

Gutman v Cabrera

2010 NY Slip Op 33965(U)

September 3, 2010

Supreme Court, County of Kings

Docket Number: 25405/08

Judge: Laura Lee Jacobson

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At an IAS Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of September, 2010

P R E S E N T:

HON. LAURA LEE JACOBSON,

Justice.

-----X
CATHERINE GUTMAN, in her capacity as President of the Condominium Board of the unincorporated condominium association THE WASHINGTON CONDOMINIUM ASSOCIATION, managers of THE WASHINGTON CONDOMINIUM located at 35 Underhill Avenue, Brooklyn, New York 11238

Plaintiff,

- against -

Index No. 25405/08

HEYLIN CABRERA,

Defendant.

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The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 5 _____
Opposing Affidavits (Affirmations) _____	6 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff Catherine Gutman, in her capacity as President of the Condominium Board of The Washington Condominium Association (the Condominium Association), moves for an order: (1) pursuant to CPLR 3211 and 3014, striking the answer of defendant/third-party plaintiff Heylin Cabrera (Ms. Cabrera or

defendant/third-party plaintiff), the owner of unit B-3-H (the Unit) in the building located at 35 Underhill Avenue in Brooklyn (the Building), and dismissing all defenses, counterclaims and the third-party action. Defendant/third-party plaintiff cross-moves for an order: (1) directing plaintiff to serve upon her a copy of the order of this court dated November 13, 2009 in accordance with CPLR 2103(a)(5); (2) determining a court mandated method of service for defendant/third-party plaintiff's pleadings or, in the alternative, (3) compelling plaintiff and third-party defendants to accept service of the amended verified answer and third-party complaint; (4) determining that A. David Fuster, II, Esq., the attorney who currently represents Ms. Cabrera, may continue to represent her, in spite of his intention to purchase the Unit with J. A. Sanchez, Esq., the attorney who previously represented her in the underlying transaction; (5) enjoining plaintiff's attorney from making threats of a frivolous nature with regard to his intention to seek sanctions; and (6) awarding sanctions, attorney's fees and costs.

Facts and Procedural Background

Briefly stated, plaintiff commenced this action seeking to enjoin defendant from performing construction work in the Building in order to annex a portion of the common area (the Disputed Area) to her Unit and to recover money damages.

After defendant/third-party plaintiff served what she denominated an answer, counterclaim and third-party complaint, plaintiff moved to dismiss the pleading, pursuant to CPLR 3014, arguing that the "convoluted web of defenses, counterclaims, and third-party

causes of action all contained under the same heading and with an impermissible hybrid pleading” made it impossible to answer; that the paragraphs were not sequentially numbered; and that defendant/third-party plaintiff further confused the issues by naming plaintiff as a third-party defendant, so that it would be difficult, if not impossible, to charge a jury. By decision dated November 13, 2009, the motion was granted on default and without opposition, to the extent that defendant/third-party plaintiff was ordered to serve a corrected pleading within 30 days of service of the order; plaintiff’s request for sanctions was held in abeyance (the November 2009 Decision).

Plaintiff contends that she served a copy of the Decision on defendant/third-party plaintiff on November 19, 2009; a second copy was allegedly served hours later when it was discovered that a paralegal mailed it to the wrong address. On December 22, 2009, defendant/third-party plaintiff served a corrected answer with counterclaims and third-party complaint (the corrected pleading). On December 30, 2009, she allegedly served the third-party defendants; third-party defendants 630 Realty LLC, the sponsor (the Sponsor), and Isaac Fishman, a member of the Sponsor, contend that they have not been properly served. By letter dated January 5, 2010, plaintiff rejected the corrected pleading.

Thereafter, plaintiff served defendant/third-party plaintiff with a Notice to Cure and Notice of Right of Entry dated January 12, 2010 (the Notice to Cure). On January 20, 2010, defendant/third-party plaintiff’s counsel received a letter asking him to agree to an inspection of the Unit. By stipulation dated January 21, 2010, defendant/third-party plaintiff agreed;

plaintiff agreed that no action would be taken to interfere with defendant/third-party plaintiff's use of the Unit and that the Notice to Cure would be held in abeyance.

On February 11, 2010, plaintiff made the instant motion to dismiss. By order dated May 11, 2010, defendant/third-party plaintiff withdrew all claims, cross-claims and/or counterclaims pleaded against Ms. Gutman and Peter Courtein, in her and his individual capacity, relating to the claims set forth in the corrected pleading.

