

**Board of Directors of 133 Essex St. Condominium v
Evanford, LLC**

2011 NY Slip Op 30930(U)

March 31, 2011

Supreme Court, New York County

Docket Number: 112906/07

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

BOARD OF DIRECTORS OF
133 ESSEX ST. CONDO
EVANFORD LLC

INDEX NO. 112906/07
MOTION DATE 8
MOTION SEQ. NO. _____
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 (e) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**


FILED

APR 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

*and c/c scheduled
for July 21, 2011 - Part 10 9:30 am*

Dated: MAR 31 2011


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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**

-----X
 Board of Directors of 133 Essex Street
 Condominium,

Plaintiff (s),

-against-

Evanford, LLC, Calabrese Investors LLC and
 "John Doe No. 1" and "Jane Doe No. 25" et al.

Defendant (s).
 -----X

DECISION/ ORDER
 Index No.: 1129906-07
 Seq. No.: 008

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

FILED
 APR 01 2011

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

Papers

Pltf's n/m (3025) w/AJ affirm, exhs	1
Calabrese opp w/LAD affirm	2
Evanford x/m (3212) w/RS affid, exhs	3
Pltf's opp to x/m, further support w/AJ affirm, WG, EC affids, exhs ...	4
Evanford reply w/RR affirm	5

NEW YORK
 COUNTY CLERK'S OFFICE
 Numbered

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

This action involves claims among the Board of Directors of 133 Essex Street Condominium ("the board"), the sponsor of the condominium conversion ("Calabrese") and the commercial tenant occupying the first floor as a restaurant bar ("Evanford"). The board seeks to amend its complaint to add new defendants. It also seeks to extend the date for the filing of the note of issue and an order directing a non-party to respond to the subpoena it served.

Evanford opposes that motion insofar as it seeks to add new claims and Evanford has cross moved for summary judgment dismissing all claims against it. Since summary judgment relief is available, the motion in chief and the cross motion will be decided on their relative merits (CPLR 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept 2001]). The reader is presumed to be familiar with the facts of this case which has an extensive history of litigation.

Arguments

The commercial condominium units owned by Calabrese were the subject of a foreclosure action (Black Label, LLC v. Calabrese Investors, LLC et al, Supreme Court, N.Y. Co., Index No. 111127-08). The mortgage and note which had been at one point owned by China trust Bank was assigned to Black Label, LLC. As part of the assignment, Calabrese assigned the Evanford lease. In March 2010, Calabrese delivered a quit claim deed to non-party 31 Rockaway Avenue, LLC ("31 Rockaway") and Black Label later bought the units from 31 Rockaway for only \$50,000. The board seeks to amend its complaint to assert claims against 31 Rockaway and Black based on allegations that 31 Rockaway and Black Label are agents of one another, if not alter egos. The board claims that since one or both of these companies are now the real party in interest, plaintiff must be allowed to amend its complaint to assert claims against them. Such claims include actions in violation of the governing documents of the condominium.

In addition to seeking the right to amend its complaint, the board seeks an order directing 31 Rockaway to comply with the subpoena it served on the company. The board also seeks an order extending its time to file the note of issue,

[* 4]

Calabrese contends that the motion to amend is moot as to 31 Rockaway because 31 Rockaway's interest in the property was been terminated by the foreclosure sale and premature as to Black Label because a referee's deed has yet to be delivered to that company.

While not directly challenging the claims against it, Evanford argues that the amended complaint should not be allowed because this action has gone on long enough and it is very costly for Evanford to litigate this case. Evanford has cross moved for summary judgment, primarily on the basis that its lease allows it to operate its bar in the manner it has and, in any event, whatever unlawful acts that it may have done early in its tenancy have now been corrected.

Discussion

The proposed amended complaint

Leave to amend and supplement pleadings should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise (CPLR § 3025 [b]; Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590 [1st Dept., 1990]). This is true, particularly when the denial of the motion would create a greater prejudice than would be granting it (Murray v. City of New York, 43 NY2d 400 [1977]). Leave, however, may not be granted where the amended pleading fails to state a cause of action (Stroock & Stroock & Lavan v. Beltramini, *supra*).

The amended complaint will be allowed as to both proposed defendants. Leaving aside whether Calabrese is or not still an "interested party" (Calabrese claims it is not), 31 Rockaway and/or Black Label obtained an ownership interest in the commercial units while this action was pending. Judging by Mr. DeLuca's statements,

* 5]

at the time these motions were made, title was in limbo. Although that may have been resolved, the resolution (if any, has not been brought to the court's attention). The complaint in the form proposed shall be served within Ten (10) Days from date of entry of this decision/order.

The board's motion to enforce the subpoena served on 31 Rockaway is denied, however, without prejudice, not only because the board has not filed proof of service of this motion on 31 Rockaway but also because the board may now proceed to serve discovery notices.

The board's motion to extend discovery and the time to file the note of issue is granted. The discovery deadline is extended to July 7, 2011 and the note of issue shall be filed no later than July 22, 2011, in the manner provided in the rules for Part 10. A compliance conference is hereby scheduled for July 21, 2011 at 9:30 a.m.

Summary Judgment

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Furthermore, all the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inference must be resolved in that party's favor (Udoh v. Inwood Gardens, Inc., 70 A.D.3d 563 [1st Dept 2010]).

In support of its motion for summary judgment, Evanford offers its opinion that it has occupied and used the commercial premises in compliance with the lease that

Calabrese gave it and, even if it did have certain lapses when it first opened its establishment, those issues have been resolved.

The arguments raised by Evanford were previously raised when it moved to dismiss this action pre-answer. While the legal principles cited have merit, the facts of this case (i.e. the permitted use of the commercial premises) are no clearer now or less in dispute than they were then. The motion is, therefore, denied.

Conclusion

The board's motion to serve an amended complaint is granted. Its motion to enforce discovery is denied without prejudice. Its motion to extend discovery deadlines is granted and the date to file the note of issue is extended to July 7, 2011. The note of issue shall be filed no later than July 22, 2011, in the manner provided in the rules for Part 10. A compliance conference is hereby scheduled for **July 21, 2011 at 9:30 a.m.**

Evanford's cross motion for summary judgment is denied for the reasons stated.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 31, 2011

So Ordered:



Hon. Judith J. Gische, JSC

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APR 01 2011
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