

Lei Chen Fan v New York SMSA Ltd. Partnership

2013 NY Slip Op 30746(U)

April 10, 2013

Supreme Court, New York County

Docket Number: 110483/06

Judge: Martin Shulman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C.
Justice

PART 1

Index Number : 110483/2006
FAN, LEI CHEN
vs.
NEW YORK SMSA LP.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 110483/06
MOTION DATE _____
MOTION SEQ. NO. 003

The following papers, numbered 1 to 6, were read on this motion ~~to~~ for summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits A No(s) 1
~~Notice of Cross-Motion~~
Answering Affidavits — Exhibits _____ No(s) 2, 3, 4
Replying Affidavits - Exhibits No(s) 5, 6

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the attached decision and order.

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

FILED
APR 12 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 10, 2013

MARTIN SHULMAN, J.S.C.
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 1

-----X
LEI CHEN FAN, LEO FAN and LEI MIN FAN,
Trustees under the Kitty Fan Koo
Irrevocable Inter-Vivos Trust dated
December 19, 2002,

Plaintiffs,

-against-

Index No. 110483/06

NEW YORK SMSA LIMITED PARTNERSHIP
d/b/a VERIZON WIRELESS, POSTO INC.
d/b/a POSTO THIN CRUST PIZZA and CHUCK
GING YEP, SOU-CHOCK YEP and WILLIAM
C. YEP,

Defendants.

FILED

APR 12 2013

-----X
MARTIN SHULMAN, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence nos. 003 and 004 are consolidated for disposition. In motion sequence no. 003, defendant Posto Inc. d/b/a Posto Thin Crust Pizza (Posto) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. In motion sequence no. 004, defendants Chuck Ging Yep, Sou-Chock Yep, and William C. Yep (collectively, the Yeps) similarly move to dismiss the complaint. Plaintiffs cross-move, pursuant to CPLR 3025 (b), for leave to amend the complaint. Plaintiffs are the fee owners of the building located at 312 Second Avenue in Manhattan (Building). The Yeps are the fee owners of the adjoining building located at 310 Second Avenue on the corner of East 18th Street (Adjoining Building). Posto operates a restaurant on the ground floor of the Adjoining Building.

Insofar as is relevant here, the complaint alleges that: Posto and the Yeps made alterations to the Adjoining Building, including enclosing an open area on the Yep's lot; prior to such alterations, rainwater flowed from plaintiffs' property onto East 18th Street; and as a result of the alterations to the Adjoining Building, rainwater now builds up on plaintiffs' lot, causing water damage to the Building, as well as damage from mold. The complaint's remaining causes of action seek money damages (third cause of action) and

an injunction requiring Posto and the Yeps to modify the alterations to allow rainwater to resume its previous flow onto East 18th Street (fourth cause of action).

It is settled that either the proprietor of a higher lot, or the proprietor of a lower lot, can, so long as the action is taken in good faith:

improve his land according to his own desire in any manner to which the land is suited, without being liable to the abutting owner for change in the flowage of the surface water provided that he does not resort to drains, pipes or ditches.

Kossoff v Rathgeb-Walsh, Inc., 3 NY2d 583, 588 (1958); accord *Congregation B'nai Jehuda v Hiyee Realty Corp.*, 35 AD3d 311, 312 (1st Dept 2006). The complaint does not allege that the alterations to the Adjoining Building were undertaken in bad faith, or that the buildup of water on plaintiffs' lot results from defendants' use of drains, pipes or ditches. Thus, but for the issue of plaintiffs' cross motion, defendants would clearly be entitled to summary judgment. Accordingly, the court turns to the cross motion.

Motions for leave to amend a pleading are to be given freely, absent prejudice resulting from the delay. CPLR 3025 (b); *Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 670 (1st Dept 2012). However, leave should be denied when the proposed amendment is palpably insufficient as a matter of law. *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012). Prejudice sufficient to warrant denying a motion for leave to amend consists of the adverse party "[having] been hindered in the preparation of his case or [having] been prevented from taking some measure in support of his position." *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 (1st Dept 2011) (citations and internal quotation marks omitted). Absent prejudice, lateness is not a reason to deny leave to amend a pleading. *Abrahamian v Tak Chan*, 33 AD3d 947, 949 (2d Dept 2006); *Laham v Chambi*, 299 AD2d 151, 152 (1st Dept 2002).

The proposed amended complaint, which is supported by the affidavit of Kitty Fan Koo, adds the factual allegations that: the alterations made to the Adjoining Building consisted of the construction of an addition to the restaurant that extended to the rear

property line; in order to keep rainwater and melting snow from aggregating against the brick wall of the addition, the Yeps or Posto caused a ditch to be dug in the rear yard of the Building; and the presence of the ditch resulted in the water and mold damage to the Building. The proposed amended complaint also alleges that in December 2007, the New York City Department of Buildings (DOB) issued a notice of violation (NOV) to the Adjoining Building, charging that the addition, which blocked a secondary exit from the Adjoining Building, had been constructed without a building permit. On May 16, 2008, the New York City Environmental Control Board (ECB) dismissed the NOV after a hearing at which Robert Strong, the Yeps' architect, testified that DOB microfilm records pertaining to the Adjoining Building show the plans for the addition under Alteration 2329 of 1914, prior to the time that DOB permits were required for such construction. The proposed amended complaint alleges that: in fact, those microfilm records pertain to a building located at 314 Second Avenue; Chuck Ging Yep and William C. Yep reside in that building; and the architect's testimony to the ECB was fraudulent and the Yeps knew it to be so.

The proposed amended complaint alleges the following six causes of action: (1) damages for water damage; (2) private nuisance; (3) removal of the addition, because it was constructed and is maintained, in violation of law; (4) fraud perpetrated on the ECB; (5) damages for water damage; and (6) injunctive relief requiring modification of the addition.

In a May 15, 2008 letter to the ECB pertaining to the NOV, Mr. Strong wrote that he undertook research into the DOB records of 314 Second Avenue at the request of the first floor tenant of that building, and found that DOB "microfilm records for 314 2nd Avenue contain records of the rear extension of the first floor store under Alteration 2329 of 1914." Millman Aff. dated 2/1/13, Exh. B at unnumbered p. 6. In view of this letter, this court cannot fathom how Mr. Strong could have testified before the ECB, if he did so testify, that the microfilm records that he submitted to the ECB pertained to the Adjoining Building (310

Second Avenue), or how the ECB could have concluded that the DOB records submitted by Mr. Strong were relevant to, and indeed dispositive of, the NOV.

However, both the ECB's ruling and the question of whether a fraud was perpetrated upon the ECB are irrelevant to the dispute between the parties. For the reason stated above, even if the construction required DOB's approval and defendants undertook the construction without such approval, defendants would not be liable to plaintiffs for any change in the flow of surface water resulting from that construction. Accordingly, and also because plaintiffs did not in any manner rely upon anything pertaining to the NOV or the proceeding before the ECB, the proposed fraud claim (the fourth cause of action) is palpably devoid of merit and plaintiffs lack standing to raise it. As to the third cause of action which is based upon the allegation that the addition was constructed and maintained in violation of law, plaintiffs similarly lack standing to maintain this claim.

The first, second, fifth and sixth causes of action in the proposed amended complaint are all expressly based on changes allegedly made to the Adjoining Building. Accordingly, none of them is viable in the form in which it is stated. However, each cause of action repeats and realleges every preceding paragraph of the proposed amended complaint. Accordingly, the first, second, fifth and sixth causes of action are also based on, and they will be deemed to be solely based on, the ditch that is alleged to have been dug on plaintiffs' lot. *See Raglan Realty Corp. v Tudor Hotel Corp.*, 149 AD2d 373, 374 (1st Dept 1989) (a cause of action that realleges an earlier allegation includes that allegation). The court notes, however, that the fifth cause of action is entirely redundant with the first.

Posto states in its brief in opposition to plaintiffs' cross motion that one of Posto's principals, who had knowledge of the events occurring in connection with the addition's construction, has died since the commencement of this action and Posto is thus hampered from defending itself from the proposed claim for private nuisance. In addition, both Posto

and the Yeps argue that, given plaintiffs' theory that water has been migrating into the Building from the alleged ditch, any ditch found on plaintiffs' lot will have undergone significant physical change in the course of the last seven years.

On balance, the prejudice that defendants claim is insufficient to warrant denial of the cross motion. Defendants had notice from the onset of this action that plaintiffs claimed to have suffered water damage as a result of the construction of the addition to the Adjoining Building. If defendants did in fact cause a ditch to be dug on plaintiffs' lot, they cannot be surprised that plaintiffs are now claiming that they were damaged thereby. At trial, plaintiffs, of course, will have the burden of proving that defendants arranged to have a ditch dug on plaintiffs' lot, without plaintiffs' consent, and they will also have to prove, on the basis of the current condition of the ditch, that the ditch, as it was seven years ago, caused at least the beginning of the damage to the Building. Plaintiffs will also face the question of why, if the ditch started causing damage seven years ago, they have chosen not to have it filled.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 003, defendant Posto Inc. d/b/a Posto Thin Crust Pizza's motion for summary judgment is denied; and it is further

ORDERED that, in motion sequence no. 004, the motion of defendants Chuck Ging Yep, Sou-Chock Yep and William Yep for summary judgment is denied; and it is further

ORDERED that plaintiffs' cross motion for leave to amend the complaint herein is granted to the extent that the amended complaint in the proposed form annexed to the moving papers, but excluding the third, fourth and fifth causes of action, shall be deemed served upon plaintiffs' service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 325, 60 Centre Street, on May 14, 2013, at 9:30 a.m.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York New York
April 10, 2013



HON. MARTIN SHULMAN, J.S.C.

FILED
APR 12 2013
NEW YORK
COUNTY CLERK'S OFFICE