SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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IRENA SHAYKHLISHLAMOVA,

Plaintiff,

-against-

PERRY STREET DEVELOPMENT CORP., CHARLES BLAICHMAN, RICHARD BORN, IRA DRUKIER, SCORCIA AND DIANA ASSOCIATES, INC., SCORCIA AND DIANA ASSOCIATES, LLC, BOARD OF MANAGERS OF 166 PERRY STREET CONDOMINIUM, PENMARK REALTY CORPORATION, PENMARK MANAGEMENT LLC, ASYMPTOTE ARCHITECTURE, PLLC, ABC INC, and XYZ CORP,

Defendants.

"ABC INC" and "XYZ CORP" are the fictitious names of entities whose true identities are unknown that are believed to have performed work and/or supplied materials to condominium unit located at166 Perry Street, unit 1C, New York, New York relating to the subject matter of this action.

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Index No. 154911/2012

Motion Seq. 004

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action alleging property damage, defendant Penmark Realty Corporation ("Penmark Realty") moves for summary judgment dismissing the amended complaint and all cross claims as asserted against it.

Factual Background

Defendant Perry Street Development Corp. (the "Sponsor") filed a Condominium Offering Plan (the "Offering Plan") for the renovation and creation of condominium units at 166 Perry Street, New York, New York. Penmark Realty was deemed the Managing Agent of the

Condominium "commencing the date of the First Closing" (p. 121). However, prior to the first unit closing, Penmark Realty sold its property management agreements with 166 Perry Street Condominium (the "Condominium") to Penmark Management, pursuant to an Asset Purchase Agreement "made as of" November 4, 2009.

By agreement "made as of" November 12, 2009, the Condominium and Penmark Realty entered into the "Condominium Apartment House Management Agreement" (the "Management Agreement"), which was to take effect "at the first unit closing" (Paragraph, Ninth, page 7). According to Penmark Realty, the first unit closing was November 12, 2009. (Penmark Realty Memorandum of Law, p. 2; see also, Ninth Amendment ¶2).

Further, in a Ninth Amendment to the Offering Plan, dated April 15, 2014, Penmark Management provides the "New Name and Address of Managing Agent" as follows: "Penmark Realty . . . is now known as Penmark Management, LLC ["Penmark Management"] and is located at . . . ."

Plaintiff executed a purchase agreement for the Unit on July 28, 2010, and closed title to her Condominium unit 1C (the "Unit") in September 2010, after which she noticed certain construction defects in her Unit. As a result, plaintiff commenced this action alleging, *inter alia*, breach of contract against the Penmark Realty.[1]

In support of dismissal of the complaint and all cross-claims, Penmark Realty argues, through the affidavit of its President, Bernard Friedman, that the Condominium Offering Plan, Asset Purchase Agreement between Penmark Realty and Penmark Management ("Asset Purchase

[1] Plaintiff alleges that it is a third party beneficiary of the Management Agreement, and that Penmark Realty breached its fiduciary duty to plaintiff, as well as various warranties against construction defects.

Agreement"), forms from the New York State Division of Corporation, and Management Agreement demonstrate that Penmark Realty is not, and was never, the Managing Agent of the Condominium and not a party to the Management Agreement at the time plaintiff purchased and closed on her Unit. Penmark Realty sold its business, including the Management Agreement, to Penmark Management on November 4, 2009. When the Management Agreement became effective on the date of the first closing, *i.e.*, November 12, 2009, Penmark Management was the Managing Agent of the Condominium. The Ninth Amendment also shows that Penmark Management was listed as the management agent. Therefore, all of plaintiffs' six causes of action against Penmark Realty, which are either premised upon the assertion that Penmark Realty was the managing agent, or duplicative of the unmeritorious breach of contract action, fail. Further, there was no communication between Penmark Realty and plaintiff concerning the alleged construction defects in her Unit because Vashti Rampersad ('Rampersad"), with whom plaintiff allegedly spoke, was never an employee of Penmark Realty; instead Rampersad was employed by Penmark Management. And, Penmark Realty had no obligation to raise the affirmative defense that it is not a proper party.

