior

written approval as well as House Rule #15.¹ The defendants claim that they had written approval for the alteration work which the plaintiff disputes. This lawsuit thereafter was commenced.

The defendants now move for dismissal of the plaintiff's complaint pursuant to CPLR §3211 (a)(1) alleging documentary evidence showing the plaintiff's approval of the claimed alterations. The plaintiff disputes this claim to the extent that it agreed that in the fall of 2008 it approved certain alterations pursuant to a diagram depicting plantings to be installed but never approved the extensive alterations conducted in the spring of 2009 with the additional plantings and rock wall. The plaintiff cross-moves to amend its complaint pursuant to CPLR §3025 (b) to assert an additional claim that the defendants also violated House Rule #15. However the defendants oppose the requested relief arguing that the amendment is irrelevant and without merit because they had permission to do the alterations.

For the following reasons, the defendants' motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 (a)(1) based on documentary evidence is denied in its entirety. The plaintiff's cross-motion to amend its complaint to assert a violation of House Rule #15 pursuant to CPLR §3025 (b) is granted.

When considering a motion pursuant to CPLR §3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted in support of the motion by the defendants conclusively establishes a defense to the asserted claims as a matter of law. As with any other CPLR §3211 motion, the complaint is to be liberally construed and the plaintiff is to be afforded the benefit of every possible favorable inference. **511 W. 232nd Owners Corp. v. Junnifer Realty Co.**, 98 NY2d 144, 746 NYS2d 131 (2002). The documentary evidence must be so compelling and conclusive, such that it resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim. **Mazur Bros. Realty LLC v. State of New York**, 59 AD3d 401, 873 NYS2d 326 (2nd Dept. 2009); **Weston v. Cornell University**, 56 AD3d 1074, 868 NYS2d 364 (3rd Dept. 2008); **Berger v. Temple Beth-EL of Great Neck**, 303 AD2d 346, 756 NYS2d 94 (2nd Dept. 2003).

A review of the submissions by the defendants does not conclusively establish, through documentary evidence, the written permission from the plaintiff to the renovations conducted on the plaintiff's premises in which the defendants reside. Since the plaintiff is to be afforded the benefit of every favorable inference, the documentation does not conclusively resolve the factual issues surrounding the renovation conducted in the spring of 2009, especially with regard to the construction of the two feet wide by twenty feet rock wall. The Court notes that in the defendants' submission, dated November 16, 2008, they discuss with the plaintiff that

¹Pursuant to paragraph 13 of the proprietary lease there are certain House Rules of the cooperative, a violation any of which constitutes a default of the proprietary lease.

“Susan Rasmussen has created a garden for planting in our barren area in front of the fence. It will be formed by planting one and two gallon plants, plus bulbs and ground cover. The shrubs include ... Along the fence will be climbing vines to cover the fence over the years. The broken area of fence behind Cherise will be blocked by plantings which will become taller... .”

The e-mail continues and states:

“please let me know if anyone has any input before we start planting. The design will be a semi-circle with most of the bushes in a curve-shaped configuration with vinca in the center.”

There is nothing contained in any of the documentary evidence submitted by the defendants indicating a discussion of a rock wall or a diagram of the rock wall contemplated and subsequently built. The plaintiff agrees that the plantings originally discussed within the e-mails and diagrams submitted in November of 2008 (in which it was discussed that the defendants wanted the planting done “by George Eckhart before Thanksgiving” because “planting before the winter allows the roots to strengthen during the cold weather”) were not the basis of the present lawsuit. The plaintiff’s lawsuit was commenced when it alleges even more extensive renovation, alteration and plantings took place in the spring of 2009 along with the construction of a two feet wide by twenty feet long rock wall. In particular, the plaintiff argues that the defendants fail to adequately address the rock wall construction or to conclusively establish written permission by the plaintiff for its construction.

