

Goldsmith v Ellenberg
2013 NY Slip Op 31009(U)
March 25, 2013
Supreme Court, New York County
Docket Number: 115560/08
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN BRANSTEN

J.S.C.

PRESENT:

PART 3

Justice

Index Number : 115560/2008
GOLDSMITH, DAVID
vs.
ELLENBERG, SHEPPARD
SEQUENCE NUMBER : 006
PARTIAL SUMMARY JUDGMENT

INDEX NO. 115560/08
MOTION DATE 10/19/12
MOTION SEQ. NO. 006

The following papers, numbered 1 to 3, were read on this motion to/for partial summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3-25-13


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 3

-----X
DAVID GOLDSMITH,

Plaintiff,

-against-

Index No. 115560/08
Motion Seq. No.: 006, 007,
008

Motion Date: 10/19/12

SHEPPARD ELLENBERG, PENQUIN TENANTS CORP.,
ARISTOCRAT SUPPER CLUB, LLC, and JOHN DOE, As
Subtenant of the Restaurant Premises located at 19-21-23
West 9th Street, New York, New York,

Defendants.

-----X

BRANSTEN, J.:

This action arises out of the construction of an unlawful structure occupying the backyard appurtenant to plaintiff David Goldsmith's ("Goldsmith") cooperative apartment located at 23 West 9th Street in New York City (the "Building"). Plaintiff further contends that the roof of the structure also encroaches upward at least seven inches above the floor of his apartment, obstructing his egress from the apartment, and creating ongoing water leaks and a serious fire hazard. In the complaint, plaintiff seeks a declaratory judgment establishing his ownership rights to the backyard, as well as an injunction under section 871 of the Real Property Actions and Proceedings Law ("RPAPL"), requiring defendant Sheppard Ellenberg ("Ellenberg") to remove the encroachment.

Motion Sequence Nos. 006, 007 and 008 are consolidated for disposition.

In Motion Sequence No. 006, plaintiff moves for partial summary judgment on the seventh and eighth causes of action in the second amended complaint.

In Motion Sequence No. 007, plaintiff moves, pursuant to CPLR 3025(b), for an order granting him leave to amend the second amended complaint.

In Motion Sequence No. 008, defendant Penquin Tenants Corp. (“Penquin” or the “co-op”) moves for an order: (1) dismissing Ellenberg’s cross claims; (2) disqualifying Jeffrey Eilender, Esq. and the law firm of Schlam, Stone & Dolan LLP from representing plaintiff; and (3) striking Ellenberg’s jury demand.

BACKGROUND

Since 1994, plaintiff has been the tenant-shareholder of Unit 1 (the ground floor apartment) in the Building. Plaintiff contends that he is also the leaseholder of the rear yard garden area. Plaintiff alleges that he has been denied the use and enjoyment of the backyard because of an illegal extension erected by the tenant of the Building’s basement unit, which encroaches on the backyard, blocking his access to the yard. Plaintiff further alleges that the extension also encroaches above the floor of his apartment (the “Vertical Encroachment”), obstructing the doors that are supposed to open onto the backyard, and causing water to infiltrate the apartment.

Penquin is a co-operative corporation, and the owner of the Building.

Ellenberg has leased the restaurant space from Penquin since the Building's conversion to a co-op in 1980. Ellenberg has subleased the space to various restaurants over the years.

Ellenberg claims that the encroachment was authorized by a provision of plaintiff's proprietary lease, and a substantially similar provision of the restaurant's lease, that gave the restaurant an option, within one year of the execution of the restaurant's lease, to build an extension into the backyard area, providing that certain conditions were met: (1) that the extension be built to the property line; and (2) that the restaurant build a terrace on top of the extension for the benefit of the tenant of Unit 1. Plaintiff contends that the restaurant failed to comply with those conditions because the extension did not go to the property line, and the required terrace was not built. In addition, the extension was illegal because the restaurant never obtained the required permit from the New York City Department of Buildings. Plaintiff contends that, as a result of the restaurant's failure to satisfy these conditions, all rights to the backyard reverted to the tenant of Unit 1.

