

**Board of Mgrs. of the Bldg. Condominium v 13th &
14th St. Realty, LLC**

2015 NY Slip Op 30860(U)

May 20, 2015

Supreme Court, New York County

Docket Number: 100061/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BOARD OF MANAGERS OF THE A BUILDING
CONDOMINIUM, *et al.*,

Index No. 100061/11

Plaintiffs,

Mot. seq. no. 025

-against-

DECISION ORDER

13th & 14th STREET REALTY, LLC, *et al.*,

Defendants.

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BARBARA JAFFE, J.:

For plaintiffs:

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By notice of motion, plaintiffs move pursuant to CPLR 3217(b) for an order permitting plaintiffs Jonathan Behling and Renee Furini, Scott Center, Joon Choi, Yvonne Chung, Gregory Decter, Brandon Evans, Ryan Feeney, Tamara Finger, Jack Hasler, Adriana Kertzer, Joon Ma and David Silverstein, Paul Mower, Theresa and Glenn Mueller, Zachary C. Present, Ryan Rampersaud, Robert Reese, Kelly B. Scher, Veronica Song, Andrew Steinthal, Hana Sykorova, Natascha Tillmanns, Joel, Barbara, and Arielle Winnik, Ray Yeung, Angela Yim, Elinor Zach, Lona Prasad, Lauren and Brian Weisenthal, Khey Hy, Ben Phillips, Kevin Potter, Luke Baker,

and Joseph Del Rio to withdraw from this action without prejudice and to amend the caption to reflect their withdrawal. Defendants Hudson Meridian Construction Group LLC, 13th & 14th Street Realty, LLC, Magnum Management, LLC, and Ascend Group, LLC (sponsors), Crystal Curtain Wall System Corp. and Crystal Window and Door System, Ltd. (Crystal), and Taube Management Realty, LLC, oppose.

I. BACKGROUND

This action arises from the allegedly defective construction of a condominium. Plaintiffs individual unit owners seek monetary damages based on causes of action for, *inter alia*, negligence, professional malpractice, defective construction, breach of warranty, fraud and/or negligent misrepresentation, and breach of contract. (NYSCEF 145). The Board of Managers of the A Condominium is also a plaintiff.

Pursuant to its statutory obligation, sponsors submitted to the office of the New York State Attorney General an offering plan for the condominium project, which provided, as pertinent here, that the Board may “bring or defend against any proceedings that may be instituted on behalf of, or against, the Unit Owners” (NYSCEF 1240, 1266).

In October 2013, Crystal and sponsors sought documentation from plaintiffs pertaining to the alleged defective units, and lists of potential witnesses. (NYSCEF 582, 1270). By compliance conference order dated November 6, 2013, I ordered plaintiffs-unit owners to respond to sponsors’ and Crystal’s discovery demands, produce documentation of repairs to their units, and provide the location of any claimed damages in their units and a proposed schedule for their depositions. (NYSCEF 582). By compliance conference order dated January 15, 2014, I ordered that the completed deposition schedule be distributed at the next compliance conference,

and that plaintiffs provide a list of units to be inspected. (NYSCEF 625).

By demand dated August 20, 2014, sponsors renewed their earlier demand, requesting many emails regarding, *inter alia*, the sale, lease, or refinancing of individual units. (NYSCEF 1271). Instead of providing the demanded discovery, plaintiffs interposed this motion.

Following the filing of this motion, plaintiffs Ryan Rampersaud and Joon Choi withdrew their applications for a discontinuance (NYSCEF 1306), and plaintiff Joel Winnik died. (NYSCEF 1314).

At oral argument, I ordered the parties to submit proposed conditions to accompany an order of discontinuance for the above-named plaintiffs-unit owners, and indicated that additional legal arguments would not be entertained. (NYSCEF 1390).

II. CONTENTIONS

Defendants propose, as conditions to an order granting a discontinuance, that plaintiffs-unit owners provide them with all documentation related to the purchase, sale, refinance, and lease of condominium units, and comply with outstanding discovery demands, and that upon their review of the responses, that plaintiffs produce the above-named plaintiffs for deposition at plaintiffs' expense, that service of process be simplified, that above-named plaintiffs submit affidavits of compliance thereof, and that the Board waives its right to maintain any claims on above-named plaintiffs' behalf. (NYSCEF 1383).

And, if the discontinuance is ordered without prejudice, defendants also propose that should the above-named plaintiffs seek to reinstate their claims, they must do so 30 days before filing the note of issue, that the action be stayed 90 days to conduct additional discovery, and that the above-named plaintiffs' failure to produce discovery thereunder will result in dismissal of

their claims with prejudice. (*Id.*).

Sponsors otherwise argue that if plaintiffs' motion is granted, the Board will likely advance their claims, which would require them to seek discovery from non-parties as opposed to parties, thereby hampering discovery. (NYSCEF 1260).

Hudson Meridian adds that the obligation of seeking discovery from non-party unit owners will greatly increase defense costs, burden the court, and raise complex attorney-client privilege issues. It also alleges that discovery is incomplete, as there are pending demands for documentation pertaining to refinancing and the sale or lease of individual units. (NYSCEF 1247). Crystal and Taube adopt sponsors' and Hudson Meridian's arguments. (NYSCEF 1295, 1304).

In reply, plaintiffs contend that defendants do not demonstrate prejudice to a substantial right or other improper circumstances resulting from plaintiffs' motion, and argue that nothing precludes defendants from deposing or otherwise seeking discovery from withdrawing plaintiffs as non-party witnesses. Moreover, plaintiffs deny having ignored discovery demands, and contend that to date, they have contributed to a good-faith exchange of discovery materials. (NYSCEF 1306). In lieu of proposed conditions to accompany an order of discontinuance, they submit further legal argument (NYSCEF 1384), which I do not consider.

III. ANALYSIS

An action may be discontinued upon order and upon terms and conditions as the court deems proper (CPLR 3217[b]), and such a determination is within the courts' sound discretion. (*Tucker v Tucker*, 55 NY2d 378 [1982]). A discontinuance should be granted absent a showing of prejudice to adverse parties or other special circumstances. (*Bank of Am., Nat. Assn. v*

Douglas, 110 AD3d 452 [1st Dept 2013]). Delay, frustration, and expense do not ordinarily constitute prejudice warranting the denial of a motion for a voluntary discontinuance. (*Eugenia VI Venture Holdings, Ltd. v Maplewood Equity Partners, L.P.*, 38 AD3d 264, 265 [1st Dept 2007]).

Whether plaintiffs-unit owners' claims are withdrawn with or without prejudice is a difference without practical significance here, as the offering plan authorizes the Board to advance those claims so long as they relate to common structural elements or more than one unit. (See Real Property Law § 339-dd [condominium board of managers authorized to bring action on behalf of unit owners "relating to the common elements or more than one unit"]). And, a final judgment or settlement of the Board's claims on behalf of withdrawing plaintiffs-unit owners bars future related claims brought by them, whether or not the motion is granted with or without prejudice. (See *All Terrain Props., Inc. v Hoy*, 265 AD2d 87, 96 [1st Dept 2000] [*res judicata* applies to "those whose interests are represented by a party to the action, and possibly coparties to a prior action"], citing *Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]).

Moreover, that great expense has been and will be incurred, and that other procedural hardships may result from granting the motion without prejudice, does not constitute prejudice (see *Pearson v New York City Health & Hosps. Ctr.*, 43 AD3d 92, 99 [1st Dept 2007] [expenses incurred and delay resulting from withdrawal did not constitute prejudice]; see also *In re Vitamins Antitrust Litigation*, 198 FRD 296, 304-305 [D DC 2000] [although some plaintiffs moved to withdraw, defense expenses incurred were inevitable where there remained other plaintiffs pursuing litigation]), and defendants only speculate as to plaintiffs' motives (see *Hurrell-Harring v State*, 112 AD3d 1213, 1215 [3d Dept 2013] [defendant made no claim that

withdrawal of seven plaintiffs was based on improper motive]). In any event, having to pursue discovery from nonparty witnesses constitutes minimal hardship. (*See Kapon v Koch*, 23 NY3d 32, 38 [2014] [adopting more lenient “material and necessary” standard of First and Fourth Departments: “so long as disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty”]; *see also Hoag v Chase Pitkin Home & Garden Ctr.*, 252 AD2d 953, 953-954 [4th Dept 1998] [existing discovery demand for third-party defendant not foreclosed by stipulation of discontinuance of third-party action, where that party could still be deposed as nonparty witness]; *see also Westchester County v Welton Becket Assocs.*, 102 AD2d 34, 50 [2d Dept 1984] [intent to subpoena former parties insufficient to prevent their withdrawal]).

However, an illegitimate motive for moving to discontinue may warrant denying the motion (Siegel-NYPrac § 297 [5th ed.]), or imposing conditions on the discontinuance (*Hempstead Pain and Med. Svcs. v Progressive Cas. Ins. Co.*, 2003 NY Slip Op 51319[U] [Dist Ct, Nassau Co. 2003]), and here, plaintiffs-unit owners’ delay in responding to defendants’ demands constitutes some indication of an attempt to avoid discovery, thereby warranting the imposition of conditions for the discontinuance.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs’ motion for an order discontinuing the action as to the above-named plaintiffs, except for plaintiffs Ryan Rampersaud, Joon Choi, and Joel Winnik, is granted without prejudice, and the caption is hereby amended to reflect that contained in plaintiffs’ affirmation in support of their motion (NYSCEF 1161), upon satisfaction of the following

conditions:

(1) all above-named plaintiffs shall, on or before July 3, 2015, and prior to the issuance of an order finalizing their withdrawal from this case, provide documents, including but not limited to relevant emails, relating to the purchase, sale, refinance, and lease of their condominium units, as well as all other outstanding discovery outlined in defendant Crystal Curtain Wall System Corp. and Crystal Window and Door System, Ltd.'s demands, as well as defendants 13th & 14th Street Realty, LLC, Magnum Management, LLC, and Ascend Group, LLC's demands through August 2014;

(2) defendants Hudson Meridian Construction Group LLC, 13th & 14th Street Realty, LLC, Magnum Management, LLC, and Ascend Group, LLC, Crystal Curtain Wall System Corp. and Crystal Window and Door System, Ltd., and Taube Management Realty, LLC, shall review the sufficiency of the aforementioned discovery responses and report same to the Court at a reasonable date to be determined at the June 3, 2015 compliance conference;

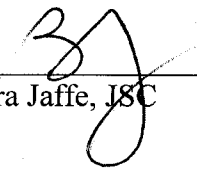
(3) plaintiff Board of Managers of the A Building Condominium agrees that it will produce every above-named plaintiff for deposition, and agrees to accept service upon counsel for plaintiff Board of Managers of the A Building Condominium as proper service upon the above-named plaintiffs;

(4) following each plaintiff's satisfaction of the discovery demands and appearance for deposition, the parties shall file a stipulation as to that plaintiff-unit owner's withdrawal from the action; and

(5) should any of the above-named plaintiffs seek to revive and prosecute his or her claims, he or she must do so at least 30 days before a note of issue is filed by remaining

plaintiffs.

ENTER:



Barbara Jaffe, JSC

DATED: May 20, 2015
New York, New York