Similarly, since plaintiff seeks recovery of economic damages and there was no duty owed to plaintiff regarding her Unit, the cross-claims for contribution are barred. Further, the common law and contractual indemnification claims must be dismissed because Penmark Realty was not the actual wrongdoer in connection with the construction or management of the Unit or Condominium, and there is no agreement under which Penmark Realty agreed to indemnify and hold harmless the co-defendants. And, the Sponsor's cross-claim for failure to obtain insurance for its benefit fails because there is no agreement between these parties under which Penmark

Realty undertook such an obligation.

In opposition, plaintiff argues that Penmark Realty failed to submit the entire Asset Purchase Agreement, pages of which are redacted and incomprehensible, the effective date of the Asset Purchase Agreement is before the effective date of the management agreement under which Penmark Realty became the managing agent of the Condominium. The Management Agreement between the Condominium and Penmark Realty was made "as of" November 12, 2009, eight days before the effective date of the Asset Purchase Agreement. Thus, as a matter of law, the Management Agreement could not have been subject to the Asset Purchase Agreement, as it did not exist at the time that the Asset Purchase Agreement became effective. Further, the Ninth Amendment does not provide that Penmark Management is listed as the Condominium's managing agent, but simply gave notice of a name change. Thus, Penmark Realty was the managing agent of the Condominium. There is no affidavit from Penmark Management regarding its relationship with Penmark Realty, or from the Sponsor or Board of Managers of the Condominium regarding the roles of Penmark Realty and Penmark Management. In any event, affidavits would not be dispositive, as plaintiff would be entitled to cross examine the affiants at a deposition.

Moreover, by Supplemental Response to plaintiff's Interrogatories dated April 2, 2014, the Sponor defendants (Sponsor, Charles Blaichman, Richard Born, and Ira Drukier) identified Penmark Realty as an entity involved in the construction in plaintiff's Unit. And, Penmark Realty never alleged as an affirmative defense that it was not a proper party.

Discovery has not been completed, and depositions of parties and non-parties have not yet occurred. Thus, summary judgment is premature.

In reply, Penmark Realty argues that plaintiff offers no proof to demonstrate that Penmark Realty was the Managing Agent of the Condominium. There is no evidence that plaintiff ever communicated with Penmark Realty her request that Penmark Realty remedy the alleged construction defects. Penmark Realty was never the Managing Agent while plaintiff owned her Unit. Penmark Realty offers for *in camera review* a complete copy of the Asset Purchase Agreement. Plaintiff's argument that the Asset Purchase Agreement is irrelevant because it became effective eight days before the Management Agreement became effective bolsters Penmark Realty's argument that it never assumed the role of managing agent for the Condominium. And, the Ninth Amendment does not reflect merely a name change.

No further discovery is needed regarding Penmark Realty, and plaintiff's opposition fails to demonstrate that any additional discovery, including depositions, could lead to relevant evidence, or that facts essential to oppose the motion are in Penmark Realty's exclusive knowledge. And, the Sponsor defendants provided a Second Supplemental Response to plaintiff's Interrogatories, dated April 16, 2014, stating that (1) the "prior response concerning the mechanical engineer was incorrect" and (2) Stan Slutsky was the Condominium's mechanical engineer. And, none of the co-defendants have opposed the motion.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of

a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Once this showing is made, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky, supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi*, 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Although Penmark Realty established that it had no role in the construction of the Condominium or of plaintiff's Unit,[2] it is unclear as to the role, if any, it played in managing the Unit under the Management Agreement. While Penmark attempts to show that it never assumed

[2] Plaintiff's reliance on the Supplemental Response of the Sponsor defendants is misplaced, as this document was corrected and supplanted by the Sponsor defendants' Second Supplemental Response dated April 16, 2014 and accompanying letter explaining that the previous response was incorrect. It is noted that the Second Supplemental Response is dated prior to the date of plaintiff's opposition papers dated July 3, 2014.

management of the Condominium, it fails to adequately reconcile the timeline of events *vis-a-vis* the Asset Purchase Agreement and Management Agreement.