Plaintiff also contends that the Vertical Encroachment constitutes an additional trespass on plaintiff's leasehold, and interferes with his use and enjoyment of his property. According to plaintiff, nothing in the co-op's operating statement, the restaurant lease, or plaintiff's proprietary lease authorizes the construction of the Vertical Encroachment.

On November 15, 2008, plaintiffs commenced this action against Ellenberg, Penquin, Jonathan Hettinger, and John Doe, as subtenant of the restaurant premises. The original complaint asserted five causes of action: (1) a cause of action for a declaratory judgment that plaintiff “is the sole leaseholder” of the backyard area “from the building line to the property line” (Compl. ¶¶ 43-46); (2) an alternative cause of action for a declaratory judgment that plaintiff “is the sole leaseholder of the property, from the end of the structure extension that has been previously built, to the property line” (*id.* ¶¶ 47-48); (3) a cause of action against Penquin for breach of contract arising from Penquin’s alleged “constant threats and harassment” of plaintiff in violation of his rights under the proprietary lease and the co-op’s by-laws (*id.* ¶¶ 49-54); and (4) two causes of action for an injunction barring defendants from installing air conditioning units in the backyard area. *Id.* ¶¶ 55-60.

Plaintiff subsequently amended the complaint to assert a sixth cause of action for an injunction barring the restaurant from proceeding with demolition and construction work that was “being performed in an unworkmanlike manner, causing dust to infiltrate [plaintiff’s] apartment.” (Am. Compl. ¶¶ 62-69.)

Plaintiff and Ellenberg each filed motions for summary judgment. Plaintiff also filed a motion to amend the complaint for a second time, adding: (1) specific allegations about the Vertical Encroachment; and (2) new causes of action (the seventh

and the eighth) for injunctive relief under RPAPL § 871, seeking removal of the encroachment, or alternatively, requiring that defendants build the extension to the property line. On January 4, 2011, this court denied the motions for summary judgment, finding that the terms of the restaurant lease were ambiguous as to whether the lessee was obligated to build an extension to the property line in order to exercise the option, or instead had the right to build as far as the property line. The court also found an issue of fact as to whether the restaurant extension was illegally constructed without a required building permit. This court did, however, grant the motion for leave to amend, including the new allegations regarding the Vertical Encroachment. Plaintiff filed a note of issue on December 8, 2011. No trial date has been set.

DISCUSSION

Motion to Amend the Complaint (Motion Sequence No. 007)

Plaintiff moves to amend the complaint to add a new theory of recovery – a claim for damages. First, plaintiff seeks to amend the seventh cause of action under RPAPL § 871, which presently seeks an injunction requiring Ellenberg to remove the encroaching structure, in order to add an alternative claim for damages based on the diminution in the value of his property caused by the encroachment. Second, the proposed amended complaint contains two new causes of action (the ninth and tenth),

which seek damages for common law trespass and nuisance based on the same underlying facts.

Pursuant to CPLR 3025(b), the court may grant leave to amend a complaint at any time. Leave to amend is “freely given” under CPLR 3025(b), “provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit.” *Clark v. Clark*, 93 A.D.3d 812, 816 (2d Dep’t 2012) (citation omitted); *see also Miller v. Cohen*, 93 A.D.3d 424, 425 (1st Dep’t 2012) (on a motion to amend a complaint, the plaintiff “need not establish the merit of the proposed new allegations, but must ‘simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit’”) (citation omitted); *Loewentheil v. White Knight, Ltd.*, 71 A.D.3d 581, 581 (1st Dep’t 2010) (“Leave to amend pleadings ... should be liberally granted”).

Plaintiff’s motion to amend the complaint is granted, as plaintiff has demonstrated that the proposed amended complaint is not devoid of merit. The statute upon which plaintiff bases its argument for an injunction expressly states that the court may grant damages as an alternative form of relief. *See* RPAPL § 871(1) (“Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction”).

The proposed causes of action for trespass and nuisance are also not devoid of merit. If plaintiff is able to establish rights to the backyard, the presence of the restaurant extension in the backyard could be construed as a trespass upon plaintiff's property. *See Shaw v. Bronfman*, 284 A.D.2d 267, 268 (1st Dep't 2001), *lv dismissed* 97 N.Y.2d 725 (2002) ("The cause of action for trespass ... was supported by evidence of an entry onto plaintiffs' property by a steel beam emanating from the ... defendants' premises without the consent or permission of plaintiffs"). Likewise, the restaurant extension could be construed as interfering with plaintiff's "use and enjoyment" of the backyard, thus giving rise to a cause of action for nuisance. *See Berenger v. 261 W. LLC*, 93 A.D.3d 175, 182 (1st Dep't 2012).

Moreover, defendants have failed to demonstrate prejudice if plaintiff's motion to amend is granted. "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine." *Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983) (citation omitted); *accord Bishop v. Maurer*, 83 A.D.3d 483, 484 (1st Dep't 2011). "Prejudice does not occur simply because a defendant is exposed to greater liability ... or because a defendant has to spend additional time preparing its case." *Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 A.D.3d 652, 654 (1st Dep't 2009) (internal citation omitted). Rather, a showing of prejudice requires "some indication that the defendant

has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.” *Kocourek v. Booz Allen Hamilton, Inc.*, 85 A.D.3d 502, 504 (1st Dep’t 2011) (citation omitted).

Here, the amendments do not present any unfair surprise, since they “merely ... add a new theory of recovery, without alleging new or different transactions.” *Sample v. Levada*, 8 A.D.3d 465, 468 (2d Dep’t 2004).

Moreover, although Ellenberg seeks denial of the motion on the ground that plaintiff is moving to amend the complaint on the “eve of trial” (Ellenberg Memorandum of Law in Opposition (“Ellenberg Mem.”) at 14), the fact that a note of issue has already been filed does not change the analysis. “[T]he addition of a new claim or theory; even after the note of issue, is not alone a basis to deny [the] motion.” *Charles v. Suvannavejh*, 28 Misc.3d 1157, 1169 (Sup. Ct. Bronx Cty. 2009); *see e.g. Washington v. Asfaw*, 15 Misc.3d 1107[A] (Sup. Ct. N.Y. Cty. 2007) (permitting amendment to answer long after note of issue filed); *see also Norwood v. City of New York*, 203 A.D.2d 147, 148 (1st Dep’t 1994), *lv dismissed* 84 N.Y.2d 849 (fact that motion to amend was made “just prior to opening statements” to jury was “no bar to granting leave”).

The court also rejects Ellenberg’s claim of “severe prejudice” based on lack of discovery with respect to any monetary damages sustained by plaintiff (Ellenberg

Mem. at 14, 16). Defendants' concerns about discovery can be mitigated by directing additional discovery, if defendants so desire.

Accordingly, plaintiff's motion to amend the complaint is granted.

Motion for Partial Summary Judgment (Motion Sequence No. 006)

Plaintiff moves for partial summary judgment on the seventh and eighth causes of action of the second amended complaint, arguing that the indisputable facts show that: (1) defendants had no right to construct any extension of the restaurant space upward above the floor level of plaintiff's apartment; and (2) the Vertical Encroachment constitutes a trespass and a private nuisance that is causing ongoing injury to plaintiff. Plaintiff contends that, because nothing in the co-op's offering plan, the restaurant lease, or his proprietary lease permits the construction of an extension upward into plaintiff's space, blocking his access to the rear yard, it is clear, as a matter of law, that the Vertical Encroachment is an unauthorized trespass on plaintiff's leasehold, as well as private nuisance that interferes with plaintiff's quiet enjoyment of the property and, as such, he is entitled to summary judgment.

In support of his motion for summary judgment, plaintiff submits the same affidavit, dated April 23, 2010, that he submitted in support of his original motion for summary judgment. Plaintiff also submits an expert affidavit in which the

expert opines that the Vertical Encroachment creates a potential fire hazard, obstructs a legally-mandated egress, and causes water to infiltrate and damage the interior of the apartment (*see* Affidavit of Charles J. DiSanto, ¶¶ 4, 20-30).

Plaintiff's motion for partial summary judgment is denied, as it is improper to make successive motions for summary judgment based upon facts or arguments which could have been submitted on the original motion. *Levitz v. Robbins Music Corp.*, 17 A.D.2d 801 (1st Dep't 1962). In *Levitz*, the defendant moved for summary judgment on a wrongful discharge claim by arguing that plaintiff voluntarily resigned. After that motion was denied, the defendant moved for summary judgment a second time, arguing that the statute of frauds barred the complaint. The Court denied the second motion, finding that:

Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment. A court, upon a motion for summary judgment, must examine all of the facts presented by the affidavits, pleadings and documents and decide whether a triable issue is raised. Once having done so, a court may not on a subsequent motion consider matter which a party has withheld or failed to urge as a ground for summary judgment theretofore denied

Id. at 801; *see also Phoenix Four v. Albertini*, 245 A.D.2d 166, 167 (1st Dep't 1997)

("The IAS Court properly denied the plaintiff's motion for summary judgment since the motion was based on matters that could have been but were not raised in an earlier

summary judgment motion”). The only exception to this rule is by demonstrating newly discovered evidence or other sufficient justification. *Jones v. 636 Holding Corp.*, 73 A.D.3d 409, 409 (1st Dep’t 2010).

Here, plaintiff submits no newly discovered evidence. Instead, he relies exclusively upon the same affidavit, dated April 23, 2010, that he submitted in support of his prior motion for summary judgment, and an expert affidavit which could have been obtained before the instant motion. This is insufficient to support his subsequent motion for summary judgment. *See id.* (successive motion for summary judgment barred where the only new evidence was an expert affidavit which could have been obtained before the first motion).

Moreover, even if this court were to consider the substance of this later summary judgment motion, it is clear that plaintiff has failed to establish his entitlement to summary judgment. The seventh cause of action seeks an order pursuant to RPAPL § 871 that defendants remove the “restaurant’s encroachment from plaintiff’s leasehold.” The eighth cause of action seeks a declaration that defendants extend the structure to the property line, and build plaintiff a deck. However, in the prior decision denying summary judgment, this court already determined that issues of material fact exist which preclude the grant of summary judgment on these causes of action. Specifically, this court found that material issues of fact exists as to: (1) who possesses the leasehold for the backyard;

(2) whether the extension was erected legally; and (3) whether Ellenberg was obligated to build a deck to the property line.

Accordingly, plaintiff's motion for partial summary judgment on the injunctive relief claims asserted in counts seven and eight is denied.

Motion to Disqualify (Motion Sequence No. 008)

Penquin moves to disqualify Jeffrey Eilender (Eilender) and the law firm of Schlam, Stone & Dolan, LLP ("SS&D") from representing plaintiff, on the ground that Eilender and SS&D previously represented the co-op, and because the interests of plaintiff and the co-op are materially adverse. As set forth below, Penquin's motion to disqualify is denied.

In support of his opposition to the motion to disqualify, plaintiff submits Eilender's affidavit, in which Eilender sets forth the circumstances surrounding his and SS&D's former representation of the co-op. In late 2003, Penquin retained SS&D to assist the co-op in addressing a discrete problem with a restaurant that was operating in the building's ground-level commercial space. (Eilender Aff. ¶ 14.) SS&D was introduced to Penquin by plaintiff, a tenant-shareholder in the co-op, who was elected to Penquin's board of directors (the Board) in 2003.

Id. The management of the restaurant was engaged in misconduct, including blasting loud music and condoning drug dealing, that affected the quality of life of the co-op's residents. *Id.* ¶¶ 12-13.

Under the commercial lease, the co-op, as the landlord, had the right to promulgate house rules (the "House Rules") regulating the use of the restaurant premises. *Id.* ¶ 18 & Ex. 1. Specifically, paragraph 35 of the lease empowers the landlord to enact such house rules supplementing or changing the original house rules included in the lease. *See id.*

SS&D advised the Board on the preparation of revised House Rules, the purpose of which was to curb the abuses with respect to the operation of the restaurant premises. *Id.* ¶ 19. The revised House Rules were adopted by the Board in January 2004. *Id.* The final version of the House Rules was unanimously adopted by the Board at a meeting held on January 29, 2004. *Id.* ¶ 20 & Ex. 6.

When it appeared that Ellenberg would not abide by these rules, SS&D commenced an action against Ellenberg to enforce the House Rules in the Supreme Court of the State of New York. In that action, SS&D made a successful motion for a preliminary injunction to enforce the House Rules. *Id.* ¶ 21 & Ex. 7.

Further, the lease also provided that Ellenberg could challenge the reasonableness of any such rules through an arbitration proceeding before the American

Arbitration Association (the “AAA”). *Id.* ¶ 25; *see* Lease, ¶ 35. In August 2004, Ellenberg availed himself of the right to arbitration by serving a Demand for Arbitration. *Id.* Before proceeding to arbitration, Penquin and Ellenberg engaged in mediation under the auspices of the AAA. *Id.* SS&D and plaintiff participated in the mediation on Penquin’s behalf. *Id.* The mediation was ultimately unsuccessful, and the arbitration hearings began on January 17, 2006. *Id.* ¶ 27. Although the only issue in dispute was the reasonableness of the co-op’s revised House Rules, the arbitrators did allow Ellenberg to present evidence in support of alleged misconduct by the Board that had not been raised in his demand for arbitration. *Id.* On September 28, 2006, the arbitrator issued an arbitration award, which essentially sustained (in slightly rewritten form) the House Rules adopted by the Board. *Id.* ¶ 28; *see* Ex. 10.

Following the issuance of the arbitration award, SS&D moved to vacate a partial award of attorney’s fees that the arbitrator had made to Ellenberg, and Ellenberg moved for damages incurred as a result of the preliminary injunction granted in June 2004. *Id.* ¶¶ 29-30. Both of these motions were denied. *Id.*

The attorney-client relationship between SS&D and the co-op eventually ended, when the board of directors terminated SS&D, and refused to pay its outstanding invoices. *Id.* ¶ 36.

Penguin now moves to disqualify SS&D from representing plaintiff, arguing that the prior representation of the co-op in the House Rules litigation prevents the firm from representing another party adverse to Penguin in this case.

“A party’s entitlement to be represented in ongoing litigation by counsel of its own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted.” *Dominguez v. Community Health Plan of Suffolk*, 284 A.D.2d 294, 294 (2d Dep’t 2001). Accordingly, “motions to disqualify opposing counsel are disfavored, must be ‘carefully scrutinized,’ and require a high standard of proof.” *Ciao-Di Rest. Corp. v. Paxton 350, LLC*, 22 Misc.3d 1117(A), at *2 (Sup. Ct. N.Y. Cty. 2008) (quoting *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987)). As the party seeking disqualification, Penguin bears the burden on this motion. *S & S Hotel Ventures Ltd. Partnership*, 69 N.Y.2d at 443; *NYK Line v. Mitsubishi Bank, Ltd.*, 171 A.D.2d 486, 488 (1st Dep’t 1991).

To meet its burden, a party seeking to disqualify opposing counsel must make a clear showing: (1) that counsel’s prior representation of the movant was “substantially related” to the current litigation (*Lightning Park v. Wise Lerman & Katz*, 197 A.D.2d 52, 55 (1st Dep’t 1994); or (2) “that in the prior action [the attorney] had received specific confidential information substantially related to the present litigation.”” *Nomura Sec. Intl., Inc. v. Hu*, 240 A.D.2d 249, 250 (1st Dep’t 1997) (citation omitted).

Penquin has not met its burden on either of these elements, and its motion to disqualify Eilenberg and SS&D must be denied.

Penquin has failed to establish that SS&D's prior representation of the co-op in the House Rules litigation was "substantially related" to the firm's current representation of plaintiff. In order to meet the substantial relationship test, the issues in the present litigation must be "identical to" or "essentially the same as" those in the prior case before disqualification will be granted. *Lighting Park, Inc.*, 197 A.D.2d at 55; *accord Siegel Consultants, Ltd. v. Nokia, Inc.*, 32 Misc.3d 1215(A), *6 (Sup. Ct. N.Y. Cty. 2011). Penquin has not made that demonstration.

The central issue in SS&D's representation of Penquin, and the focus of the co-op's year-long arbitration against Ellenberg and pre- and post-arbitration litigation – was the reasonability of the House Rules governing the operation of the restaurant. That issue is not remotely similar to the issue underlying the present lawsuit – the ownership rights to the rear yard behind the building. The mere fact that both the House Rules litigation and this case have something to do with the restaurant does not automatically render the "issues" in both litigations "identical," or "essentially the same." *See Matter of Bacot v. Winston*, 21 Misc.3d 1123(A), *6 (Sup. Ct. Bronx Cty. 2008) (disqualification was not warranted where "the actions are independent, the issues are different and the questions of law are not at all related"); *Bank of Tokyo Trust Co. v. Urban Food Malls*

Ltd., 229 A.D.2d 14, 31 (1st Dep't 1996) (in action to foreclose on various mortgages and leasehold interests, prior representation in which attorney had drafted "two master leases" that "form part of the collateral for the loans" was not "substantially related" to the "matters at issue in this proceeding, including the right of the mortgage pledgee to foreclose on the mortgaged property").

Although Penquin claims that "substantial testimony regarding occupancy of the yard" was introduced during the arbitration, and that this testimony "factored in the arbitrator's decision" (Penquin's Memorandum of Law ("Penquin Mem.") at 6-7), it offers no evidence, however, to support this assertion. To the contrary, as the arbitrator noted in the award, the parties' "dispute revolves around written amended Rules and Regulations (the "Rules"), which were issued in January 2004 by [Penquin] ... in connection with Penquin's commercial tenant, [Ellenberg]." (Eilender Affidavit, Ex. 10, at 1). The legality of the extensions, or the issue of whether they were encroaching upon plaintiff's property, was not at issue, and the arbitrator did not resolve any disputed issues regarding ownership of that property.

Penquin's failure to demonstrate any substantial relationship between SS&D's current representation of plaintiff, and its prior representation of the co-op, without more, warrants denial of its disqualification motion. *See Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 637 (1998) ("There being no evidence of a substantial

relationship between [the attorney's] past and current representation, on that ground alone no violation of DR 5-108 (A) (1) was demonstrated").

In the alternative, a party may seek to disqualify opposing counsel on the ground that "the attorney received confidential information about the party that is 'substantially related' to the current litigation." *Bank of Tokyo Trust Co*, 229 A.D.2d at 30 (citation omitted). Here, however, Penquin makes no attempt to demonstrate that it conveyed any such confidential information to SS&D. The moving party "has the burden of identifying the 'specific confidential information imparted to the attorney.'" *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 32 A.D.3d 284, 286 (1st Dep't 2006), *aff'd* 8 N.Y.3d 506 (2007) (citation omitted).

Although Penquin claims, with no supporting evidence, that SS&D served as the co-op's "general counsel" (Penquin Mem. at 4), in fact, SS&D's retainer letter shows that the firm was retained for a specific purpose – "to prosecute certain claims relating to violations of the commercial lease in the Co-op's building" – not to serve as general counsel. *See Eilender Aff.*, Ex. 4, at 1. In any event, "[g]eneral allegations of confidential information receiving" are insufficient. *Bank of Tokyo Trust Co.*, 229 A.D.2d at 31 (allegation that attorney "had unrestricted access to the [client's] personnel and documents" insufficient to support disqualification motion).

Accordingly, Penquin's motion for disqualification is denied.

Motion to Dismiss Ellenberg's Cross Claims (Motion Sequence No. 008)

In his answer, Ellenberg brought two cross claims against the co-op: (1) a declaration that he is entitled to use and occupy the yard; and (2) a monetary contribution from the co-op towards any damages won by plaintiff. Penquin moves to dismiss Ellenberg's cross claims, contending that, after the commencement of this action, Ellenberg signed and delivered a general release in the co-op's favor.

In 2009, during the pendency of this action, an additional dispute arose between Ellenberg and the co-op. Thereafter, the parties agreed to settle that dispute, and all other claims between them. The co-op paid Ellenberg \$700,000 and extended his lease for an additional 33 years, in exchange for a general release of all claims:

whatsoever, in law, admiralty or equity, which against the [co-op], [Ellenberg], [Ellenberg's] heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matters, cause or thing whatsoever from the beginning of the work to the date of this RELEASE

(Affirmation of Brett L. Carrick in Further Support of Penquin's Motion, Ex. E)

(12/20/09 General Release).

A general release disposes of all claims existing between the parties at the time of its execution. *Buffalo Elec. Co. v. State of New York*, 14 N.Y.2d 453 (1964). If a particular outstanding claim is not mentioned, the effectiveness of the release is not destroyed, as long as that claim was in existence at the time of the release's execution.

Lucio v. Curran, 2 N.Y.2d 157, 161-162 (1956); see e.g. *Serbin v Rodman Principal Invs., LLC*, 87 A.D.3d 870, 870-71 (1st Dep't 2011) (finding that plaintiff's general release executed as part of a separation agreement barred a later claim for fraud, even though the release did not specifically refer to fraud, and the release was not given in settlement of any fraud claim).

Here, given the fact that the general release was executed *after* the commencement of this action, it is clear that all of Ellenberg's cross claims were in existence and/or known at the time that he executed the general release. Therefore, he may not pursue those claims in this action, and his cross claims against the co-op are dismissed.

Although Ellenberg argues that, to the extent that the motion seeks to dismiss or otherwise affect any of his claims or rights that have arisen since December 20, 2009, the motion should be denied, the court rejects this argument, as Ellenberg fails to identify which cross claims, if any, should survive. In any event, all of his cross claims were first alleged by Ellenberg in his January 2009 answer to the complaint, and therefore, arose no later than January 2009, well prior to the execution of the December 2009 release, and are thus barred.

Penquin's Motion to Strike Ellenberg's Jury Demand (Motion Sequence No. 008)

Plaintiff filed his note of issue, without a jury demand, on December 8, 2011. On the same day, Ellenberg filed a demand for a jury trial. Ellenberg's cross claims seek equitable relief, in addition to seeking contribution for any adverse money judgment. However, the CPLR provides for a jury trial where the party "demands and sets forth facts which would permit a judgment for a sum of money only." CPLR 4101(1). In addition, "joinder of claims for legal and equitable relief amounts to a waiver of the right to demand a jury trial." *Kaplan v. Long Is. Univ.*, 116 A.D.2d 508, 509 (1st Dep't 1986); *see also Cannon Point North, Inc. v. City of New York*, 87 A.D.3d 861, 865 (1st Dep't 2011) ("[W]here [a] plaintiff brings a claim triable by jury and the defendant asserts a related counterclaim not triable by jury, defendant thereby waives a jury trial in all respects, including on the main claim.") (citation omitted).

Here, as the relief sought is both equitable and legal, it is clear that Ellenberg has waived his right to a jury trial, and that his demand must be stricken.

Although Ellenberg argues that the joinder of equitable claims does not constitute a waiver of his right to a jury trial, citing *Russell v. Adams*, 2012 NY Slip Op 30243[U] (Sup. Ct. Greene Cty. 2012), the Court rejects this argument. In *Russell*, the court found that joinder of equitable causes of action does not constitute a waiver of one's right to a jury trial when those claims are "incidental," to the claim under RPAPL § 1501.

Here, Ellenberg seeks a declaration that he “be permitted to install heating, ventilation and air-conditioning equipment on the roof of the building.” This claim is clearly equitable in nature, and not incidental to Ellenberg’s claim under RPAPL § 1501. Therefore, it constitutes a waiver of his right to a jury.

The court has considered the remaining arguments, and finds them to be without merit.

ORDER

Accordingly, it is

ORDERED that plaintiff’s motion for leave to amend the second amended complaint herein (Motion Sequence No. 007) is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon 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 plaintiff’s motion for partial summary judgment on the seventh and eighth causes of action of the second amended complaint (Motion Sequence No. 006) is denied; and it is further


ORDERED that the motion of defendant Penquin Tenants Corp. for an order disqualifying Jeffrey Eilender, Esq. and the law firm of Schlam, Stone & Dolan LLP from representing plaintiff (Motion Sequence No. 008) is denied; and it is further

ORDERED that the motion of defendant Penquin Tenants Corp. for an order dismissing the cross claims of defendant Sheppard Ellenberg (Motion Sequence No. 008) is granted, and those cross claims are severed and dismissed; and it is further

ORDERED that the motion of defendant Penquin Tenants Corp. for an order striking the jury demand of defendant Sheppard Ellenberg (Motion Sequence No. 008) is granted.

Dated: New York, New York
March 25, 2013

ENTER:


Hon. Eileen Bransten, J.S.C.