Nowhere in the diagrams, e-mails or other correspondence is there mention of further planting, removal of existing vegetation or plantings and construction of a rock wall, let alone an approval by the plaintiff of the rock wall. Thus the defendants’ failure to establish and resolve the factual issue of permission to construct a rock wall as well as the additional planting in the spring of 2009 necessitates denial of the motion to dismiss. The plaintiff is entitled to have its pleading liberally construed, all facts contained therein presumed to be true and accorded the benefit of all favorable inferences. ***Scott v. Bell Atlantic Corp.***, 282 AD2d 180, 726 NYS2d 60 (1st Dept. 2001). The plaintiff claims no permission was given for the alteration which took place in the spring of 2009 or for the construction of the rock wall and the defendants have not submitted any documentary evidence to establish the permission to build a rock wall as called for by paragraph 21(a) the proprietary lease. Therefore they have not conclusively disposed of the plaintiff’s claim and the motion must be denied. ***New York Schools Insurance Reciprocal v. Gugliotti Assocs.***, 305 AD2d 563, 759 NYS2d 372 (2nd Dept. 2003).

Finally, the defendants argue that the proprietary lease does not apply to the plaintiff’s claim because the renovation/alteration work occurred in the common area and does not fall within the language of the proprietary lease language of paragraph 21(a) wherein it states:

“The Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld, make in the apartment or building, on any roof, penthouse, terrace or balcony appurtenant thereto, any alteration, enclosure or addition....”

The defendants claim that the alteration work occurred in the common area and not the apartment so the provision in paragraph 21(a) does not apply. This argument is without legal merit because the clear import of the language is that alterations should not be done without the plaintiff's permission. As to the claim by the defendants that the provision in paragraph 21(a) does not apply because the alteration, renovation work occurred in the common area, the common areas are owned by **all** the tenants represented by the plaintiff and not one tenant and therefore the defendants cannot claim they have a right to build, alter or renovate on property they do not own or that the plaintiff is required to specifically provide in its rules that tenants cannot build on property which they do not own. In any event, the plaintiff claims House Rule #15 which is the subject of the accompanying cross-motion to amend addresses even that issue since it states no plantings on the property without prior permission of the plaintiff. Accordingly, the motion by the defendants to dismiss pursuant to CPLR §3211(a)(1) and (a)(7) is denied as is the alternatively requested relief for sanctions.

The plaintiff also cross-moves to amend its complaint pursuant to CPLR §3025 (b) to assert that the alterations not only violated paragraph 21(a) of the proprietary lease between the parties but also House Rule #15 which states “no Lessee shall install any plantings on the property without the prior written approval of the Lessor.” The defendants oppose this application arguing that they had permission. However, the permission for the subsequent plantings, alterations and rock wall remain a contested issue between the parties requiring evidentiary material.

A party may amend its pleadings at any time by permission of the Court and leave is to be freely given. CPLR 3025(b). While a court has broad discretion in deciding whether leave to amend should be granted, it is an improvident exercise of discretion to deny leave to amend in the absence of inordinate delay and a showing of prejudice to the opposing party. **Cannon v. Milone**, 157 AD2d 695, 549 NYS2d 793 (2nd Dept. 1990); **Williams v. Ludlow's Sand & Gravel Co. Inc.**, 122 AD2d 612, 504 NYS2d 901 (4th Dept. 1986); **Pignataro v. Balsamo**, 108 AD2d 1086 (3rd Dept. 1985).


Further, the merits of a proposed amendment will not be examined on the motion to amend unless insufficiency or lack of merit is clear and free from doubt. Only in those cases where the proposed amendment is palpably insufficient as a matter of law or is **totally** devoid of merit should leave be denied. **Degradi v. Coney Island Medical Group**, 172 AD2d 582, 568 NYS2d 412 (2nd Dept. 1991); **Norman v. Ferrara**, 107 AD2d 739, 484 NYS2d 600 (2nd Dept. 1985). There is no valid reason to deny the plaintiff's application to

amend its complaint to assert a violation of the House Rule #15 as well as the proprietary lease. In any event there is no prejudice. The action has just begun, no discovery has taken place and the defendants have sufficient time to defend against the proposed amendment. See, *Kiaer v. Gilligan*, 63 AD3d 1009, 883 NYS2d 224 (2nd Dept. 2009); *Kinzer v. Bederman*, 59 AD3d 496, 873 NYS2d 692 (2nd Dept. 2009).

Accordingly, the plaintiff's cross-motion to amend its complaint to assert a violation of House Rule #15 pursuant to CPLR §3025 (b) is granted and the amended complaint attached as Exhibit J to the cross-motion is deemed served upon service of a copy of this order with notice of entry thereon. The defendants shall have twenty (20) days from service of a copy of the order with notice of entry within which to serve an amended answer.

The foregoing constitutes the decision of the Court.

Dated: September 7, 2010



J.S.C.