

**Board of Mgrs. of the Residence on Madison
Condominium v Aryeh**

2011 NY Slip Op 33115(U)

November 28, 2011

Supreme Court, New York County

Docket Number: 104343/11

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

**BOARD OF MANAGERS OF THE RESIDENCE ON
MADISON CONDOMINIUM, ON BEHALF OF ALL ITS
UNIT OWNERS,**

INDEX NO. 104343/11

MOTION DATE 10-26-2011

Plaintiff(s),

MOTION SEQ. NO. 001

-against-

FILED

**MICHAEL ARYEH AND SHIREEN ARYHEN, AS TRUSTEES
OF THE MAHIN ARYEH TRUST F/B/O DANIELLA ARYEH
DATED 8/1/97 AND AS TRUSTEES OF THE MAHIN ARYEH
TRUST, F/B/O MORAD ARYEH, DATED 8/1/97,**
Defendant(s).

DEC 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 6 were read on this motion to dismiss the affirmative defenses cross-motion to Amend the Answer and cross-motion for affirmative defenses:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED	
1 - 2, 3-4	
5, 6	

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, It is Ordered that plaintiffs' motion pursuant to CPLR §3211[b] to dismiss all of the defendants' affirmative defenses and either granting summary judgment or severing the counterclaims asserted in the answer is denied. Plaintiffs' motion filed under Motion Sequence 002, for summary judgment pursuant to CPLR §3212 dismissing the counterclaims and for costs is denied. Defendants' cross-motion pursuant to CPLR §3025 to amend their answer, is granted in part as follows: leave is granted to amend the second and third affirmative defenses, eighth affirmative defense and first counterclaim, ninth affirmative defense and second counterclaim and the sixth counterclaim.

Plaintiffs brought this action seeking a judgment in the amount of \$17, 846.48 against defendants for damages based on failure to pay common charges, additional common charges, and special assessments for condominium Units 9A and 9B, additional amounts as they become due and owing after April, 2011, reasonable rental value from October 1, 2010 to date of entry of a judgment, appointment of a receiver and attorneys fees (Mot. Exh. 10). Plaintiff's motion pursuant to CPLR §3211[b], seeks to dismiss all of the defendants' affirmative defenses. In addition, plaintiffs seek to dismiss the defendants' counterclaims, obtain money judgments for \$28,006.46 which includes assessments, late fees and attorney fees, which continues to accrue and \$4,858.24 per month for both units from pendency of the action to entry of judgment, the appointment of a receiver and attorney fees. Alternatively, pursuant to CPLR §603 plaintiffs seek to sever the defendants' counterclaims.

Plaintiffs made a separate application under Motion Sequence 002, pursuant to CPLR §3212 for summary judgment dismissing the defendants counterclaims as meritless. Plaintiffs also seek costs pursuant to CPLR §8303, and for frivolous motion practice.

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

Defendants oppose both motions and cross-move pursuant to CPLR §3025 to amend their answer. Defendants claim that there would be no prejudice to the plaintiffs and this relief was not sought sooner because they were attempting to negotiate a settlement of the action. Defendants also claim that the revised affirmative defenses and counterclaims are valid and that plaintiffs' motions seeking summary judgment should be denied as premature and moot.

Defendants have withdrawn the eighth, ninth and tenth affirmative defenses as well as all the counterclaims asserted in their Answer (Mot. Exh. 11). Defendants are seeking to assert different eighth, ninth and tenth affirmative defenses and counterclaims in the proposed Amended Answer (Cross-Mot. Exh. B).

A share-holder tenant voluntarily agrees to submit to the board which may significantly restrict the property rights, however, the broad powers afforded to the board, "...have the potential for abuse when a board singles out a person for harmful treatment or engages in unlawful discrimination, vendetta, arbitrary decision making or favoritism." (40 West 67th St. v. Pullman, 100 N.Y. 2d 147, 7909 N.E. 2d 1174, 760 N.Y.S. 2d 745 [2003] citing to Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y. 2d 530, 553 N.E. 2d 1317, 554 N.Y.S. 2d 807 [1990]). The business judgment rule is subject to judicial scrutiny upon a showing that the board acted, "...(1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith." (Lorne v. 50 Madison Avenue, LLC, 65 A.D. 3d 879, 886 N.Y.S. 2d 1 [N.Y.A.D. 1st Dept. 2009] citing to Pelton v. 77 Park Ave. Condominium, 38 A.D. 3d 1, 825 N.Y.S. 2d 28 [N.Y.A.D. 1st Dept., 2006]). An individual unit owner may not be able to withhold common charges in derogation of the condominium units by-laws, however, that does not preclude the unit owner from interposing defenses or counterclaims to the action (Residential Bd. of Mgrs. of Century Condominium v. Berman, 213 A.D. 2d 206, 633 N.Y.S. 2d 478 [N.Y.A.D. 1st Dept. 1995]).

Plaintiffs have not sufficiently established that all of defendants' proposed affirmative defenses and counterclaims have no merit or are frivolous. Defendants can maintain separate defenses and counterclaims to plaintiffs' claims.

Pursuant to CPLR §3025, leave to amend pleadings, "shall be freely granted upon such terms as may be just..." the decision to disallow the amendment is at the Court's discretion (McCaskey, Davies & Associates, Inc. v. New York City, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). Leave to amend should be granted as long as there is no surprise or prejudice to the opposing party. Delay alone is insufficient to defeat a motion for leave to amend. To establish prejudice there must be a showing of hindrance in preparation of the case or the prevention from taking measures in support of a party's position (Kocourek v. Booz Allen Hamilton, Inc., 85 A.D. 3d 502, 925 N.Y.S. 2d 51 [N.Y.A.D. 1st Dept., 2011]). An examination of the merits of the proposed amendment is warranted to save judicial resources. Leave to amend a pleading will be denied where the proposed pleading fails to state a cause of action or is patently insufficient as a matter of law (Davis & Davis, P.C. v. Morson, 286 A.D. 2d 584, 730 N.Y.S. 2d 293 [N.Y.A.D. 1st Dept. 2001] and Bishop v. Maurer, 83 A.D. 3d 483, 921 N.Y.S. 2d 224 [N.Y.A.D. 1st Dept. 2011]).

Upon review of the papers submitted, this Court finds there would be no prejudice to the plaintiffs in granting defendants leave to amend based on the proposed Amended Answer (Cross-Mot. Exh. B).

A jurisdictional defense raised in an answer is deemed timely asserted and is not waived by the assertion of a related counterclaim or participating in defense of an action

Dinicu v. Groff Studios Corp., 215 A.D. 2d 323, 626 N.Y.S. 2d 800 [N.Y.A.D. 1st Dept. 1995] and Bank Hapoalim v. Kotten Mach. Co., 151 A.D. 2d 374, 543 N.Y.S. 2d 75 [N.Y. A.D. 1st Dept., 1989]). The assertion of unrelated counterclaims results in waiver of jurisdictional defenses (Textile Tech. Exch. v. Davls, 81 N.Y. 2d 56, 611 N.E. 2d 768, 595 N.Y.S. 2d 729 [1993]). Pursuant to CPLR 3211 [a][8],[e], the defense of lack of jurisdiction is properly raised in the pleadings, and the objecting party is required to make a motion to dismiss within sixty days of service of the answer or it is deemed waived absent a showing of undue hardship (Wiebusch v. Bethany Mem. Reform Church, 9 A.D. 3d 315, 781 N.Y.S. 2d 6 [N.Y.A.D. 1st Dept. 2004]).

This Court finds that there are counterclaims asserted in the proposed Amended Answer, related to the causes of action asserted in the complaint (Cross-Mot. Exh. B). Defendants have not sought to dismiss this action for lack of jurisdiction, as of the date of their cross-motion September 16, 2011, the sixty days have passed. Defendants also did not provide a showing of undue hardship, therefore, the first affirmative defense of lack of jurisdiction is waived. Defendants first affirmative defense is severed and dismissed.

Defendants' second and third affirmative defenses although not detailed, sufficiently state a defense, they indicate that the sums of money sought by the plaintiffs are not accurate and that they have been paid (Cross-Mot. Exh. B). Plaintiffs claim that copies of pages from their rent ledger which have not been authenticated (Mot. Exhs. 6 & 7) reflect the failure of defendants to pay in full and the amounts stated in the complaint are accurate, is not sufficient to dismiss these defenses.

The fourth affirmative defense is laches, fifth affirmative defense is the statute of limitations, the sixth affirmative defense is accord and satisfaction and the seventh affirmative defense is the doctrine of waiver (Cross-Mot. Exh. B). Defendants do not provide any further explanation other than the assertions, these defenses are conclusory and fail to set forth any factual basis. The seventh affirmative defense of waiver would also be denied because it could not be brought based on the no waiver provision under Article X titled Miscellaneous, Section 5 of the by-laws (Mot. Exh. 5). The fourth, fifth, sixth and the seventh affirmative defenses are severed and dismissed.

The eighth affirmative defense and first counterclaim alleges that the plaintiffs' intentionally and deliberately caused a nuisance which interfered with the defendants' private rights to use and occupy the premises.

To establish liability for a claim of private nuisance a party is required to demonstrate, "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (Copart Indus., Inc. v. Consolidated Edison Co. of N.Y. 41 N.Y. 2d 564, 362 N.E. 2d 968, 394 N.Y.S. 2d 169 [1977]). In determining whether a private nuisance exists the court must weigh the gravity of the harm against utility and necessity (Copart Indus., Inc. v. Consolidated Edison Co. of N.Y. 41 N.Y. 2d 564, supra). A claim of nuisance involves liability for interference with the use or enjoyment of land. Money damages sought under a claim of nuisance require a showing of diminution of the value of the property, or if the claim is based on a temporary condition reduction of the usable value of the property (Board of Managers of Waterford Association v. Samli, 73 A.D. 3d 617, 900 N.Y.S. 2d 860 [N.Y.A.D. 1st Dept., 2010] citing to Guzzardi v. Perry's Boats, 92 A.D. 2d 250, 460 N.Y.S. 2d 78 [N.Y.A. D. 2nd Dept., 1983]).

Plaintiffs state that there is no legal merit or facts presented by defendants to establish nuisance. Plaintiffs claim their actions were legal and proper based on the by-laws and Local

Labor Law 11 of 1998, but they have not sufficiently established their actions were solely based on utility and necessity. Defendants have stated a potential claim for nuisance.

Defendants ninth affirmative defense and second counterclaim is for breach of contract. Defendants claim there was a breach and refer to Article 5, titled Operation of Property, Section 15 which permits access to the unit for, "Installations, alterations or repairs...provided that requests for entry are made in advance and further provided that such right shall be exercised in such a manner as will not unreasonably interfere with the use of the Units." The plaintiffs claims that they were authorized to access the terrace for repair and maintenance pursuant to the by-laws, but have not sufficiently addressed the provisions of Section 5. Defendants have a potential claim for breach of contract.

Defendants tenth affirmative defense and third counterclaim is for intentional and deliberate trespass depriving them of the use of a substantial portion of the property.

Trespass requires either an unlawful act or a lawful act performed in an unlawful manner that interferes with a person's right of possession (*Kurzner v. Sutton Owners Corporation*, 245 A.D. 2d 101, 666 N.Y.S. 2d 135 [N.Y.A.D. 1st Dept., 1997] citing to *Ivancic v. Olmstead*, 66 N.Y. 2d 349, 488 N.E. 2d 72, 497 N.Y.S. 2d 326 [1985]).

Defendants have not sufficiently established that there was an unlawful act or lawful act performed in an unlawful manner. Defendants permitted the repair work and access to the premises. The tenth affirmative defense and third counterclaim cannot be sustained, it is severed and dismissed.

Defendants eleventh affirmative defense and fourth counterclaim is for the infliction of intentional emotional distress based on the deprivation of their unfettered right to privacy in their home.

