

Lamb v Regatta Prop. LLC

2014 NY Slip Op 30690(U)

March 17, 2014

Supreme Court, New York County

Docket Number: 152079/2013

Judge: Eileen A. Rakower

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 NEW YORK: PART 15

-----X

JUDITH NOELLE LAMB,

Plaintiffs,

- against -

REGATTA PROPERTY LLC,
THE REGATTA CONDOMINIUM,
THE BOARD OF MANAGERS OF THE
REGATTA CONDOMINIUM,
SOUTH COVE III ASSOCIATES,
MILFORD MANAGEMENT CORP.,
and P.S. MARCATO ELEVATOR CO., INC.,

Defendants,

-----X

THE BOARD OF MANAGERS OF THE
REGATTA CONDOMINIUM,
and MILFORD MANAGEMENT CORP.,

Third-Party Plaintiffs,

-against-

BOCA GROUP EAST, LLC,

Third-Party Defendant.

-----X

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

Index No.
152079/2013

**DECISION
and ORDER**

Mot. Seq.
02

This is a personal injury lawsuit brought by Plaintiff who alleges that she was injured in an elevator at 21 South End Avenue, New York, NY (“the Building”), and owns and resides in a condominium apartment in the Building. In

this action, Plaintiff brings claims against, among others, defendants The Board of Managers of Regatta Condominium, Milford Management Corp., and P.S. Marcato Elevator Co., Inc.

Defendant Regatta Property LLC (“Regatta Property”) interposed an Answer on October 16, 2013, with a Counterclaim for attorneys’ fees.

Defendant P.S. Marcato Elevator, Inc., interposed an Answer on May 2, 2013, interposed as a fifth affirmative defense, cross-claim, and alternatively, an adjudication of the comparative negligence of all parties. Defendants, The Board of Managers of the Regatta Condominium and Milford Management Corp., interposed an Answer on July 24, 2013, asserting cross-claims against defendant P.S. Marcato. The action has been discontinued as against defendant South Cove II.

Defendants/third party plaintiffs The Board of Managers of The Regatta Condominium and Milford Management Corp. brought a third party action against third party defendant Boca Group East, LLC (“Boca East”). Boca East, in turn, answered the Third Party Complaint, and interposed cross claims against co-defendants, including Regatta Property.

Regatta Property now moves for an Order granting Regatta Property summary judgment dismissing the Complaint and cross claims asserted against it and granting Regatta Property summary judgment on its counterclaim against Plaintiff for attorneys’ fees incurred in defending this action. In its counterclaim, Regatta Property seeks attorneys’ fees on the basis that “Plaintiff failed to make a reasonable inquiry before bringing this action against [Regatta Property].” Regatta Property therefore contends that Plaintiff is liable to Regatta Property for its attorneys’ fees for defending this alleged frivolous action.

As set forth in the affidavit of Stephen Cheung, the managing member of Regatta Property, Regatta Property is the owner of the commercial unit of the Building, which consists of all of the ground floor stores at the Building. As the owner of the “Commercial Unit”, Regatta Property has no control over the elevators in the Building. Regatta Property does not operate, manage, or maintain the elevators.

In addition, Regatta Property contends that after Regatta Property received the summons and complaint, it requested that the action be discontinued but Plaintiff refused.

Plaintiff does not oppose Regatta Property's motion for summary judgment; however, Plaintiff does oppose Regatta Property's application for attorneys' fees. Plaintiff contends that it had no factual basis to discontinue the action until it received a copy of the Declaration of The Regatta Condominium, the By-laws, the Unit Assignment Agreement and the Floor Plans of the Condominium.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Pursuant to 22 NYCRR §130-1.1(a):

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

22 NYCRR §130-1.1[a].

Conduct is frivolous under the court rule if "it is completely without merit

and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, “ “it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another,” or “it asserts material factual statements that are false.” 22 NYCRR § 130-1.1.

However, “[a] party is not entitled to such relief as a matter of right, and it may not be pleaded as a distinct cause of action. A party may apply for such relief by motion upon the happening of specific conduct. An assertion that plaintiff’s entire pleading is frivolous may be tested upon a summary judgment motion to dismiss the complaint. A counterclaim for attorney’s fees and sanctions based upon the assertion that the action is frivolous is improper.” *Yankee Trails, Inc. v. Jardine Ins. Brokers, Inc.*, 145 Misc. 2d 282, 546 N.Y.S.2d 534, 1989 N.Y. Misc. LEXIS 647 [N.Y. Sup. Ct. 1989].

Regatta Property has made a prima facie showing of entitlement to summary judgment dismissing the Complaint and counter-claims; however, Plaintiff has failed to make such a showing with respect to its counterclaim for attorneys’ fees. Regatta Property has failed to demonstrate that as a matter of law that Plaintiff’s conduct was frivolous.

Plaintiff cross moves for an order precluding the remaining defendants from seeking apportionment as against Regatta Property. Plaintiff’s cross motion is denied as moot in light of this Order’s dismissal of the cross-claims as against Regatta Property.

Wherefore, it is hereby

ORDERED that defendant Regatta Property, LLC’s motion is granted to the extent that the Complaint and cross claims asserted against Regatta Property, LLC are dismissed, and the Clerk shall enter judgment accordingly; and it is further


ORDERED that defendant Regatta Property, LLC’s motion for summary judgment on its counterclaim against Plaintiff for attorneys’ fees is denied; and it is further

ORDERED that defendant Regatta Property, LLC’s counterclaim is dismissed.

ORDERED that Plaintiff's cross motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MARCH 17, 2014



EILEEN A. RAKOWER, J.S.C.