

Burton v 325 West 45th St. Owners Corp.

2012 NY Slip Op 33645(U)

August 9, 2012

Sup Ct, New York County

Docket Number: 107539/2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 107539/2011
BURTON, ROBERT
vs.
325 WEST 45TH STREET OWNERS
SEQUENCE NUMBER : 002
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1, 2
Answering Affidavits — Exhibits _____ | No(s) 3, 4, 5
Replying Affidavits _____ | No(s) 5

Upon the foregoing papers, it is ordered that this motion is

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

HON. EILEEN A. RAKOWER

FILED

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

AUG 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/14/12



HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
ROBERT BURTON,

Plaintiff,

Index No.
107539/2011

- against -

**DECISION
and ORDER**

325 WEST 45TH STREET OWNERS CORP., SCOTT
MACKOFF, ESQ., MITOFSKY, SHAPIRO, NEVILLE
& HAZEN, LLP, ORSID REALTY CORP., ADVANCED
MANAGEMENT and ELLIOT DAVIS,

MOT SEQ. 2

FILED

Defendants.

-----X AUG 14 2012

HON. EILEEN A. RAKOWER

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Robert Burton commenced the instant action on or about June 28, 2011, by the filing of a Summons and Verified Complaint, which concerns a number of long standing disputes relating to two apartment units (#117 and #306) within the cooperative residential building located at 325 West 45th Street, New York, New York. Non-party Equity Preservation Corp. ("EPC") is the record shareholder and proprietary lessee of the two units. Burton is the president and sole shareholder of EPC. Defendant 325 West 45th Street Owners Corp. ("Owners Corp.") is the owner of the subject building. Defendants Scott [sic] Mackoff and Mitofsky, Shapiro, Neville & Hazan, LLP (the "Mitofsky Law Firm") represent Owners Corp. Defendants Orsid Realty Corp. ("Orsid") and Advanced Management ("Advanced") are the present and former managing agents of the subject apartment building respectively. Defendant Elliot Davis is the former on-site manager of the subject apartment building.

Plaintiff's Complaint alleges claims of breach of contract, tortious interference

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with contract and disparagement of title based on defendants' refusal to transfer the stock certificates and proprietary leases for apartments #117 and 306 from EPC to him personally. Plaintiff's Complaint also seeks damages based on defendants' failure to allow certain repairs to be made on Unit 306. Presently before the Court is plaintiff's motion to amend his Complaint to add two additional causes of action predicated on other conduct on defendants' part that he alleges constitute a breach of "fiduciary duties that [they] owed to plaintiff and his assignor Equity Preservation Corp."

Defendants Mackoff and the Mitofsky Law Firm cross move for an Order pursuant to CPLR §3211(a)(7) to dismiss the Complaint and grant summary judgment pursuant to CPLR §3211(c) based on plaintiff's lack of standing and privity. Orsid, Advanced, and Elliot Davis oppose plaintiff's motion to amend. In response, plaintiff submits a "notice of motion" which purports to be in further support of his motion and a cross motion for summary judgment. Plaintiff acknowledges in his papers that the request is "procedurally awkward."

Although not raised in the moving papers, it is settled that an action may not proceed unless all necessary parties have been joined. CPLR §1001(a) dictates:

Persons who ought to be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgement in the action shall be made plaintiffs or defendants . . .

Pursuant to CPLR §1003, nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice. "A court may always consider whether there has been a failure to join a necessary party . . . [t]he rule serves judicial economy by preventing a multiplicity of suits. It also insures fairness to third parties who ought not to be prejudiced or embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard." (*City of New York v. Long Island Airports Limousine Service Corp.*, 48 NY2d 469[1979]). EPC, as the record holder of the subject units and shareholder, is a necessary party to the action, as its legal rights would clearly be inequitably affected by any judgment in this action.

Wherefore it is hereby

[4]
ORDERED that plaintiff Robert Burton's motion is denied; and it is further

ORDERED that defendants Scott Mackoff and Mitofsky, Shapiro, Neville & Hazan, LLP's motion to dismiss is granted for the reasons stated above; and it is further

ORDERED that action is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 8/9/12



EILEEN A. RAKOWER, J.S.C.

FILED

AUG 14 2012

NEW YORK
COUNTY CLERK'S OFFICE