

Schlosser v Duell LLC
2010 NY Slip Op 33648(U)
December 27, 2010
Supreme Court, New York County
Docket Number: 105834/10
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ANGELIKA FRANTZEN SCHLOSSER,
Plaintiff,
-against-

INDEX NO. 105834/10
106834/10

MOTION SEQ. NO. 002

FILED

JAN 11 2011

DUELL LLC, DUELL MANAGEMENT
SYSTEMS LTD, IRENE DUELL, 24
WASHINGTON SQUARE CO., HAMERSLEY
CARPENTER ESTATE, YEFGENI PELEVIN,
and ANGELO ORTIZ,
Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3 were read on this motion by defendants(s) motion for summary Judgement.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

Defendants Irene Duell, 24 Washington Square Co., Yefgenie Pelevin (Pelevin) and Angelo Ortiz (Ortiz) (together as Movants) move to dismiss the complaint as against them based on documentary evidence and failure to state a cause of action, and to vacate Plaintiff Angelika Frantzen Schlosser's discovery demands pursuant to CPLR 3103¹. Plaintiff opposes, and cross-moves to compel disclosure and to strike defendants' affirmative defenses and counterclaims.

BACKGROUND

Plaintiff occupies a two-story apartment on the second and third floors at 24 Washington

¹"The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Square North (the Building). The third-floor unit, which included an adjacent terrace, was originally leased in 1975 by Lawrence Schlosser (the 1975 lease)² whom plaintiff married on September 11, 1981. The couple leased the third-floor unit and the second-floor unit, as of November 1, 1981, for a two-year term (the 1981 lease). They combined the two units into one apartment under the terms of the 1981 lease. As part of the renovation, they constructed a wooden deck that rested upon, but was not attached to the third-floor terrace.

In 1983, Irene Duell commenced an action, as landlord,³ against Mr. Schlosser, as tenant, in New York City Civil Court (L&T Court), under Index No. 70366/1983 (the 1983 L&T Action), which was settled by stipulation dated December 15, 1983 (the 1983 Stipulation). The 1983 Stipulation reduced the tenant's rent, allowed a credit for rent overcharges, confirmed that the premises were subject to the Rent Stabilization Law and Code, and barred the landlord, or any family member, from attempting to recover possession of the premises for her or his own use, or use by another family member. The 1981 Lease was replaced in December 1983 by a new lease for the period November 1, 1981 to October 21, 1984 (the 1983 Lease). Eventually, the 1983 Lease was superceded by a lease commencing on November 1, 1986 (the 1986 Lease), which has been successively renewed under the Rent Stabilization Code (RSC), New York City Administrative Code 26-511 *et seq.*, through the present day. The 1986 Lease also incorporated by reference an agreement dated October 16, 1986, which provided for the payment by the landlord to the tenant of \$40,000 for improvements to be made by the tenant with the landlord's consent, and an agreement dated October 27, 1986, which provided that the tenant would maintain the terrace and the roof below in good condition.

In June 1998, Irene Duell served upon the Schlossers a notice of non-renewal and termination of the then-current lease in order to give possession of the premises to her son.

²The only lease produced by any party in this motion sequence is a copy of a lease dated December 1, 2009, renewing the lease from April 1, 2010 to March 31, 2011, attached as Exhibit 4 to the Cross Motion.

³Duell LLC and Duell Management Systems Ltd maintain and manage the Building.

She also brought an owner-occupancy holdover proceeding against them in L&T Court, under Index No. 106325/2000 (the 2000 L&T Action), which she later discontinued pursuant to the 1983 Stipulation. The Schlossers divorced in October 2003, but they continued to live together in the apartment. Mr. Schlosser became seriously ill in May 2006 and has been in a succession of hospitals and nursing homes ever since.

On December 10, 2009, Ortiz, as the Building's property manager, informed plaintiff in writing of leaks in the roof below the terrace. He asked that she engage a contractor to repair or replace the roof, or else the landlord would proceed at Plaintiff's expense. Plaintiff hired an engineering firm to inspect the roof. After conducting the inspection on December 17, 2009, it reported that one leak was caused by the landlord's incorrect installation of new roof gutters and that a second leak was caused by a hole in the roofing membrane (attributed to the terrace above), which might be repaired by a patch. After receiving Plaintiff's engineer's report, Ortiz conducted his own inspection with another engineering firm. On February 17, 2010, Ortiz wrote Plaintiff that replacement of the roof was necessary, because of its deteriorated condition in exceeding its useful life. Ortiz included a proposal to replace the entire roof for \$32,500, but allowed for Plaintiff to select her own contractor to do the work.

On April 15, 2010, workmen, allegedly including Ortiz and Pelevin, the Building's superintendent, climbed onto the terrace from outside the building and broke apart and destroyed the deck without plaintiff's permission. On May 3, 2010, plaintiff commenced the instant action asserting causes of action for a declaratory judgment on the responsibility for roof repairs, a declaratory judgment on reducing plaintiff's rent, harassment, property damage, a declaratory judgment on replacement and reconstruction of the deck, and trespass.