Plaintiff's Motion to Dismiss the Corrected Pleading

Plaintiff's Contentions

In support of her motion, plaintiff argues that the corrected pleading, like the original, does not comply with CPLR 3014 in that the causes of action are still intertwined and she needs "a chart with arrows and a diagram" to answer. More specifically, plaintiff argues that in correcting the pleading, defendant did nothing more than to consecutively number the paragraphs, so that "the defenses, counterclaims and third-party action all remain intertwined and indecipherable, and predicated upon two different index numbers," thereby rendering a response impossible to formulate. Plaintiff further argues that although she served defendant/third-party plaintiff with a copy of the November 2009 Decision on November 19, 2009, the corrected pleading was not served until December 22, 2009, so that it should be dismissed as untimely and she should be granted a default judgment.

Defendant/Third-Party Plaintiff's Contentions

In opposition to the motion and in support of her cross motion, defendant/third-party

plaintiff asserts that plaintiff's motion is improper and should be denied. More specifically, counsel argues that he was not properly served with the first motion to dismiss the answer, since it was mailed to him at "33-16 71st Street" instead of "33-16 70th Street." When defendant/third-party plaintiff learned that the motion had been made because she was in court on another matter,¹ the parties stipulated to adjourn the return date. Due to some misunderstanding and/or confusion, the court would not permit the requested adjournment. Counsel for defendant/third-party plaintiff did not learn that the motion was being heard until the morning that it was on the calendar, and he was unable to appear before this court by 11:00, as directed; these facts are corroborated by a letter from plaintiff's counsel, dated November 24, 2009. Counsel for Ms. Cabrera further avers that she was not properly served with the resulting November 2009 Decision, since the copy faxed to him was mailed to the wrong address, so that service was not complete pursuant to CPLR 2103. Counsel explains that when he could not procure a copy of the Decision from the court, he requested a copy of the order from plaintiff's counsel by letter dated November 30, 2009. He thereafter served the corrected pleading on December 22, 2009.²

Counsel goes on to explain that in late December 2009, defendant/third-party plaintiff was served with the Notice to Cure. He therefore drafted an order to show cause seeking to enjoin plaintiff from acting on the Notice, along with the demands for relief made herein.

¹ Ms. Cabrera is employed as a paralegal.

² Although there is no affidavit of service attached to the papers now before the court, plaintiff avers that the corrected pleading was served on or about December 22, 2009.

When the Stipulation was executed, counsel thought that there would be no need to file that motion. Shortly thereafter, however, he was served with the motion now before the court.

Defendant/third-party plaintiff thus argues that since she was not properly served with November 2009 Decision, service of the corrected pleading was timely. In addition, she argues that the corrected pleading is in compliance with CPLR 3014 in that the errors in numbering the paragraphs have been remedied and the corrected pleading clearly sets forth the facts upon which defendant/third-party plaintiff's claims are based. More specifically, and as is set out in the corrected pleading, Ms. Cabrera contends that in purchasing the Unit, she relied upon the representation made by Rick Staula of Aguayo & Huebner Realty Group, Inc., the real estate agent who showed her the Unit. Ms. Cabrera alleges that she was told that the Disputed Area, which was behind one of the walls, was available to her. In addition, the Offering Plan stated that the Unit had 1,589 square feet on two floors. Ms. Cabrera accordingly signed an agreement to purchase the Unit on November 9, 2006, which was signed by Mr. Fishman on January 3, 2007 and was re-executed by the Sponsor on February 21, 2007. On January 29, 2007, amended plans were filed with the Building Department and on February 27, 2007, the Offering Plan was amended to reduce the size of the Unit to 1,420; defendant/third-party plaintiff claims that it actually has only 1,315 square feet. On March 30, 2007, defendant/third-party plaintiff closed on the sale of the Unit and shortly thereafter, the Sponsor sent two contractors to take down the wall that lead to the Disputed Area. In July 2008, third-party plaintiff/defendant Jeremy Villano purchased the adjoining unit and

suggested to Ms. Cabrera that they share the Disputed Area, Ms. Cabrera refused that request.

The corrected pleading accordingly interposes the affirmative defenses of failure to state a cause of action and unclean hands, and counterclaims and/or third-party claims alleging breach of contract, breach of fiduciary duty, prima facie tort, misappropriation of funds, a demand for an accounting, negligent misrepresentation, a claim pursuant to General Business Law § 349, negligence, a demand to pierce the corporate veil and breach of warranty. Defendant/third-party plaintiff thus concludes that while the factual predicates for the counterclaims and third-party claims may be complicated and interrelated, the corrected pleading clearly appraises plaintiff and the third-party defendants of the causes of action asserted against each with sufficient clarity to allow each to answer. In the alternative, defendant/third-party plaintiff requests permission to serve a second corrected pleading to further clarify her claims, if the court finds the corrected pleading is not in compliance with CPLR 3014.

The Contentions of the Sponsor and Mr. Fishman

In support of plaintiff's motion, these third-party defendants argue that the corrected pleading is not much improved, as "[i]t continues to lump together defenses, counterclaims and third-party claims in such a way as to render it virtually impossible to answer in a logical way."

Discussion

As a threshold issue, the court will not permit the Sponsor or Mr. Fishman to submit opposition papers addressing the substantive merits of the instant motion, while arguing that the court does not have jurisdiction over them. In this regard, “[t]he effect of the adoption of CPLR 320 (subd [b]) was to abolish the special appearance and to permit the joinder of a defense on the merits with an objection to jurisdiction. Under it, a party may appear by the service of an answer, but that appearance does not confer personal jurisdiction if the answer raises an objection on that ground’ (see *In re Katz*, 81 AD2d 145, 148-149 [1981], *affd* 55 NY2d 904 [1982], citing *Colbert v International Security Bur.*, 79 AD2d 448 [1981], *lv denied* 53 NY2d 608 [1981]). From this it follows that the law does not allow a defendant to participate in a litigation and seek a resolution of the matter in his or her favor, while at the same time arguing that the court has not yet acquired jurisdiction over him or her.

In addressing additional procedural issues, the court also notes that although plaintiff’s notice of motion states that she is seeking relief pursuant to CPLR 3211 and 3014, the moving papers address only the issue of the sufficiency of the corrected pleading pursuant to CPLR 3014 and do not discuss whether the causes of action should be dismissed pursuant to 3211. Accordingly, this decision will not address the issue of whether the corrected pleading should be dismissed on the ground that it fails to state a cause of action.

In addition, although plaintiff requests that a judgment of default be entered against defendant/third-party plaintiff in the body of the moving papers, this demand for relief was

not made in a notice of motion or notice of cross motion, and therefore will not be considered by the court (*see generally* CPLR 2214 and 2215; *Chun v North American Mtge. Co.*, 285 AD2d 42 [2001]; *Bauer v Facilities Dev.*, 210 AD2d 992 [1994]; *Guggenheim v Guggenheim*, 109 AD2d 1012 [1985]). Moreover, even if the court were to address the issue, this court would not grant plaintiff a judgment of default because even assuming that service of the corrected pleading was not made until December 22, 2009, the delay of a few days is *de minimus* and will be excused by the court, particularly since the delay did not work to prejudice plaintiff (*see generally* CPLR 2004; *Lawrence v Palmer*, 59 AD3d 394 [2009]). In this regard, the court also notes that there is ample evidence to support defense counsel's assertion that he did not receive a copy of the November 2009 Decision until he requested it on November 30, 2009, so that he has an excuse for any default. In addition, the corrected pleading adequately establishes that defendant/third-party plaintiff has a meritorious defense to the action, as well as facially valid counterclaims and third-party claims. Accordingly, in view of these considerations and the strong public policy favoring the resolution of cases on the merits, defendant/third-party plaintiff's default, if one did occur, would be vacated (*see e.g. Merchants Ins. Group v Hudson Val. Fire Protection Co.*, 72 AD3d 762, 764 [2010], citing *Paramount Transp. Sys v Lasertone Corp.*, 59 AD3d 603 [2009]; *Scarlett v McCarthy*, 2 AD3d 623 [2003]; *Zolna v Lupino*, 251 AD2d 658 [1998]).

Turning to the merits, the court finds that the corrected pleading adequately satisfies the requirements of CPLR 3014 in that the paragraphs are now sequentially numbered and

it sufficiently articulates separate causes of action interposed against plaintiff and each third-party defendant to allow for an answer to be filed. It is also noted that a review of the court records indicates that third-party defendant Mr. Staula served an answer with affirmative defenses and a cross claim on March 1, 2010. In addition, since defendant/third-party plaintiff withdrew her third-party claim against Ms. Gutman, in her individual capacity, plaintiff's contention that naming her as third-party defendant would be confusing to a jury has been rendered moot. Accordingly, that branch of plaintiff's motion seeking to dismiss the corrected pleading is denied.

***Defendant/Third-Party Plaintiff's
Request for an Order Directing Service***

The Parties' Contentions

In support of this request for relief, defendant/third-party plaintiff relies upon the contention that she has not yet been properly served with the November 2009 Decision and that proper service must be made if she is to be ordered to serve a second corrected pleading. She further avers that such an order is necessary because her "process server is having trouble personally serving the other parties at the Condominium because they will not let him in, and upon information and belief has had to serve them by 'nail and mail' service;" that plaintiff and the Sponsor are contesting service; and that serving the parties again would be costly.

Discussion

Since the court has determined that defendant/third-party plaintiff's service of the

corrected pleading will not be rejected as untimely and that a default judgment will not be entered, her request for an order directing service of the November 2009 Decision has been rendered moot. Further, it is beyond dispute that plaintiff received the corrected pleading, since the instant motion is addressed to its adequacy.

The court will not, however, render a decision addressing the issue of whether the corrected pleading was served in such a manner as to acquire jurisdiction over the third-party defendants, nor will the court compel the third-party defendants to accept service of the corrected pleading. In so holding, it is noted that defendant/third-party plaintiff offers no basis upon which any alleged failure to serve the third-party summons and complaint upon the third-party defendants as required by the appropriate provisions of the CPLR should be excused, nor does she cite any authority upon which such relief should be granted.

***Defendant/Third-Party Plaintiff's Request to
Allow Mr. Fuster to Continue Representing Her***

Defendant/Third-Party Plaintiff's Contentions

In support of this branch of the motion, Mr. Fuster explains that Mr. Sanchez had represented Ms. Cabrera in the purchase of the Unit. When plaintiff's counsel told Ms. Cabrera that he intended to depose Mr. Sanchez and would therefore move to have him removed as counsel, Mr. Sanchez recommended that Ms. Cabrera retain Mr. Fuster to represent her in the matter in an effort to avoid such a motion. Mr. Fuster now advises the court that he seeks permission to be allowed to continue to represent Ms. Cabrera if he and Mr. Sanchez buy the Unit.

Plaintiff's Contentions

Plaintiff does not oppose this branch of defendant/third-party plaintiff's motion and for the reasons discussed above, the opposition offered by the Sponsor and Mr. Fishman will not be considered.

Discussion

The court declines to address this branch of the motion, finding that it is premature. In so holding, the court notes that "[t]he jurisdiction of this Court extends only to live controversies [so that the court is] prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions'" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003], *cert denied* 540 US 1017 [2003]). Thus, until such time as Mr. Fuster purchases Ms. Cabrera's Unit, it is premature to address this branch of the cross motion. Further, the court notes that since the other parties to the action are not obligated to request disqualification, if Mr. Fuster can secure their consent to his continuing representation, the court will not need to address the issue. The court cautions counsel, however, that unless he obtains the consent of all of the parties in this action to allow him to continue to represent Ms. Cabrera if ownership of the Unit is conveyed to him, purchasing the Unit may well be problematic.

Sanctions***Plaintiff's Contentions***

In the instant motion, plaintiff seeks to renew her request for sanctions to compensate

her for the expense and inconvenience incurred in making the instant motion, contending that defendant/third-party plaintiff failed to comply with the November 2009 Decision by failing to serve the corrected pleading in a timely fashion and because the corrected pleading is still not in compliance with CPLR 3014.

Defendant/Third-Party Plaintiff's Contentions

Defendant/third-party plaintiff opposes plaintiff's request for an order of sanctions and seeks an order instructing plaintiff's counsel to "cease and desist in his threats to request sanctions against him" and to award sanctions in her favor. More specifically, Ms. Cabrera contends that her pleadings were not frivolous in that neither was completely without merit in law, nor was the pleading undertaken primarily to delay or prolong resolution of this action. Instead, it is plaintiff's counsel who should be sanctioned by reason of his continuing action in sending correspondence to her attorney at the wrong address and then seeking to obtain relief for plaintiff premised upon the resultant delay. Defendant/third-party plaintiff therefore concludes that she should be awarded sanctions in the amount of \$10,000, which is equal to the attorneys' fees that she has incurred in defending against the three motions made by plaintiff in this action, particularly since she prevailed in successfully opposing the motion seeking a preliminary injunction. Further, because the instant motion should not have been made because she has not yet been properly served with the November 2009 Decision, she contends that her time to serve a corrected pleading has not yet begun to run.

The Law

Pursuant to 22 NYCRR 130-1.1(a), “[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part.” Rule 130-1.1(c)(1) provides that conduct is frivolous if “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” (*see generally Kornblum v Kornblum*, 34 AD3d 749, 751 [2006], citing *Kucker v Kaminsky & Rich*, 7 AD3d 491, 492 [2004]). Pursuant to Rule 130-1.1(c)(2), conduct is frivolous if “it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.”

Discussion

Herein, the court finds that neither party has met the burden of establishing that an award of sanctions is appropriate. Similarly, defendant/third-party plaintiff offers no basis upon which plaintiff’s counsel should be restrained from moving for sanctions in the future. In so holding, the court notes that in the event that any party moves for sanctions, the opposing parties can cross-move for the same relief.

Conclusion

All relief requested in the motion and cross motion is denied. Plaintiff is directed to reply to the counterclaims within 30 days of service upon her of a copy of this order.

The foregoing constitutes the order and decision of this court.

ENTER

J. B. C.

HON. LAURA JACOBSON