

**Hudson v Delta Kew Holding Corp.**

2013 NY Slip Op 32645(U)

October 16, 2013

Supreme Court, Suffolk County

Docket Number: 16425-12

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 8/8/13  
ADJ. DATES 8/30/13  
Mot. Seq. # 003 - Mot D  
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JOAN THERESE HUDSON, :  
 :  
 Petitioner/Plaintiff, :  
 :  
 -against- :  
 :  
 DELTA KEW HOLDING CORP. f/k/a 37-05 :  
 REALTY CORP., SHINHAN BANK AMERICA :  
 and CHB AMERICA BANK f/k/a CHO HUNG :  
 BANK OF NEW YORK :  
 :  
 Respondents/Defendants :  
 :  
 -----X

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Upon the following papers numbered 1 to 10 read on this motion by plaintiff for leave to amend its complaint; Order to Show Cause and supporting papers 1-3; Notice of Cross Motion and supporting papers:                      Opposing papers: 4-5; 6-7; Reply papers:                     ; Other papers: 8-9 (memorandum); 10 (memorandum); it is

**ORDERED** that this motion (#003) by the plaintiff for leave to serve an amended complaint is considered under CPLR 3025 and is granted only to the extent set forth below.

The petitioner/plaintiff commenced this hybrid special proceeding/action by service of an order to show cause dated May 29, 2012 and a petition/complaint. Therein, the petitioner/plaintiff [hereinafter plaintiff] seeks the following relief: 1) a judicial declaration that a certain 99 year lease, under which defendant Delta Kew Holding Corp. [hereinafter "Kew"] is the sole tenant, is void under RPL §231, RPAPL §715 and §721; 2) a judgment awarding exclusive possession of the demised premises to the plaintiff pursuant to RPAPL §711; 3) a judicial declaration that the subject lease is null and void under the doctrine of merger; 4) a permanent injunction restraining the defendants and their agents from possessing the leased premises; 5) a judicial declaration that a certain mortgage or mortgages encumbering the premises are unauthorized and void with respect to the plaintiff's one-third ownership interest in the subject premises; 6) recovery of money damages from defendant Kew by reason of its purported breach of fiduciary duties; and 7) recovery of money damages from

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defendant Kew attributable to its purported waste of the subject premises. Following the service of these initiatory papers, defendant, Delta Kew, a tenant in common with the plaintiff, appeared herein by answer dated July 6, 2012. Issue was joined with respect to defendants, CHB Bank and Shinhan Bank [hereinafter “Banks”], who are the owners of the mortgages targeted for cancellation, by service of their joint answer in November of 2012.

The factual averments set forth in the petition/complaint and in papers submitted in support thereof include, among others, that the plaintiff “has a one-third ownership interest as a tenant in common in the demised premises located at 139-01 Grand Central Parkway” (*see* ¶ 2 of the petition/complaint attached as Exhibit A to the moving papers), and that “defendant Kew is the tenant in common of the other two thirds interest in the demised premises” (*see id.* at ¶ 5). The premises to which the plaintiffs’ one-third interest attaches consist of a combined parcel of two lots referred to as Parcels I and II in early conveyances to and from members of a family named “Erny”. These combined parcels (hereinafter “Erny parcel”), are now improved with a hotel (*see* plaintiff’s Memo of Law, page 2, submitted in opposition to Delta Kew’s motion to dismiss [#002]).

A parcel adjacent to the south of the demised premises houses a parking lot (hereinafter the “parking lot parcel”). Admittedly, defendant Kew is the sole owner of this south parking lot parcel which it uses, together with the northern lot or Erny parcel, in the operation of its hotel business (*see* ¶ 3 of the Reply affirmation of plaintiff’s counsel to its motion [#001] for judgment). The “demised premises, namely a one-third interest in the northern Erny parcel, may have been later mapped so as to include the second, south parking lot parcel which is indisputably solely owned by defendant Delta Kew. Although the plaintiff made no claim of ownership to any portion of the south parking lot in her pleading or submissions on prior motion practice, the demised premises were alleged to be located at 139-01 Grand Central Parkway, Queens New York, and as bearing a tax map designation of “Block 6634, Tax Lot 1, on the Tax Map of Queens County” (*see* ¶ 2 of the petition/complaint attached as Exhibit A to the moving papers).

The history of the transfers by which the plaintiff and defendant Kew obtained their respective ownership interests in the subject premises were in set forth in the record adduced on prior motion practice wherein the plaintiff moved for an accelerated judgment on her petition/complaint (#001) and defendant Delta Kew cross moved (#002) for a change in venue and dismissal. A recitation of the facts underlying the parties’ demands for relief as put before the court by the parties was outlined by the court in its October 18, 2012 order determining such motions. Apparent therefrom was that the plaintiff’s one-third interest as tenant in common with Delta Kew in the “demised premises” was limited to the Erny parcel which lies north of the south parking lot parcel. This adjoining south parking lot parcel was expressly described by the plaintiff as being “neither owned by the Plaintiff nor the subject of this action” (*see* ¶ 3 of the reply affirmation of plaintiff’s counsel on motion #001).

In its October 18, 2012 order, the court denied the plaintiff’s motion for judgment and it denied defendant Kew’s cross motion for dismissal and other relief except to the extent that a portion of the plaintiff’s First Cause of Action wherein she sought relief under RPAPL §715 was dismissed. No findings of any of the facts advanced by the parties and recited by the court were made in such order as such facts served merely as the context within which the court was asked to determine the cross applications pending before it (*cf.*, CPLR 3212[g]). Contrary to the claims of counsel, the law of the

case doctrine is not implicated here since the denials of the prior motions to dismiss and for summary judgment were premised upon proof insufficiencies and did not constitute a merits based determination (see *Mobarak v Mowad*, 55 AD3d 693, 865 NYS2d 344 [2d Dept 2008]; *Gay v Farella*, 5 AD3d 540, 772 NYS2d 871 [2d Dept 2004]; *D'Amato v Access Mfg., Inc.*, 305 AD2d 447, 762 NYS2d 393 [2d Dept 2003]).

By the instant motion (#003), the plaintiff seeks leave to amend her petition/complaint so it “conforms the pleadings to [the court’s] dismissal” of the plaintiff’s RPAPL §715 claim (see ¶ 4 of the Affirmation of attorney Wishod attached in support of plaintiff’s motion). The amendment is further characterized as one which “omits the Fifth Cause of Action declaring the mortgages unauthorized and void” (*id.*), although an errant reference thereto is still included in subparagraph (e) of the “Introduction” portion of the amended complaint. The proposed amendment is also characterized as one which “clarifies and expands the relief sought against Delta Kew and the Banks” by expanding the demands for money damages for breach of fiduciary duties and waste so as to charge both with liability for both (*id.*). Finally, the amendment adds a new cause of action for partition of the “premises” as all references to the “demised premises” that was the cornerstone of the plaintiff’s original petition/complaint, have all been eliminated in the proposed amended pleading. The plaintiff has thus enlarged the premises in which she claims a one-third interest as a tenant in common with Delta Kew from the “demised premises”, which were limited to the northern Erny parcel, to a one-third interest in the parcel as mapped, which appears to include both the northern Erny parcel and the adjoining south parking lot parcel.

Delta Kew opposes the plaintiff’s motion upon grounds that the plaintiff’s proposed new partition claim is palpably improper and/or legally insufficient as it rests upon the newly asserted factual allegations by which she enlarges her previously claimed one-third ownership interest in the demised premises to include the south parking lot as well. Delta Kew contends that because the plaintiff has no ownership interest in the south parking lot parcel, as a tenant in common with Delta Kew or otherwise, she has neither a proper nor a legally sufficient claim for a judgment partitioning the south parking lot as she does with respect to northern Erny parcel. The defendant Banks oppose the plaintiff’s motion on the grounds that the proposed amendment of the plaintiff’s breach of fiduciary duties claim to include a claim against the banks for aiding and abetting such breach is substantively insufficient as a matter of law. They further contend that the same is procedurally improper due to the expiration of all applicable periods of limitations. For the reasons stated below, the motion is granted only to the extent set forth below.

The standard for determining a party’s right for leave to amend its pleading is simply whether the amendment is palpably improper or patently insufficient as a matter of law (see *Carroll v Motola*, 109 AD3d 629, 970 NYS2d 820 [2d Dept 2013]; *Koenig v Action Target, Inc.*, 76 AD3d 997, 907 NYS2d 692 [2d Dept 2010]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). If it is neither, leave to amend should be granted unless the record indicates or an adverse party demonstrates that surprise or prejudice will directly result from the amendment (see *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; *Koenig v Action Target, Inc.*, 76 AD3d 997, *supra*; *Degregorio v American Mfrs. Mut. Ins. Co.*, 90 AD3d 694, 934 NYS2d 457 [2d Dept 2011]; *Yemini v Goldberg*, 46 AD3d 806, 848 NYS2d 676 [2d Dept 2007]). The sufficiency or underlying merit of the proposed amendment may not be further examined (see *Gomez v State*, 106 AD3d 870, 965 NYS2d 542 [2d Dept 2013]; *Lucido v Mancuso*, 49 AD3d 220, *supra* at 227).

The Banks' challenges to the propriety and sufficiency of those portions of the plaintiff's proposed amendment wherein she seeks to extend her tort claims against the Banks under theories of aiding and abetting are sustained. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach; and 3) that plaintiff suffered damage as a result of the breach" (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 867 NYS2d 169 [2d Dept. 2008], quoting *Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [2d Dept 2003]; see also *Wechsler v Bowman*, 285 NY 284, 291 [1941]). There must be an allegation that the defendant had actual knowledge of the breach of duty as constructive knowledge is insufficient to impose liability (*id.*). The defendant must have rendered "substantial assistance" to the fiduciary in the course of effecting the alleged breach of fiduciary duty (see *Velazquez v Decaudin*, 49 AD3d 712, 854 NYS2d 163 [2d Dept 2008]). In the absence of allegations that the defendant acted with the actual intent to aid in the fraud allegedly perpetrated, the cause of action must fail (see *Greenfield v Tassinari*, 8 AD3d 529, 779 NYS2d 531 [2d Dept 2004]).

Here, the plaintiff's aiding and abetting claims against the Banks are premised upon allegations that their advancement of mortgage funds to Delta Kew enabled it to use the premises as a "bawdy house" and/or for other illegal purposes. Such claims fall far short of those required to state a claim of aiding and abetting Delta Kew's purported breach of fiduciary duties owing to the plaintiff under the terms of her co-tenancy with Delta Kew. As such, the aiding and abetting of fiduciary duties claim against the Banks that is set forth in ¶ 48 and ¶ 49 of the proposed new FIFTH Cause of Action is without merit. For the same reasons, the court further finds that the plaintiff's proposed amendment extending her previously pleaded claim for waste against Delta Kew to include a claim of aiding and abetting such waste by the Bank defendants, is likewise wholly devoid of merit (see ¶ 51 and ¶ 52 in the SIXTH Cause of Action set forth in the proposed amended complaint attached as Exhibit J to the moving papers). Those portions of the plaintiff's motion wherein it seeks leave to amend the originally pleaded tort claims to include these two aiding and abetting tort claims against the Bank defendants are thus denied. The proposed amendments effecting a deletion of the plaintiff's originally pleaded claims for judgments declaring the invalidity of the Banks' mortgages are proper and allowed as such claims have been withdrawn by the plaintiff.

The motion is, however, granted as to the remaining proposed amendments, including those challenged by Delta Kew as an improper enlargement of the premises in which the plaintiff claims an ownership interest and a new claim for the partition thereof. While the court agrees that these amendments may be viewed as an expansion of the premises at issue to include the parcel as mapped, which may include both the northern Erny parcel and the south parking lot, in which the plaintiff admits to having no ownership interest, and to allow the plaintiff to abandon the original more limited description of the premises she previously advanced, these circumstances do not warrant a denial of these amendments.

Although the right to partition is not absolute (see *Tsoukas v Tsoukas*, 107 AD3d 879, 968 NYS2d 109 [2d Dept 2013]; *Pando v Tapia*, 79 AD3d 993, 995, 914 NYS2d 226 [2d Dept 2010]), a legally sufficient claim for partition and sale of real property rests upon allegations by a person holding or having a possessory interest of real property as joint tenant or tenant in common that a partition of such real property cannot be made without great prejudice to the owners (see RPAPL

901[1]). Here, the amended complaint sets forth allegations that the plaintiff is a tenant in common with Delta Kew of the premises located at 139-01 Grand Central Parkway, Block 6634, Tax Lot 1, on the Tax Map of Queens County and that the plaintiff is entitled to a partition and sale of same. These allegations advance a facially sufficient claim for partition of said premises. Under the case authorities governing amendments of the pleading cited above, this court is precluded from inquiring further into the merits of the proposed amendments (*see Gomez v State*, 106 AD3d 870, *supra*; *Lucido v Mancuso*, 49 AD3d 220, *supra* at 227).

The granting of the plaintiff's motion for leave to amend is thus compelled by the statutory mandate of liberality governing applications to amend pleadings (*see* CPLR 3025[b]), unless prejudice or surprise is evident from the record. Prejudice or surprise may be found where the proposed amendments arise out of materially different rather than the same facts as those underlying the action (*see Koenig v Action Target, Inc.*, 76 AD3d 997, *supra*; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 830 NYS2d 262 [2d Dept 2007]). Prejudice may also be found where an opposing party demonstrates that a material change in position or hindrance in the preparation of his or her case has been sustained which could have been avoided had the original pleading contained the proposed amendment (*see RCLA, LLC v 50-09 Realty, LLC*, 48 AD3d 538, 852 NYS2d 211 [2d Dept 2008]; *Dawley v McCumber*, 45 AD3d 1399, 1399–1400, 845 NYS2d 888 [2d Dept 2007]; *Yemini v Goldberg*, 46 AD3d 806, *supra*). In contrast, surprise may be the result of belated attempts to add new allegations that are entirely inconsistent with the allegations contained in the movant's original pleading (*see DeLuca v Pecoraro*, 109 AD3d 636, 970 NYS2d 822 [2d Dept 2013]).

Here, neither the record nor the submissions of Delta Kew present any evidence that surprise or prejudice would result by the granting of the proposed amendments. The enlargement in the plaintiff's description of the premises in which she appears to claim a one-third interest as tenant in common with Delta Kew and the addition of the partition claim with respect thereto are advanced at the pre-deposition stage of this action and they do not arise out of a materially different set of facts as previously alleged. Notions of prejudice and surprise are thus absent. While these new allegations may be perceived as "inconsistent" with those contained in the plaintiff's original complaint and other submissions to the court, they do not unfairly surprise or prejudice Delta Kew in its defense. In the event that the prior and more limited description of the subject premises that was advanced in the original pleadings and submissions constitute either formal or informal judicial admissions or acts giving rise to estoppel against the plaintiff, all negative jural consequences thereof, if any, remain available to Delta Kew for use at trial or on any motion equivalent thereof, notwithstanding the grant of a judicially sanctioned amendment (*see Zegarowicz v Ripatti*, 77 AD3d 650, 911 NYS2d 69 [2d Dept 2010]; *Bogoni v Friedlander*, 197 AD2d 218, 610 NYS2d 511 [1<sup>st</sup> Dept 1994]; *see also Kwiecinski v Chung Hwang*, 65 AD3d 1443, 885 NYS2d 783 [3d Dept 2009]). Under these circumstances, the court finds that no prejudice or surprise sufficient to warrant a denial of the amendments challenged by Delta Kew is discernable from the record.

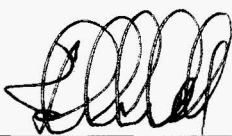
In view of the foregoing, the instant motion by the plaintiff for leave to amend her petition/complaint is denied with respect to the assertion of the claims for recovery in tort against the Bank defendants that are advanced in certain portions of the proposed new FIFTH and SIXTH Causes of Action. The motion is granted with respect to the remaining proposed amendments except for the demand for extinguishment of the Bank's mortgages set forth in subparagraph (e) on page two of the

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proposed amended complaint. This demand is an obvious typographical error in light of the plaintiff's unequivocal withdrawal of her mortgage extinguishment claims against the Banks on this motion.

The plaintiff is granted thirty days leave from the date of this order to prepare an amended petition/complaint that is consistent with the terms of this order and to serve same upon counsel for the defendants within such time, together with a copy of this order. Absent objections as to form, the defendants shall have thirty days after service of the amended petition/complaint to serve their amended answers thereto.

Dated: 10/16/13

  
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THOMAS F. WHELAN, J.S.C.