

Hollandale Apts. & Health Club LLC v Bonesteel

2014 NY Slip Op 34029(U)

October 29, 2014

Supreme Court, Saratoga County

Docket Number: 2014-1912

Judge: Robert J. Chauvin

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK COUNTY OF SARATOGA
SUPREME COURT

ORIGINAL

HOLLANDALE APARTMENTS & HEALTH CLUB LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No: 2014-1912

RJI No: 45-1-2014-1143

MICHAEL BONESTEEL,

Defendant.

Appearances:

Plaintiff: David H. Pentkowski, Esq.
Pentkowski, Pastore & Freestone
P.O. Box 445
Clifton Park, NY 12065

Defendant: Michael Bonesteel
Self-Represented Litigant

Intervenor/Defendant: Sandra Pullman, Esq., Assistant Attorney General
Office of the NYS Attorney General
120 Broadway
New York, NY 10271

Before: Hon. Robert J. Chauvin, JSC

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SARATOGA COUNTY
CLERKS OFFICE
BALLSTON, N.Y.

FILED

By notice of motion dated July 28, 2014 the Office of the Attorney General of the State of New York seeks an order permitting it to intervene in this action on behalf of the People of the State of New York, pursuant to CPLR §§ 1012 and 1013, based upon the authority set forth in Executive Law §§ 63 (12) and 296 (18) (2). In support of such motion to intervene defendant-intervenor submitted a motion to intervene, the affidavit of Assistant Attorney General, Sandra Pullman, Esq. along with copies of four pages of testimony taken May 20, 2014, and defendant-intervenor's counterclaims, all dated July 28, 2014.

In opposition the plaintiff submitted the attorney's affidavit in response of David H. Pentkowski, Esq., dated August 4, 2014, along with a copy of an Assurance of Discontinuance.

The matter was initially returnable August 7, 2014. However the court scheduled oral argument for September 9, 2014. Further upon such appearance the court requested and permitted the defendant-intervenor two additional weeks to submit additional written argument concerning the interposition of the proposed counterclaims. Pursuant thereto the Office of the Attorney General submitted defendant-intervenor's supplemental brief in support of its counterclaims, dated September 22, 2014 and filed September 23, 2014.

In addition, although not addressed herein, since the appearance upon the motion, by notice of motion dated September 17, 2014, the plaintiff has also moved for default judgment as against the individual defendant, Michael Bonesteel. Annexed to such moving papers were the summons and complaint and an affidavit of service. By letter filed October 1, 2014 defendant, Michael Bonesteel, filed a copy of a self represented written answer and verification, said verification dated September 25, 2014 (Such answer and verification were filed along with a cover letter which indicates that a copy was sent directly to the court attorney, however no such correspondence or documents were received at chambers by the court nor the court attorney).

Likewise, in addition to the relief requested in the instant motion, in its supplemental brief the defendant-intervenor argues that the motion for a default judgment should be stayed pending resolution of the instant motion and that the counterclaims proposed to be interposed proceed by way of a summary proceeding, alleging that there are no material disputes concerning the underlying factual contentions. As with the motion for default judgment the court does not address such request for a stay herein and certainly does not make any determination as to how the counterclaims, which have yet to be interposed, are to proceed. As with plaintiff's pending motion for a default judgment, such additional requests for relief are not addressed herein.

Further, as a preliminary matter, although not submitted upon the motion, in order to fully determine the application herein, the court has reviewed the copy of the summons and complaint filed in this matter. In this regard it is noted that although CPLR § 1014 requires submission of a proposed answer, it does not per se require submission of the pending pleading(s) (*Farfan v Rivera*, 33 AD3d 755 [2d Dept 2006]).

The underlying action herein was commenced by the filing of a summons and complaint on June 24, 2014. Such complaint contained four causes of action all seeking relief by way of a declaratory judgment. In the first three causes of action the plaintiff has sought a determination by the court that the plaintiff's actions set forth therein are not illegal, discriminatory or violative of fair housing laws, that the plaintiff does not need to permit the plaintiff to have a dog in his apartment and/or that, at the very least, a hearing is required concerning same. In the fourth cause of action the plaintiff seeks a determination that the plaintiff is being denied a property right without due process.

Factually the underlying action concerns a lease agreement between the plaintiff and the individual defendant. The allegations within the complaint, as well as, the documents submitted upon the instant motion, establish that since December, 2011 the defendant, Michael Bonesteel, has leased an apartment from the plaintiff. Such apartment is located within a complex of 493 living units operated by the plaintiff in the Town of Clifton Park, Saratoga County, New York. During the entire time of such lease the plaintiff has maintained a no pet policy. Although, admittedly, the plaintiff has made exception for other tenant(s) where a need has been shown, such as a seeing eye dog.

In November, 2013 the plaintiff received a letter from a licensed psychologist, in regard to the defendant, indicating that she had prescribed Mr. Bonesteel to obtain an emotional support animal. Apparently upon presentation of such to the plaintiff, the plaintiff was and has been unwilling to permit the presence of a dog in the defendant's apartment. The plaintiff did offer the option of a cat's presence, but not a dog. Less than two months later, the same psychologist wrote a further letter in which she indicated that a cat was not a helpful/therapeutic option and that she was recommending/prescribing a dog as a therapy animal for the defendant. (Despite the contentions that the plaintiff improperly published medical records of the individual defendant, the court does recognize that said records were supplied by the treating psychologist directly to the plaintiff and that such form the basis for the contentions of the individual defendant. As such, irrespective of the request to seal, any privilege of such records has been waived).

Based upon a complaint, apparently made by defendant, Michael Bonesteel, (see proposed Assurance of Discontinuance), in either December, 2012 or December, 2013, the Office of the Attorney General reviewed Mr. Bonesteel's complaint of the plaintiff's denial of his request

to have an emotional support dog at his apartment and initiated an investigation concerning same. (It is unclear when such investigation was started as the papers submitted upon the instant motion aver that such investigation was initiated in December or late, 2012 and spanned over a year, but the proposed Assurance of Discontinuance reflects that such investigation was initiated in December, 2013. The court does note that the date of the complaint and the subsequent initiation of the investigation is of significance in light of the date of the documentation which has been submitted supporting the claims of the defendant).

Upon such review and investigation documents produced pursuant to a subpoena were reviewed and the testimony of plaintiff's principal was taken. Such actions were taken in accordance with the procedures set forth in Executive Law § 297. Further the court notes that despite the repeated characterization and conclusions set forth in defendant-intervenor's papers that the actions of the plaintiff were and/or are discriminatory and unlawful, no such determination by the Division of Human Rights, pursuant to Executive Law § 297, has been submitted nor is the court aware of any such determination.

Rather, prior to any formal determination, an apparent proposal to settle the ongoing investigation by the Office of the Attorney General was made by way of a so-called "Assurance of Discontinuance". Above and beyond mandating plaintiff's acceptance of and agreement to multiple factual determinations tantamount to an admission of having engaged in discriminatory and unlawful practices, such stipulation or agreement required the plaintiff to establish and/or provide extensive written policies and procedures, training, record keeping, reports to the Office of the Attorney General and pay \$25,000 to the State of New York.

In response to such proposal, the instant action was commenced. As pertinent to the motion herein, prior to the time of oral argument, the individual defendant had not interposed any answer or other opposition to said complaint.

Now the Office of the Attorney General seeks an order permitting it to intervene in this action. Although admittedly not appearing on behalf of the individual defendant, upon such motion the Attorney General has proposed and requested to be permitted to interpose certain counterclaims which declare the actions of the plaintiff to be discriminatory and illegal, to enjoin the plaintiff from engaging in such discriminatory and illegal actions, seeking monetary damages by way of restitution to any victims of such actions and the sealing of certain papers. In addition,

as set forth in its supplemental brief, the defendant-intervenor is requesting a stay of another pending motion and seeking ancillary relief concerning the manner in which their proposed counterclaims are to proceed. Again, the court does not address such additional requests for relief herein.