The basis for a claim of infliction of emotional distress is conduct that is so extreme and outrageous, "...it transcends the bounds of human decency as to be regarded as atrocious and intolerable in civilized society" (*Friehofer v. Hearst Corp.*, 65 N.Y. 2d 135, 480 N.E. 2d 349, 490 N.Y.S. 2d 735 [1985]). The extreme and outrageous conduct is required to result in either reckless or intentional severe distress (*Friehofer v. Hearst Corp.*, 65 N.Y. 2d 135, supra).

Defendants have failed to provide sufficient details in the pleadings to establish their claim that the conduct involved, was so extreme and outrageous as it would be deemed intolerable or that there were damages. The eleventh affirmative defense and fourth counterclaim cannot be sustained, it is severed and dismissed.

The fifth counterclaim seeks attorney fees. A claim for attorney fees cannot be maintained without specific statutory or contractual authority (*Devlin v. 654 First Avenue Manhattan Company*, 229 A.D. 2d 343, 645 N.Y.S. 2d 476 [N.Y.A.D. 1st Dept., 1996] and *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y. 2d 1, 503 N.E. 2d 681, 511 N.Y.S. 2d 216 [1986]).

Defendants have not provided either statutory or contractual authority for the fifth counterclaim. The bylaws (Mot. Exh. 5) do not provide for legal fees in the event a unit owner brings an action and the statutory relief applying to landlord and tenant actions does not apply to this action. The fifth counterclaim cannot be sustained, it is severed and dismissed.

The sixth counterclaim is for property damage caused by the storage of heavy materials on the terrace by plaintiffs' contractors. Defendants claim that the storage of equipment on the terrace was negligent and resulted in tilting of the terrace and damage to personal property.

A claim by a proprietary tenant for property damage arising out of negligence has a three year statute of limitations (King v. 870 Riverside Dr. Hous. Dev. Fund Corp., 74 A.D. 3d 494, 902 N.Y.S. 2d 86 [N.Y.A.D. 1st Dept., 2010]).

Defendants in support of the cross-motion have stated that the damages to the terrace and personal property occurred during the March of 2011 through September of 2011 repair work. The defendants have stated a potential claim for property damage.

Accordingly, it is ORDERED that, plaintiffs' motion pursuant to CPLR §3211[b] to dismiss all of the defendants' affirmative defenses and either granting summary judgment or severing the counterclaims asserted in the answer, is denied, and it is further,

ORDERED that plaintiffs' motion filed under Motion Sequence 002, for summary judgment pursuant to CPLR §3212 dismissing the counterclaims and pursuant to CPLR §8303 for costs is denied, and it is further

ORDERED that, defendants' cross-motion pursuant to CPLR §3025 to amend their answer, is granted in part as follows: leave is granted to amend the second and third affirmative defenses, eighth affirmative defense and first counterclaim, ninth affirmative defense and second counterclaim and the sixth counterclaim and to this extent the amended answer in the form annexed to the cross-motion shall be deemed served upon service on all parties, of a copy of this Order with Notice of Entry, and it is further

ORDERED that, leave to amend the answer is denied with respect to defendants' proposed first, fourth, fifth, sixth and seventh affirmative defenses, tenth affirmative defense and third counterclaim, eleventh affirmative defense and fourth counterclaim and fifth counterclaim and those affirmative defenses and counterclaims are stricken, and it is further

ORDERED that, the plaintiffs shall answer the amended counterclaims or otherwise respond within twenty (20) days from the date of service of a copy of this Order with Notice of Entry, and it is further

ORDERED, that movant is directed to serve a copy of this Order with Notice of Entry on the Clerk of the Trial Support Office (Room 158), who shall set this matter down for a Preliminary Conference in IAS Part 13.

This constitutes the decision and order of this court.

DEC 02 2011

Dated: November 28, 2011

NEW YORK COUNTY CLERK'S OFFICE
MANUEL J. MENDEZ J.S.C. MANUEL J. MENDEZ J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE