

**Valentini v 326 E. 30th St. Owners, Inc.**

2012 NY Slip Op 32992(U)

December 11, 2012

Supreme Court, New York County

Docket Number: 103711/10

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

KIM VALENTINI,  
Plaintiff,

- against -

326 EAST 30<sup>TH</sup> STREET OWNERS, INC.,  
THE BOARD OF DIRECTORS OF 326 EAST 30<sup>TH</sup>  
STREET OWNERS INC., TAV CLAVIN, TOM  
BIRNE, CLAUDIA WHITEHEAD, CAROL WINER,  
SUSAN CLAVIN,  
Defendants.

INDEX NO. 103711/10  
MOTION SEQ. NO. 004

ACTION 1

326 EAST 30<sup>TH</sup> STREET OWNERS, INC.  
Plaintiff,  
-against-

**FILED**  
DEC 18 2012  
NEW YORK COUNTY CLERK'S OFFICE  
ACTION 2

KIM VALENTINI,  
Defendant.

The following papers numbered 1 to 5 were read on this motion by plaintiff for leave to amend the complaint and to reargue.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits (Memo) _____	<u>2, 3</u>
Reply Affidavits — Exhibits (Memo) _____	<u>4, 5</u>

Cross-Motion: Yes  No

Kim Valentini ("Valentini" or "plaintiff") commenced this action (Action 1) on or about May 22, 2010 against defendants 326 East 30<sup>th</sup> Street Owners, Inc., its Board of Directors, fellow coop owners, Tav Clavin, Tom Birne, Claudia Whitehead, Carol Winer, and Susan Clavin ("the Coop" or "defendants") for, *inter alia*, declaratory judgment, preliminary injunctive relief, breach of warranty of habitability, and property damage arising from structural damage to the roof of the Coop's building which allowed infiltration of water into plaintiff's apartment. This litigation primarily concerns a dispute over which party bears the financial responsibility to repair the structural damage to the roof and the subsequent damage caused to plaintiff's apartment due to water infiltration. Issue was joined on or about May 25, 2010, when the defendants

interposed an answer. Discovery is not complete and Note of Issue has not been filed. Before the Court is Valentini's motion, in Action 1, pursuant to CPLR 3025, for leave to serve an amended verified complaint adding additional causes of action. Plaintiff also moves, pursuant to CPLR 2221, to reargue, renew, and reconsider the Court's Decision and Order dated December 27, 2010. Defendants cross-move for an order directing plaintiff to pay maintenance fees that have accrued since June 2010 and to continue to pay use and occupancy fees pending the litigation.

### BACKGROUND

Valentini is the owner of apartment unit number 4 ("apartment") in 326 East 30<sup>th</sup> Street ("the building"), a cooperative building, and is a shareholder of the building ownership corporation. Plaintiff bought her apartment in 2003. Plaintiff's apartment comprises the fourth and fifth floors, which are the top floors of the building. In June 2006, a fire broke out in an adjacent and/or adjoining building, causing structural damage to the building and the roof. Repairs were done to the building after the fire, but the damage to the roof has not been remedied by structural repairs, construction, or otherwise. Plaintiff avers that excessive water damage occurred in both levels of her apartment causing, among other things, cracked walls and damaged wood flooring, as well as the buildup of mold and mildew due to the structurally damaged roof and building (see Verified Complaint ¶¶ 23, 27-8). As a result of this damage, plaintiff sought other shelter at her own cost as she claims her apartment became uninhabitable (see Plaintiff's Affirmation in Support ¶ 6). Plaintiff alleges she has requested that the members of the Board of Directors of the building repair the roof or that she be granted written consent to have a general contractor repair the roof, yet her requests have been unreasonably denied (see plaintiff's aff'd ¶¶ 8-12).

Valentini commenced Action 1 by the filing of a summons and complaint on or about March 22, 2010, against the defendants for, *inter alia*, declaratory judgment, preliminary

injunctive relief, breach of warranty of habitability, and property damage, and is seeking a judgment in the amount of approximately \$1,000,000.00. Plaintiff also seeks a judgment declaring and directing defendants to: (1) grant plaintiff written consent to conduct structural and other construction and repair to the roof of the premises at defendants' full cost; (2) sustain all costs of any and all structural repairs to the roof and adjacent area, pursuant to the By-Laws, Proprietary Lease and its amendments regarding apartment unit four; (3) abstain from collecting any and all maintenance fees from plaintiff, until such time that the subject premises and defective roof existing there are properly structurally repaired.

On or about May 4, 2010, 326 East 30<sup>th</sup> Street, Inc. brought a non-payment proceeding against Valentini, (Action 2), in Civil Court, New York County, Index. No.65645-10. In an Order dated June 25, 2010, Civil Court Judge Brenda Spears directed, that pending an adjournment, "respondent [Valentini] shall pay maintenance from 6/10 pendente lite. Payment of said funds and acceptance thereof is without prejudice to the rights of either party" (Notice of Cross-Motion exhibit C).

Valentini then moved by Order to Show Cause dated May 5, 2010 requesting, *inter alia*, that the defendants be preliminary and permanently enjoined from: (1) unreasonably, capriciously and arbitrarily refusing to grant plaintiff written consent to repair the structural defects of the roof and adjacent area; (2) withholding permission for the plaintiff and her general contractor to gain access to the roof and adjacent area, to conduct structural repairs and construction work; and (3) collecting any and all maintenance fees from the plaintiff until such time that the structural defects of the subject roof and adjacent area at the premises are remedied. In doing so, plaintiff relied upon provisions of the By-Laws and the Proprietary Lease ("the Lease") and its amendments. This Court denied Valentini's motion for a preliminary injunction, but granted Valentini's motion to consolidate Action 1 with the Civil Court Summary proceeding, Action 2 (see Defendants' Affirmation in Opposition exhibit E).

Valentini, in Action 1, now moves, pursuant to CPLR 3025, for leave to serve an amended verified complaint to add new causes of action for constructive eviction, negligence and attorneys fees, to withdraw her sixth cause of action for intentional infliction of emotional distress and to correct the citation to the New York State Business Corporation Law in her fourth cause of action. Plaintiff also moves, pursuant to CPLR 2221, to reargue, renew, and reconsider the Court's Decision and Order dated December 27, 2010, in which the Court denied plaintiff's motion for a preliminary injunction, and to clarify the Court's ruling on plaintiff's co-op monthly maintenance payments pending litigation.

Defendants do not oppose the portion of plaintiff's motion seeking to amend her complaint to withdraw the sixth cause of action for intentional infliction of emotional distress and to correct the citation to the Business Corporation Law in the fourth cause of action. However, defendants oppose her application to amend the complaint to add causes of action for constructive eviction, negligence and attorneys fees. Specifically, as to constructive eviction, defendants maintain that this claim is devoid of merit and can be wholly refuted by documentary evidence, and that it is time-barred by the statute of limitations. Moreover, defendants assert that plaintiff's claim for negligence is barred by the statute of limitations, and her request for attorneys fees is palpably deficient as she has failed to submit any proof that the Coop failed to perform any covenant under the lease. Defendants also cross-move for an order directing plaintiff to pay maintenance fees that have accrued since June 2010, and continue to pay use and occupancy fees pending the litigation. Defendants also request that this Court deny plaintiff's motion to reargue and renew the previous Decision and Order of this Court, dated December 27, 2010.

#### DISCUSSION

##### *Motion to Amend the Complaint*

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by

setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . Leave shall be freely given upon such terms as may be just . . . .” The law in New York is well settled that such leave shall be freely granted absent prejudice or surprise resulting from the delay (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] [“Leave to amend pleadings should, of course, be freely given”]). The First Department has “consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted. . . .” (*Ancrum*, 301 AD2d at 475; *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). “Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Thompson*, 24 AD3d at 205; *see Ancrum*, 301 AD2d at 475; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

“It is well settled that a cause of action for constructive eviction is governed by a one year statute of limitations” (*Kent v 534 E. 11th St.*, 80 AD3d 106, 111 [1st Dept 2010]; *see CPLR 215*; *Jones v City of New York*, 161 AD2d 518, 518–519 [1st Dept 1990]; *Yokley v Henry–Clark Assoc.*, 170 Misc2d 779, 781, 655 NYS2d 714, 716 [App Term 2d Dept 1996] [finding a claim based on constructive eviction is actually one for wrongful eviction and is subject to the one year statute of limitations]. A cause of action for negligent injury to property is governed by a three-year statute of limitations (*see CPLR 214[4]*; *Kent*, 80 AD3d at 112).

In opposition to plaintiff’s motion, defendants submit as documentary evidence the affidavit of Nathan Farber, the manager of the Horizon Condominium, located at 415 East 37<sup>th</sup> Street, New York and an alleged one-year lease agreement between Horizon Condominium and Valentini, dated January 25, 2006, effective February 1, 2007. Defendants assert that plaintiff vacated and abandoned her Coop apartment for a new condominium at Horizon on February 1, 2006 for reasons other than the water damage caused by the fire in June 2006, and thus she could not have been constructively evicted. Valentini counters this argument with

her assertions that she was having problems with her husband and temporality moved to resolve those issues. She alleges that her intent was not to abandon, but rather keep the apartment as her primary residence, and therefore she could be constructively evicted from the apartment (see Steven Wagner, *aff'd* ¶¶ 32-34, p. 12-13). In addition, in her amended complaint Valentini also alleges that Board of Directors' wrongful acts are continuous and ongoing, and she "vacated the apartment and has been unable to occupy the apartment since June 2006" (Notice of Motion, exhibit A, Proposed Amended Verified Complaint ¶ 33). Therefore, plaintiff asserts that June 2006 is the operational date for her constructive eviction claim and that the claim is proper.