At oral argument the court indicated that it intended to grant the motion to intervene. Upon further inquiry concerning the proposed counterclaims, the Office of the Attorney General expressly indicated that it sought to interpose such counterclaims as an alternative proceeding to its remedies set forth in Executive Law §§ 297 and 298, due to the contention that the court's determination of the causes of action in plaintiff's complaint and the counterclaims proposed by the defendant-intervenor would and/or will have a binding effect upon any further administrative proceeding.

There is no question, but that CPLR §§ 1012 and 1013, permit the intervention of various parties in proceedings upon numerous grounds. As pertinent to the instant proceeding CPLR § 1012 permits intervention as of right when a statute confers an absolute right to intervene and when the representation of a person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment. Further CPLR § 1013 provides that upon timely motion any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court or when a person's claim or defense and the main action have a common question of law or fact.

In the present matter, Executive Law § 63 does provide statutory authority for the intervention of the Office of the Attorney General in a matter such as the underlying action herein, at the very least, as a matter of discretion with the court.

Further the causes of action set forth in the plaintiff's complaint and the underlying administrative investigation initiated by the Office of the Attorney General, as well as, the proposed counterclaims to be interposed do share common issues of law and fact. As set forth above, as the defendant-intervenor seeks to interpose such counterclaims as an alternative to the remedies and procedures set forth in Executive Law §§ 297 and 298, both parties seek the determination of this court as to the legality of the plaintiff's actions in not permitting the individual defendant to have a dog reside in his apartment.

Moreover it is argued and conceded that the determination(s) of the court in the underlying action could have and would have a binding effect upon the administrative investigation and/or proceeding having been initiated by the Office of the Attorney General pursuant to Executive Law §§ 297 and 298. As set forth above, and through the apparent concession that a determination by this court upon the plaintiff's claims would have a binding effect upon any administrative proceeding, the Office of the Attorney General, by way of counterclaims, has sought to submit it's Executive Law § 296 claims to this court for its determination. In this regard the court also notes the lack of opposition to plaintiff's complaint interposed by the individual defendant prior to the time of oral argument, in considering the potential inadequacy of representation upon such issues absent permission to intervene.

As such, in light of the language set forth in Executive Law § 63; the common issues of law and fact presented; and the acknowledged binding effect of this court's determination in the plaintiff's action upon any administrative proceeding conducted or to be conducted by the defendant-intervenor, along with, the potential inadequacy of representation upon such issues absent permission to intervene, the court does find a sufficient basis to permit intervention by the Office of the Attorney General. As such, based upon the foregoing, the motion is granted and the defendant-intervenor is made a party to the underlying action. Moreover the defendant-intervenor is permitted to interpose the proposed counterclaims for the court's determination upon the instant action. Any proposed answer and/or counterclaims are to be served upon the plaintiff within thirty days of the date of this decision and order.

This memorandum shall constitute the decision and order of the court. The original decision and order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

DATED: October 29, 2014
Ballston Spa, NY

ENTERED
Craig A. Hayner
Craig A. Hayner
Saratoga County Clerk

[Signature]
HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

2014 OCT 31 AM 11:45
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

The following papers were read and considered:

1. Notice of Motion to Intervene dated July 28, 2014;
2. Affidavit of Sandra Pullman, Esq. dated July 28, 2014 with attached exhibits "A" through "C";
3. Defendant-Intervenor's Counterclaims dated July 28, 2014;
4. Motion to Intervene dated July 28, 2014;
5. Affidavit of David H. Pentkowski, Esq. dated August 4, 2014 with attached exhibits "A"; and
6. Defendant-Intervenor's Supplemental Brief in Support of its Counter-Claims dated September 22, 2014.