Concord Assoc., L.P. v EPT Concord, LLC
2012 NY Slip Op 33799(U)
February 8, 2012
Supreme Court, Sullivan County
Docket Number: 1611-2011
Judge: Frank J. LaBuda
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN
----------X

CONCORD ASSOCIATES, L.P.,
CONCORD RESORT, LLC and
CONCORD KIAMESHA LLC,,

Plaintiffs,

DECISION and ORDER
Index # 1611-2011

-against-

EPT CONCORD, LLC and EPT
CONCORD II, LLC, DANIEL
BRIGGS, COUNTY CLERK OF
SULLIVAN COUNTY,

Defendants.

----------X

APPEARANCES: DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, New York 10601
By: Alfred E. Donnellan, Esq.
Attorneys for Plaintiffs

Morrison Cohen LLP
909 Third Avenue
New York, New York 10022
By: Y. David Scharf, Esq.
Attorneys for Defendants

Paul, Weiss, Rifkind, Wharton & Garrison, LLP
1285 Avenue of the Americas
New York, New York 10019
By: Robyn Tarnofsky, Esq.
Attorneys for Non-Party Empire Resorts, Inc.

LaBuda, J.

Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1),(2) and (7). Alternatively, the defendants request the Court to treat the motion to dismiss as a motion for summary judgment pursuant to CPLR 3211(c). The plaintiffs have not opposed the motion. The plaintiffs filed and served an Amended Complaint dated October 20, 2011. On November 9, 2011 the plaintiffs moved for an Order discontinuing the action without prejudice pursuant to CPLR 3217(b) and cancelling the Notice of Pendency. The defendants oppose the motion to discontinue as it relates to their counterclaim which sought a declaratory judgment. The defendants also request a hearing to determine the amount of costs and attorney fees to be assessed to the plaintiffs as result of their wasteful litigation maneuvers.

The non-party, Empire Resorts, Inc., moves for a protective order pursuant to CPLR § 3103 and an order quashing a subpoena duces tecum pursuant to CPLR § 2304 served upon it by the plaintiffs returnable August 8, 2011. Plaintiffs oppose the motion. This matter has been stayed pending the resolution of the other motions.

FACTS

The plaintiffs owned two large parcels of land in the Town of Thompson, County of Sullivan that were formally utilized as the Concord Hotel. The plaintiffs intend to redevelop the property as a gaming facility, casino facility and resort. The plaintiffs intend to utilize one parcel as a casino and the other parcel as a resort. After protracted litigation in New York State Supreme Court and the U.S. District Court for the Western District of Missouri, the plaintiffs and the defendants entered into a Settlement Agreement dated June 18, 2010. As a result, the plaintiff, Concord Resort, LLC agreed to convey real property to the defendant EPT Concord II. In a deed dated June 18, 2010, Concord Resort conveyed the Resort parcel to EPT Concord II which included ceratin tracts of land that are part of the Hotel/Casino Parcel and the Racetrack Parcel. A restrictive covenant was signed by EPT Concord II, which prohibited the development of a casino on the Resort parcel by EPT. In consideration of the transfer of the Resort property, EPT Concord II entered into a Casino Development Agreement ("CDA") with Concord Associates and Concord Kiamesha on June 18, 2010. This Agreement required EPT Concord II to provide certain easements, leases and other agreements regarding the use and development of a hotel, a gaming facility including a casino and a harness horse track and other improvements on the Casino property and Racino tract. The CDA

contained financing requirements for the construction and development of the Casino/Hotel project. In addition, Concord Kiamesha LLC and Concord Raceway Corp. signed an Amended and Restated Master Credit Agreement where they agreed to borrow up to $275 million dollars to fund the project.

The plaintiffs allege the defendants indicated their willingness to cooperate and facilitate the development of the Casino/Hotel project while also pursing a theme park and other retail development on their own property. The plaintiffs claim things changed in early 2011 when the defendants conspired with Empire Resorts, Inc. to jointly develop a casino on the Resort parcel and to engage in conduct that would prohibit the plaintiffs from developing the Casino/Hotel property.

Plaintiffs commenced this action by filing a Summons and Complaint on June 11, 2011. On or about October 20, 2011, the Plaintiffs filed and served an Amended Complaint which sought a Declaratory Judgment finding the defendants prevented them from complying with the conditions of the Restrictive Covenant and preventing the defendants from alleging the plaintiffs failed to comply with the Restrictive Covenant.