The Asset Purchase Agreement establishes that Penmark Realty sold "All Seller's right, title and interest in its real property management agreements set forth on Schedule C attached hereto . . . ." On the page entitled, "Schedules," "C" is identified as "Management Agreement/Buildings." Under "Exhibit C," "166 Perry," the Condominium at issue, is listed under a subheading "Building"; notably, no reference on "Exhibit C" is made to "Management Agreement." After the Asset Purchase Agreement was made, Penmark Realty and the Condominium "made" the Management Agreement at issue, on November 12, 2009. Therefore, as plaintiff points out, it is unclear as to whether the Management Agreement was subject to, or was to be retroactively applied, to the Asset Purchase Agreement entered prior thereto. Thus, it cannot be said, as a matter of law, that Penmark Realty was not the Managing Agent of the Condominium at the time the Management Agreement, upon which plaintiff's breach of contract claim is based, became effective.

Further, the Ninth Amendment, dated June 11, 2010, (approximately one month before plaintiff entered into her purchase agreement for the Unit), indicates the "New Name" of the managing agent, Penmark Realty, as Penmark Management: "Penmark Realty Corp. is now known as Penmark Management, LLC." Notwithstanding that the New York State Division of Corporations records show that these entities may be distinct, and that Penmark Management was formed on November 4, 2009 (when it purchased Penmark Realty's assets), Penmark Realty failed to adequately establish the relationship between Penmark Realty and Penmark Management, in relation to the Condominium as indicated in the Ninth Amendment.

Further, that plaintiff did not speak to any employee of Penmark Realty is of no moment, at this juncture, in light of Penmark Realty's failure to establish that it was not the managing agent of the Condominium pursuant to the Management Agreement at issue.

Therefore, since Penmark Realty did not meet its burden, the motion must be denied, "regardless of the sufficiency of the opposition" (*Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 965 N.E.2d 240 [2012]). It is noted that discovery, including depositions, are necessary to explore the above issues.

Inasmuch as Penmark Realty claims that plaintiff's non-breach of contract claims are premised on the assertion that it was not the managing agent of the Condominium under the purportedly transferred Management Agreement, dismissal of the remaining claims is unwarranted. And, inasmuch as Penmark Realty claims, in conclusory fashion, that plaintiff's non-breach of contract claims are duplicative of the contract-based claim, dismissal is unwarranted, since it has not been established that an enforceable agreement governs the dispute between plaintiff and Penmark Realty (*see e.g., Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Management Inc.*, 80 A.D.3d 293, 915 N.Y.S.2d 7 [1st Dept 2010] (where third party beneficiary of investment management agreement between reinsurer and management company sued management company for mismanagement, neither the breach of fiduciary duty claim nor the gross negligence claim is duplicative of the contract claim); *JFK Family Ltd. Partnership v. Millbrae Natural Gas Development Fund 2005, L.P.*, 21 Misc.3d 1102(A), 873 N.Y.S.2d 234 (Table) [Supreme Court, Westchester County 2008] (declining to dismiss breach of fiduciary duty claims, stating, "not all of the Defendants are parties to the contract documents so the [breach of fiduciary duty] claims are not completely duplicative of the breach of contract

claim")). However, dismissal of the twenty-first cause of action for punitive damages is warranted, as it is uncontested that this matter involves a private dispute *(see Fulton v. Allstate Ins. Co.*, 14 A.D.3d 380, 788 N.Y.S.2d 349 [1st Dept 2005] ("Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights")). Plaintiff does not address the lack of merit to the punitive damages claim.

Therefore, dismissal of the complaint as against Penmark Realty is denied except as to the twenty-first cause of action for punitive damages, at this juncture.

Further, since there is no opposition to dismissal of the cross-claims asserted against Penmark Realty, the cross-claims are hereby severed and dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant Penmark Realty Corporation moves for summary judgment dismissing the amended complaint and all cross claims as asserted against it is granted solely to the extent that plaintiff's twenty-first cause of action for punitive damages and the cross-claims by co-defendants asserted against Penmark Realty are hereby severed and dismissed; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 26, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD