

Silverman v Nicholson
2012 NY Slip Op 30602(U)
February 23, 2012
Supreme Court, Suffolk County
Docket Number: 19062-11
Judge: Peter Fox Cohalan
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INDEX # 19062-11
 RETURN DATE: 7-29-11
 MOT. SEQ. # 001

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

PRESENT:

Hon. PETER FOX COHALAN

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 HENRY B. SILVERMAN and MELISSA SILVERMAN,

Plaintiffs,

-against-

HARRY NICHOLSON, MARIANNE NICHOLSON,
 SHIRLEY COVERDALE, and WILLIAM COYLE,
 Individuals residing in the State of New York,

Defendants.

CALENDAR DATE: September 21, 2011
 MNEMONIC: MG; XMD; C/Disp

PLTF'S/PET'S ATTORNEY:

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 Riverhead, New York 11901

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Upon the following papers numbered 1 to 31 read on this motion to dismiss and cross motion ;
 Notice of Motion/Order to Show Cause and supporting papers 1-14 ; Notice of Cross-Motion and
 supporting papers 15-25 ; Answering Affidavits and supporting papers 26-31 ; Replying
 Affidavits and supporting papers _____ ; Other _____ ; and after hearing counsel in support of and
 opposed to the motion it is,

ORDERED that this motion by the defendants, Harry and Marianne Nicholson, Shirley Coverdale and William Coyle, seeking dismissal of plaintiffs' action pursuant to CPLR §3211(a)(3) because the plaintiffs lack the legal capacity to sue; CPLR §3211(a)(5) because res judicata or collateral estoppel principles apply; CPLR §3211(a)(7) for failure to state a cause of action; and CPLR §3211(a)(10) for failure to proceed with a necessary party, i.e. Wells Creek Homeowners Association, Inc. is, after due consideration, granted and the plaintiffs' action is dismissed. The request for sanctions is denied at this time. The plaintiffs' cross-motion for summary judgment pursuant to CPLR §3212 seeking judgment on their first and second causes of action for breach of contract and unjust enrichment is denied.

This action instituted by Henry and Melissa Silverman (hereinafter Silvermans) follows a prior action in which the Silvermans attempted to exert ownership and control over a dock belonging to the Wells Creek Homeowners Association Inc. (hereinafter Wells Creek). Initially, the Town of Riverhead, New York (hereinafter Town) instituted an action entitled Town of Riverhead v Henry Silverman, Melissa Silverman, Wells Creek Homeowners Association, Inc. and JP Morgan Chase, N.A. under Index #14988-06 seeking to enjoin and restrain the Silvermans from occupying or using their two story residence until certain Town Code violations previously identified by the Town were corrected and a certificate of occupancy was issued. The Town also complained that the Silvermans had changed the grade of a private road and easement to the Wells Creek dock causing neighborhood lands to flood, changed the configuration of the Wells Creek dock to accommodate their sailboat to the prejudice of Wells Creek as well as the defendants in this case and had brought electric out onto the dock, all in violation of the Town Code.

Subsequently, the Silvermans, in a cross claim against Wells Creek which was comprised of the Silvermans and four other adjoining landowners, attempted to assert custody, ownership and control over the Wells Creek dock to the exclusion of the others. Wells Creek, in its answer to the Silvermans cross claim, denied the allegations and asserted its own cross claims against the Silvermans involving ownership and damages for costs, expenses and attorney's fees in having to defend against the Silvermans' claims. This Court in a decision, dated June 26, 2007, granted Wells Creek's motion to dismiss on documentary evidence, pursuant to CPLR §3211 (a)(1), the Silvermans' cross claims of ownership, custody and control of the Wells Creek dock and the easement over the Silvermans' land to the dock. The Silvermans appealed to the Appellate Division which affirmed this Court's decision. See, *Town of Riverhead v. Silverman*, 54 AD3d 1025, 864 NYS2d 181 (2nd Dept. 2008). Wells Creek also was granted leave to amend its cross claims against the Silvermans seeking forfeiture of the Silvermans' dock rights and the use of the dock by them as homeowners for failure to pay the Wells Creek common charges and the pro rata share of costs relating to maintenance, repairs, insurance and fees in conjunction with the upkeep of the dock. Wells Creek also claimed that the defiance to and violations of its bylaws by the Silvermans threatened the rights of the other four landowners as well as the imposition of additional attorney's fees and costs associated with the defense by Wells Creek to the Silvermans' claims. These claims, Wells Creek contends, continued when the Silvermans ignored its rules and regulations. Wells Creek also asserted and requested injunctive relief with regard to the violation of the Wells Creek bylaws and failure to pay its fees and costs.