The defendants served an Amended Answer or about November 9, 2011 which contained a general denial and several affirmative defenses. The defendants also asserted a counterclaim seeking a Declaratory Judgment declaring the plaintiff's financing proposals for the project do not meet the requirements of the Casino Development Agreement and the Master Credit Agreement.

On or about December 2, 2011, the defendants filed a Second Amended Verified Answer and asserted additional counterclaims. The defendants first counterclaim again seeks a declaratory judgment declaring the plaintiffs' financing proposals do not meet the requirements of the Casino Development Agreement and the Master Credit Agreement. The defendants second counterclaim seeks a declaratory judgment finding that in order to extend the Restrictive Covenant beyond December 31, 2011, Concord Kiamesha and Concord Raceways are obligated to close on a traditional loan of up to $275 million dollars.

DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss the original complaint pursuant to CPLR 3211(a)(1),(2) and (7). "When an amended complaint has been served, it supercedes the original complaint and becomes the only complaint in the case." (Preston v. APCH, Inc., 89 AD3d 65 [4th Dept. 2011]; St. Lawrence Explosives Corp. v. Law Bros.

Cont. Corp., 170 AD2d 957 [4th Dept. 1991]; Halmar Distrs. v. Approved Mfg. Corp., 49 AD2d 841 [1st Dept. 1975]. Thus, motions to dismiss and to strike portions of the original complaint are rendered moot by the service of the amended complaint. (Aikens Const. of Rome v. Simons, 284 AD2d 946 [4th Dept. 2001]; Samide v. Roman Catholic Diocese of Brooklyn, 194 Misc2d 561 [2003]). Since the plaintiff served an Amended Complaint, defendants' motion seeking the dismissal of the original complaint must be denied as moot.

PLAINTIFFS' MOTION TO DISCONTINUE

The plaintiffs move to discontinue this action pursuant to CPLR 3217(b). The plaintiffs allege this action is only at the pleading stage and no discovery has been conducted. The plaintiffs allege the defendants will not sustain any prejudice if the action is discontinued. The plaintiffs claim the defendants will not incur any costs in further defending this action. The plaintiffs maintain this motion has not been brought for an improper purpose or to harass the defendants. The plaintiffs claim they do not desire to litigate the provisions of the Restrictive Covenant at this time.

The defendants claim the plaintiffs should only be allowed to withdraw their claim against the defendants but should not be allowed to discontinue against the defendants' counterclaims alleged in the Second Amended Answer. The defendants claim the plaintiffs seek to manipulate this action by filing an Amended Compliant while simultaneously commencing a duplicative action in Westchester County. The defendants allege the original complaint sought declaratory relief on three causes of action. The defendants allege the amended complaint now seeks declaratory relief in regard to their financing obligations for the Casino/Hotel project. The defendants contend the motion to discontinue is a wasteful litigation maneuver. The defendants allege the plaintiffs should reimburse them for attorney fees and costs.

The plaintiffs contend the relief sought in the Westchester County action is substantially different from the relief sought in the original Sullivan County Complaint and Amended Complaint. Plaintiffs claim the Westchester County action has always been an action for money damages rather than for declaratory relief as alleged in the Sullivan County complaints. The plaintiffs contend the court should not consider the causes of action in the original complaint as they have been superceded by the amended complaint.

If a stipulation of discontinuance cannot be obtained, an action can only be discontinued by order of the Court. (see, CPLR 3217(b); People ex re. Weissman v. Weissman, 50 AD2d 989 [3rd Dept. 1975]). The determination of a motion for leave to voluntarily discontinue an action without prejudice pursuant to CPLR 3217(b) rests within the sound discretion of the court. (Tucker v. Tucker, 55 NY2d 378 [1982]). Ordinarily, a party cannot be compelled to litigate and absent special circumstances, leave to discontinue should be granted unless the party opposing the motion can demonstrate prejudice if the discontinuance is granted. (1701 Restaurant on Second, Inc. v. Armato Properties, Inc., 83 AD3d 526 [1st Dept. 2011]; Mathias v. Daily Services, 301 AD2d 503 [2nd Dept. 2003]).

A review of the record reveals the plaintiff commenced this action on June 11, 2011, served an Amended Complaint on or about October 20, 2011 and moved to discontinue on November 4, 2011. No discovery has been completed and less than four months has elapsed from when the action was commenced. The defendants have not offered any evidence of any prejudice they may sustain if the motion is granted.

Plaintiffs' motion to discontinue the action without prejudice is granted pursuant to CPLR 3217(b)and(c). The defendants have not demonstrated any special circumstances or prejudice and the Court providently exercises its discretion in granting the plaintiffs' motion. (Parraguirre v. 27th St. Holding, LLC, 37 AD3d 793 [2nd Dept. 2007]). In addition, the Notice of Pendency is hereby cancelled.

CONSIDERATION OF SUR-REPLYS

The defendants allege in a letter dated December 14, 2011 that the plaintiffs' Sur-Reply letter of December 8, 2011 was improper and should not be considered. Both parties detailed their positions in their respective reply letters. Defendants argue the plaintiffs' reply was a Sur-Reply which is not permitted pursuant to CPLR 2214. (Avila v. City of New York, 25 Misc3d 1205(A) [2009]). However, it is within the Court's discretion to consider Sur-Reply papers. (Gastaldi v. Chen, 56 AD3d 420 [2nd Dept. 2008]). In this instance, the Sur-Reply correspondences of both parties were helpful and assisted the Court in determining the relief sought in the Westchester County and the Sullivan County actions and were considered by the Court.

DEFENDANTS' COUNTERCLAIMS

In regard to defendants' counterclaims, the Court hereby elects to sever the counterclaims pursuant to CPLR § 603. The decision to order a severance of claims is one which is directed to the sound discretion of the trial court. (Lelekakis v. Kamamis, 41 AD3d 662 [2nd Dept. 2007]). "A counterclaim can be ordered severed and preserved for trial in the instant suit notwithstanding the grant of leave to discontinue the main claim." (see, CPLR 3217; Siegel, Practice Commentaries, Mc Kinneys Cons Law of NY, Book 7B, CPLR C3217:14, at 747). The counterclaims alleged by the defendants in this discontinued action are hereby severed and preserved. (Haber v. Cohen, 74 AD3d 1281 [2nd Dept. 2010]).

COSTS AND ATTORNEY'S FEES

The defendants also request a hearing on the issue of costs and attorney's fees. "Under the general rule, attorneys's fees and disbursements are incidents of litigation." (Matter of A.G. Ship Maint. Corp. v. Lezak, 69 NY2d 1 [1986]). Thus, "a prevailing party may not collect attorney fees unless authorized by agreement between the parties, by statute or court rule". (Baker v. Health Management Systems, Inc., 98 NY2d 80 [2002]; Hooper Assocs Ltd. v. AGS Computers, Inc., 74 NY2d 487 [1989]).

The plaintiffs moved to discontinue within four months from the commencement of this action. No discovery was held. The defendants served three similar Answers and elected to move to dismiss the complaint. The allegation of the defendants that the actions of the plaintiffs were wasteful litigation maneuvers is unfounded. This Court will not schedule a hearing as the expenses, costs and attorney fees attributable to defending this action are incidents of litigation.

SUBPOENA

Finally, non-party Empire Resorts, Inc. seeks a protective order pursuant to CPLR § 3101 and an order to quash a subpoena duces tecum served upon it by the plaintiffs pursuant to CPLR § 2304. Since the plaintiffs have moved to discontinue this action and the Court having consented, the subpoena served upon Empire Resorts, Inc. is deemed a nullity.

This shall constitute the Decision and Order of this Court.

DATED: February 8, 2012
Monticello, New York

Hon. Frank J. LaBuda
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated August 10, 2011;
2. Affirmation of Kristin T. Roy, Esq. dated August 10, 2011 with exhibits annexed;
3. Defendants' Memorandum of Law dated August 10, 2011;
4. Notice of Motion dated November 4, 2011;
5. Affirmation of Alfred E. Donnellan, Esq. dated November 4, 2011 with exhibits annexed;
6. Affirmation of Kristin T. Roy, Esq. dated November 10, 2011 with exhibits annexed;
7. Defendants' Memorandum of Law dated November 10, 2011;
8. Affirmation of Y. David Scharf, Esq. dated December 2, 2011 with exhibits annexed;
9. Correspondence of Alfred E. Donnellan, Esq. dated December 8, 2011;
10. Correspondence of Kristin T. Roy, Esq. dated December 14, 2011;
11. Notice of Motion dated July 20, 2011;
12. Non-Party Empire Resorts, Inc.'s Memorandum of Law dated July 20, 2011;
13. Affirmation of Alfred E. Donnellan, Esq. dated August 1, 2011;
14. Plaintiffs' Memorandum of Law dated August 1, 2011;
15. Non-Party Empire Resorts, Inc.'s Memorandum of Law dated August 5, 2011.