Plaintiff's request for a temporary restraining order against the landlord proceeding with roof repairs was denied on July 7, 2010. The court's suggestion that the parties stipulate to a settlement of the dispute has not been followed.

Movants' Motion to Dismiss

A "CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence . . . may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 (2002). On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

Movants argue that Irene Duell, although acknowledged as owner of the Building, is improperly named in the complaint as a defendant because "Duell LLC and Duell Management Systems Ltd. are responsible for the maintenance and upkeep of the building, not Irene Duell." *Olshever Affirm.*, ¶ 31. She is 89-years old and "unable to partake in any strenuous or stressful activities." *Id.*, ¶ 30. Any relief, if granted, can be obtained from those business entities. Maintaining this action against her will place her "under undue mental hardship, physical burdens and [she] will be substantially prejudiced and impaired." *Id.*, ¶ 33.

The unsworn letter from Irene Duell's physician stating that participating in this action would be detrimental to her health is an insufficient basis to dismiss her as a defendant. Ex. I attached to Motion. There is no claim that she lacks capacity to aid her defense. The fact that much of her business affairs have been conducted by Duell LLC and Duell Management Systems Ltd. should ease her personal burden and allow her counsel to be adequately informed and guided in its representation. She shall remain a defendant.

Movants argue that Pelevin, the Building's superintendent, and Ortiz, the Building's property manager, are improperly named in the complaint as defendants, because they are not

principals of Duell LLC, Duell Management Systems Ltd. or 24 Washington Square Co., not party to any agreement or in privity with Plaintiff, and not the subject of any specific allegation.

The complaint alleges that “defendants Ortiz and Pelevin climbed ladders . . . on the outside of the Building to reach the terrace . . . and brought with them approximately six other men who proceeded to destroy plaintiff’s deck.” Complaint, ¶ 59. The entire group allegedly ignored her requests to leave, because they lacked permission to enter the terrace. *Id.*, ¶ 60. Then, the complaint charges that “Ortiz and Pelevin locked the door from the Apartment to the terrace by boarding it up from the outside.” *Id.*, ¶ 61. The causes of action for harassment, property damage and trespass “by defendants” arguably extend to Pelevin and Ortiz as individuals, under the circumstances described, without the necessity of naming them. They shall also remain as defendants in the action.

Movants argue that the complaint’s first cause of action, for a declaratory judgment on the responsibility for roof repairs is moot as a result of a letter, dated September 15, 2010, that “informed Plaintiff that Defendant Duell LLC does not intend to charge Plaintiff for any cost in relation to the roof repair of the Building.” Olshever Affirm., ¶ 45 referencing Ex. J attached to Motion. The letter addressed to Plaintiff’s counsel by defendants’ counsel, however, reads:

“Confirming our several telephone conversations, and those between our respective clients, as a result of the work being performed by my client at this time, my client has determined that there are no outstanding claims for reimbursement from Ms. Schlosser for the roof replacement, or for any structural work below same.”

The letter does not make a flat statement about defendants’ intentions not “to charge Plaintiff for any cost in relation to the roof repair of the Building,” but rather only promises “that there are no outstanding claims for reimbursement from Ms. Schlosser for the roof replacement, or for any structural work below same” as of the writing. Should defendants actually commit to their counsel’s representation, the first cause of action would be dismissed, but not until then.

Movants argue that the complaint’s second cause of action, for a declaratory judgment on reducing Plaintiff’s rent, should be dismissed. The landlord did not intentionally lock the

Plaintiff from use of the terrace, which could cause a diminution of the value of the apartment under the 1986 Lease, but claims it acted because of safety reasons while the roof was under repair. Such an explanation, though, is not the proper basis to dismiss a cause of action pursuant to CPLR 3211 (a) (7) which otherwise states a cognizable legal theory, and the second cause of action will not be dismissed.

Movants argue that the complaint's third cause of action, for harassment, should be dismissed, because access to the roof was necessary to make needed repairs. Making such repairs, as they claim were required by law, does not constitute harassment. However, the complaint alleges that "the wanton destruction of the deck belonging to plaintiff" was an element of harassment, not the repairs in and of themselves. Movants do not address this directly and the third cause of action shall remain. The complaint also alleges that the 1983 L&T Action and the 2000 L&T Action were unfounded, and thereby evidence of a pattern of harassment.

Movants argue that the complaint's fourth cause of action, for property damage, should be dismissed, because Plaintiff failed to act in spite of adequate notice of the need to repair the roof, which necessitated removal of the terrace. Plaintiff claims that the Building's "terrace adjoining the third floor apartment is actually the roof of a part of the Building which was built as a two story structure." Complaint, ¶ 19. In accordance with the 1981 Lease, she states that the Schlossers

"built a wooden deck on the third floor terrace which was not affixed to the terrace or roof.

The wooden deck was constructed in sections which fit together so as to create a level outdoor area for tenant occupancy and which are independently removable for inspection and repair of the roof which comprises the terrace area.

The wooden deck is personal property as it never was affixed to the real property."

Id., ¶¶ 20-22.

While Movants do not distinguish the terrace from the deck in its motion, their answer to the complaint "admits that Plaintiff and Lawrence Schlosser built or caused a wooden deck to-

be constructed.” Answer, ¶ 15, Ex. F attached to Motion. Accordingly, the fourth cause of action, which deals with the deck as Plaintiff’s personal property, not the terrace, a part of the Building itself, will not be dismissed.

Movants argue that the complaint’s fifth cause of action, a declaratory judgment on replacement and reconstruction of the deck, should be dismissed, because, as they read the letter agreement, dated October 27, 1986, which accompanied the 1986 Lease, “Plaintiff is entitled to replace the terrace at the expense of the Plaintiff.” Again, Movants’ fail to distinguish between the terrace, a structural element of the Building, and the deck, Plaintiff’s alleged personal property. The complaint asks for replacement of the deck. Movants do not deny destruction of the deck and the issue of its replacement under the alleged circumstances remains open. The fifth cause of action will not be dismissed.

Movants argue that the complaint’s sixth cause of action, for trespass, should be dismissed, because Plaintiff failed to meet her responsibilities under the letter agreement, dated October 27, 1986, forcing the landlord to perform the necessary repairs to the roof. In doing so, defendants entered “their own property,” making it “absurd” to charge them with trespassing. *Olshever Affirm.*, ¶ 67. The complaint alleges that the “actions of defendants in entering plaintiff’s terrace without permission constitutes a trespass upon the property of plaintiff.” Complaint, ¶ 89. Without copies of the underlying leases and agreements, the ownership of the terrace is uncertain, or more precisely the legal extent of Plaintiff’s use and possession of the terrace, and the charge of trespass shall remain.

In sum, Movants’ motion to dismiss the complaint as against them is denied in its entirety.

Movants’ Motion for a Protective Order and Plaintiff’s Cross Motion

Additionally, Movants request a protective order, pursuant to CPLR 3103. They argue that “Plaintiff’s discovery demands are unreasonable and/or unduly burdensome.” *Olshever Affirm.*, ¶ 68. Plaintiff cross-moves for compelling defendants to respond to interrogatories,

produce documents and appear for depositions as she has previously requested, and that a conditional order striking their affirmative defenses and counterclaims be issued to hasten their compliance.

In fact, some of the material requested exceeds a reasonable scope of inquiry.

Therefore, Plaintiff's demands shall be revised to follow these guidelines:

- No documents shall be requested that are dated prior to January 1, 2009, except for leases and letter agreements between the landlord and the Schlossers.
- Any document requested dated on or after January 1, 2009 must deal with the ownership, operation, repair and maintenance of the building.
- No information may be requested about anyone not a party to this action unless the person(s) were employed, hired or engaged by the landlord in the period December 10, 2009 through May 3, 2010.

Plaintiff shall serve her amended demands within 30 days of service of a copy of this order; defendants shall respond to the amended demands within 30 days of their receipt.

Depositions of defendants shall commence within 30 days of receipt by Plaintiff of defendants' responses to the amended demands.

All parties shall appear for conference with the court on Thursday, March 31, 2011 at 9:30 AM, in Room 320, 80 Centre Street, to report on the progress of discovery.

Accordingly, it is

ORDERED that the motion by defendants Irene Duell, 24 Washington Square Co., Yefgenie Pelevin and Angelo Ortiz to dismiss the complaint as against them is denied; and it is further

ORDERED that movants' motion and Plaintiff's cross motion regarding discovery issues are resolved as follows:

- No documents shall be requested that are dated prior to January 1, 2009, except for leases and letter agreements between the landlord and the Schlossers.
- Any document requested dated on or after January 1, 2009 must deal with the ownership, operation, repair and maintenance of the building.
- No information may be requested about anyone not a party to this action unless the person(s) were employed, hired or engaged by the landlord in the period December 10, 2009 through May 3, 2010.

It is further

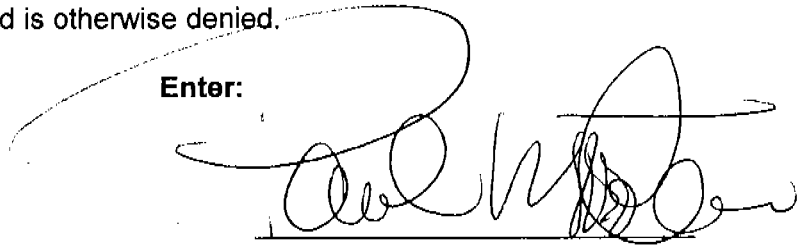
ORDERED that Plaintiff shall serve her amended demands within 30 days of service of a copy of this order, and defendants shall respond to the amended demands within 30 days of their receipt, and it is further

ORDERED that depositions of defendants shall commence within 30 days of receipt by Plaintiff of defendants' responses to the amended demands.

Any relief not specifically granted is otherwise denied.

Dated: December 27, 2010

Enter:



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: : DO NOT POST REFERENCE

FILED

JAN 11 2011

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