This Court, in a prior order, issued May 13, 2009 in the case mentioned heretofore under Index #14988-06, after a hearing on the requested temporary restraining order, granted such order to the extent of preventing the Silvermans from the use and enjoyment of the Wells Creek dock pending satisfaction of certain conditions imposed upon them by the Court. Those conditions, *inter alia*, (1) required immediate payment of any and all arrears on the maintenance costs of the Wells Creek dock as pro rated among the five landowners amounting to approximately \$2,000.00; (2) required payment of one-fifth of the attorney's fees incurred in defending Wells Creek from the actions by the Town and thereafter Silvermans' litigation with regard to the dock; (3) required obtaining a bond in an amount to cover the other four-fifths requested in attorney's fees, in the event Wells Creek was successful in its cross claims to require the Silvermans to pay all attorney's fees in defense of the Silvermans' unsuccessful attempt to seize ownership of the dock; (4) required the docking of only one boat at a Wells Creek duly designated slip; (5) restrained the Silvermans from leaving any boats, canoes, water craft or assorted nautical or other apparatus on the dock itself; (6) restrained the Silvermans from blocking access to the dock with any obstruction, motor vehicle, dog or preventing access to the dock; (7) restrained the Silvermans from bringing onto the dock electrical cords, fixtures or anything in violation of the Town Code or the rules and regulations of Wells Creek.

The Silvermans thereafter sold their home at 267 Peconic Bay Boulevard, Aquebogue, Suffolk County, Long Island, New York which comprised one-fifth of Wells Creek and as part of the sale they were required to place in escrow certain amounts to cover the expected costs and litigation arising from the attempts of Wells Creek to recover its costs for defending the prior action. This assessment amounted to \$41,005.67 which was paid by the Silvermans on June 23, 2010. This present action by the Silvermans was instituted against the individual members of Wells Creek, Harry and Marianne Nicholson, Shirley Coverdale and William Coyle alleging causes of action for breach of contract, unjust enrichment, conversion, and a

of breach of fiduciary duty. The Silvermans' complaint alleges actions taken by Wells Creek as an association of its members but Wells Creek is not named as a party defendant.

The individual defendants in this present case now move to dismiss the Silvermans' complaint pursuant to CPLR §3211 because the Silvermans have no legal capacity to sue, collateral estoppel or res judicata applies, failure to state a cause of action because the individual defendants cannot be held individually liable for the acts of Wells Creek and failure to add a necessary party to this lawsuit, i.e. Wells Creek. The Silvermans cross move for summary judgment pursuant to CPLR §3212 on their complaint as to the first and second causes of action for breach of contract and unjust enrichment. The defendants have not answered the complaint since the relief sought was a pre-answer motion to dismiss under CPLR §3211.

For the following reasons, the defendants' motion to dismiss the Silvermans' complaint pursuant to CPLR §3211 is granted in its entirety and the complaint is dismissed and the additional requested relief of sanctions is denied. The Silvermans' cross-motion for summary judgment pursuant to CPLR §3212 on their complaint as to the first two causes of action is denied as moot in light of the Court's decision dismissing the complaint but would be denied in any event as premature prior to joinder of issue since no answer has been filed to the complaint. See, CPLR §3212 (a); *City of Rochester v. Chiarella*, 65 NY2d 92, 101, 490 NYS2d 174 (1985); *Green v. Hayes* 30 AD3d 808, 810, 817 NYS2d 421 (3rd Dept. 2006); *J. Castronovo, Inc. v. Hillside Development Corp.*, 160 AD2d 763, 553 NYS2d 481 (2nd Dept. 1990).

As Professor David D. Siegel in New York Practice §258 noted:

"CPLR 3211 merely supplies the procedural expedient for bringing to the court's attention a ground that supports an early dismissal of a cause of action or defense. The merits of the particular ground, and whether it supports the dismissal sought, may involve a vast realm of law, substantive or procedural or both."

A review of the Silvermans' complaint shows that they seek relief not as against Wells Creek or its officers or directors for an assessment as against them to which they now object but against the individuals who comprise Wells Creek of which the Silvermans were members. A review of the minutes of the Wells Creek meeting on March 12, 2009 shows that a vote was taken to assess against the Silvermans the legal fees incurred by Wells Creek in its successful defense of both the Silvermans' claim to exclusive ownership to the Wells Creek dock and the Town's Code violations based upon Silvermans' attempted control of ownership of the dock and their violations in bringing, *inter alia*, electricity onto the dock. Interestingly, the Silvermans (both husband and wife) attended the March 12, 2009 meeting at which the assessments were made against them and rather than voice an objection they merely abstained in voting on the assessment.

The business judgment rule shields Wells Creek as a homeowners association in the enactment of rules and regulations governing the use and maintenance of its common areas, i.e. the dock. *Gillman v. Pebble Cove*, 154 AD2d 508, 546 NYS2d 134 (2nd Dept. 1989). In reviewing the exercise of its authority to impose certain assessments as to its dock, absent claims of fraud, self dealing, unconscionability and/ or other misconduct, the Court's review is

limited to an inquiry as to whether the action taken was reasonable and in furtherance of Wells Creek's legitimate interests. Levine v. Greene, 57 AD3d 627, 628, 871 NYS2d 187, 189 (2nd Dept. 2008). Its resolution imposing attorney's fees as against the Silvermans for Wells Creek's defense of its dock from alleged claims of exclusive ownership by the Silvermans was a proper exercise of its authority. Captain Walk Homeowners Assoc. v. Czezil, 17 AD3d 617, 794 NYS2d 82 (2nd Dept. 2005). It seems odd to the Court that the Silvermans failed to voice objection to the assessment of attorney's fees as against them for the lawsuit seeking to seize Wells Creek's property, i.e. the dock, and that they abstained in the voting on this assessment but now complain about such actions not as against Wells Creek, but as against the individual voting members constituting Wells Creek of which the Silvermans were members. Clearly, if the Silvermans felt aggrieved by the imposition of attorney's fees on them for the defense of the dock from the Silvermans' attempt to seize it, they could have voiced their objection at the time of imposition of such fees, yet they did not object as voting member of Wells Creek and instead merely abstained from voting.

The Silvermans' first cause of action alleges a breach of contract as against the individual members of Wells Creek. However there was no contract between the Silvermans and the defendants in this case, nor can the Silvermans point to an agreement with the individual defendants with reference to the assessment of the attorney's fees of which they complain. Therefore this cause of action for breach of contract cannot prevail since there was no contract with the individual named defendants and it is therefore dismissed.

The second cause of action alleges unjust enrichment arguing that the defendants were "unjustly enriched to the detriment of" the Silvermans. The elements for a claim of unjust enrichment require (1) a benefit conferred on the defendants by the plaintiff; (2) an appreciation and/or knowledge by the defendant of the benefit conferred ; and (3) the acceptance or retention of such benefit under such circumstances as to make it inequitable for the defendant(s) to retain it. See, Cruz v. McAneney, 31 AD3d 54, 59, 816 NYS2d 486, 490-491 (2nd Dept 2006). However, Silvermans' payment of attorney's fees was not to the individual defendants (who were therefore not unjustly enriched) but to Wells Creek to reimburse Wells Creek for attorney's fees incurred in defending Wells Creek from both the Town in its initial lawsuit for, *inter alia*, dock violations (Index # 14988-06) and Silvermans' unsuccessful claims to exclusive ownership of the dock. Since Wells Creek is not a named defendant and there was no inequitable conduct on the part of the individual defendants in assessing attorney's fees on the party responsible for their imposition, there is no unjust enrichment of the individual defendants and the second cause of action is dismissed. Citibank v. Walker, 12 AD3d 480, 787 NYS2d 48 (2nd Dept. 2004); Kunkel v. Kunkel, 32 Misc3d 1203(A), 934 NYS2d 34 (2011).

The third cause of action seeks conversion alleging that the defendants are exercising "unauthorized dominion of the funds in question" and have distributed said funds to the members of Wells Creek. A cause of action for conversion must allege legal ownership or an immediate right to possession of specifically identifiable funds and that the defendants are exercising an unauthorized dominion and control over such funds to the exclusion of the Silvermans' rights. See, Zendler Constr. Co., Inc. v. First Adjustment Group, Inc., 59 AD3d 439, 440, 873 NYS2d 134, 136 (2nd Dept. 2009). The defendants did not exercise control over the attorney's fees and therefore conversion does not lie and the third cause of action for conversion is dismissed.

The fourth cause of action alleges a breach of a fiduciary duty to the Silvermans on the part of the individual defendants as Wells Creek members under Not for Profit Corporation Law (hereinafter NFPCL) §717 and §720. However, the defendants are collectively sued herein as members not as officers or directors of Wells Creek, nor is Wells Creek itself a named defendant. See, *Miller v. Barlow*, 78 AD 331, 79 NYS2d 964 (1st Dept. 1903). NFPCL §717 addresses the "duty of directors and officers" yet the Silvermans make no allegations that the individual defendants are anything except voting members of Wells Creek. Further, the Silvermans do not claim that their cause of action is on behalf of Wells Creek as against the other members. They instead argue that this cause of action is against Wells Creek for its assessment of attorney's fees against them as members in violation of the bylaws of Wells Creek. As already stated Wells Creek is not a party to this lawsuit. A review of NFPCL §720 indicates that it is titled as "Actions on behalf of the corporation" and therefore the fourth cause of action alleging violations of the NFPCL §717 and §720 is dismissed.

Accordingly, the defendants' motion to dismiss the Silvermans' complaint pursuant to CPLR §3211 is granted and the action is dismissed. The defendants' additional requested relief in the form of sanctions and/or costs for the institution of a frivolous action, while having some merit as it targeted the individual homeowner/member defendants and not Wells Creek, is denied.

The Silvermans' motion for summary judgment pursuant to CPLR §3212 is denied not only because it is premature since issue has not been joined in this action with the service of an answer by the defendants [CPLR §3212(a)] but also it is moot in light of this Court's decision dismissing the Silvermans' action pursuant to CPLR §3211.

The foregoing constitutes the decision of the Court.

Dated: February 23, 2012



J.S.C.

PON. PETER FOX COHALAN