In opposition to the constructive eviction claim, defendants maintain that leave to amend to assert this cause of action should be denied as it is devoid of merit and can be wholly refuted by documentary evidence, specifically the Horizon lease. Defendants maintain that the Horizon lease and related documents were dated January 25, 2006, which is more than four months before the June 20, 2006 fire occurred. However, the Court finds that the documentary evidence submitted by defendants does not utterly refute the factual allegations contained within plaintiff's affidavit as well as the proposed amended complaint. Accordingly, the portion of plaintiff's motion seeking leave to amend her complaint to add a cause of action for constructive eviction is granted.

The Court also grants plaintiff's motion to amend her complaint to add causes of action for negligence and attorneys fees. The remaining portion of her proposed amended complaint is not opposed by the defendant Board and is therefore granted on default.

#### *Motion to Reargue and Renew*

A motion for reargument is addressed to the sound discretion of the Court, and is designed to give a party a chance to convince the Court that relevant facts or law were overlooked or misapprehended (see CPLR 2221[d][2]; *Foley v Roche*, 68 AD2d 558, 567 [1st

Dept 1979]). Moreover, the Court notes that Valentini's motion for leave to reargue was brought with leave of the Court, and thus the Court will consider the motion though it is technically untimely pursuant to CPLR 2221(d) (see *Garcia v The Jesuits of Fordham*, 6 AD3d 163 [1st Dept 2004]). The Court finds it appropriate to grant Valentini's motion to reargue the prior order of this Court, dated December 27, 2010 and entered on January 18, 2011 (motion seq. 001) pursuant to CPLR 2221(d), to address an ambiguity regarding the payment of maintenance fees, and in doing so, amends its previous Order to read as follows: it is hereby ORDERED that plaintiff Valentini is directed to pay maintenance into escrow from June 2010, pendente lite, but is otherwise affirmed. The portion of plaintiff's motion seeking to renew, pursuant to CPLR 2221(e), based on an amended complaint asserting a new cause of action for constructive eviction is denied as moot.

#### *Defendants' Cross-Motion*

In light of the foregoing, the defendants' cross-motion seeking an order directing plaintiff to pay maintenance fees that have accrued since June 2010 and to continue to pay user and occupancy fees pending the litigation, is hereby denied.

#### CONCLUSION

Upon the foregoing papers, it is

ORDERED that the portion of plaintiff's motion for leave to amend the complaint to withdraw her sixth cause of action for intentional infliction of emotional distress and to correct a citation in the New York State Business Corporation Law in her fourth cause of action is granted, without opposition; and it is further,

ORDERED that the portion of plaintiff's motion for leave to amend the complaint, pursuant to CPLR 3025(b), to add a cause of action for constructive eviction is granted; it is further,

ORDERED that the portion of plaintiff's motion for leave to amend the complaint,

pursuant to CPLR 3025(b), to add new causes of action for negligence and attorneys fees is granted; and it is further,

ORDERED that plaintiff's motion to reargue the prior order of this Court, dated December 27, 2010 and entered on January 18, 2011, pursuant to CPLR 2221(d), is granted to the extent that the Order is amended to read as follows: It is hereby ORDERED that plaintiff Valentini is directed to pay maintenance into escrow from June 2010, pendente lite, but is otherwise affirmed; and it is further,

ORDERED that the portion of plaintiff's motion seeking to renew the prior order of this Court, dated December 27, 2010 and entered on January 18, 2011, pursuant to CPLR 2221(e), is denied as moot; and it is further,

ORDERED that defendants' cross-motion is denied; and it is further,

ORDERED that plaintiff is directed to serve an Amended Verified Complaint, in accordance with this Court's decision, upon all parties within 30 days of Entry of this Order; and it is further,

ORDERED that the plaintiff shall serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court within 30 days; and it is further,

ORDERED that the parties are directed to appear for a Status Conference on January 9, 2013 at 11:00 a.m. in Part 7, 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.

**FILED**

DEC 18 2012

**NEW YORK  
COUNTY CLERKS OFFICE**

Dated: 12/11/12

Enter:

*Paul Wooten*  
Paul Wooten J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST