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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PHILIPPE DELGRANGE,

Plaintiffs,

INDEX NO. 151651/13

-against-

MADISON IMMOBILIER, LLC, ROBERTO CAVALLI, INC., ROBERTO CAVALLI, USA, INC., JEAN-PIERRE LEHMANN, and JOHN DOES 1-25,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff Phillipe Delgrange ("Delgrange") moves to amend his complaint (1) to identify one of the John Doe defendants as ZR Continental Corp. ("Continental"), (2) to include allegations that the time frame of events extends beyond December 1, 2012 through February 28, 2013, and (3) to include a cause of action compelling defendants to comply with the building code. Defendants Madison Immobilier LLC ("Madison") and Jean-Pierre Lehmann ("Lehmann")(together "the Madison defendants") oppose the motion, except insofar as it seeks to add Continental as a defendant.

Background

This action arises out of certain construction work ("the project") performed at 25 East 63rd Street, New York, NY, known as 711 Madison Avenue ("the Premises"). Plaintiff Phillipe Delgrange ("Delgrange") is a residential tenant of the Premises. Madison is a New York limited liability company, and the owner of the Premises. Lehmann is Madison's Chief Executive and the sole owner of the two members that own Madison. Continental was engaged by Madison as the construction manager on the project. Non-party Edward Rutan ("Rutan") is Continental's President.

The project has its genesis in a modification and extension agreement entered into between Madison and non-party Art Fashion Corp.[1] ("Art Fashion") in December 2010, to expand the size of Art Fashion's retail store to include space leased by Le Bilbouet, a French restaurant that then occupied the first floor and the basement of the 63rd Street side of the Premises. Poupetto is the owner of Le Bilbouet, and Delgrange was Poupetto's President.

As a result of the lease modification and the expansion of Art Fashion's space, Madison decided not renew Bilbouet's lease. Defendants maintain that before Bilbouet's lease expired in 2012, there were efforts by Mr. Ronald Perelman, who was a partner with Delgrange in Poupetto, to pressure Madison into renewing the lease for the restaurant. They cite the sworn statement of Edward Rutan, the President of Continental that Mr. Perelman called him no less than six times "pressing me on the issue" of renewing the restaurant's lease and that Mr. Perelman stated that if he did not that it "'would be the worst decision of your life.'"

The amended complaint alleges that the project involves extensive renovation and demolition work to convert the space from a restaurant and apartment into a retail store. It is further alleged the certain DOB permits were required to perform the work, including an application to change to Certificate of Occupancy, and that such application was denied, but that a permit was granted with respect to certain demolition work. In addition, it is alleged that as part of the process of obtaining permits defendants were required to obtain the services of a certified asbestos inspector, file an Asbestos Assessment Report ("ACP-5") and other plans and reports with DOB. It is alleged "on information and belief" that on or about December 19, 2012, defendants caused to be filed a ACP-5 which falsely stated the area of the Premises affected by

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[1]Art Fashion was originally named as a defendant in this action; however, by decision and order dated October 18, 2013, the court granted its motion to dismiss the complaint against it. In addition, by stipulation dated April 30, 2013, the action was discontinued as against defendants Robert Cavalli, Inc. and Robert Cavalli, USA, Inc.

the work was free of asbestos containing material, and that on or about January 4, 2013, defendants began the demolition work without following proper procedures to protect the tenants in the Premises from asbestos exposure. It is also alleged that Lehmann was personally involved in the project including, but not limited to, directing that the demolition and construction continue, without filing the appropriate documents, and that he knew or should have known and/or recklessly disregarded that there was asbestos on the premises.

The amended complaint next alleges that on February 5, 2013, a DEP inspector visited the Premises and inspected the area where the demolition work was being performed and issued a stop work order on or about February 7, 2013, which is annexed to the complaint. The stop work order requires that for work to resume, an amended ACP-5 must be submitted and approved by DEP, and that the ACP-5 be accompanied by an official laboratory bulk sample result(s). It is alleged "upon information and belief" that the work is continuing in the space despite the stop work order issued by DEP.

The amended complaint asserts causes of action for (1) an injunction enjoining defendants from proceeding with the work until such time as the Stop Work Order has been lifted and the asbestos properly abated, (2) interference with plaintiff's rights of quiet enjoyment of his apartment and nuisance for which plaintiff seeks compensatory and punitive damages, (3) negligence for which plaintiff seeks compensatory and punitive damages, and (4) breach of the warranty of habitability for which plaintiff seeks a rent abatement.

Delgrange now seeks to amend the complaint to (1) to identify one of the John Doe defendants as Continental, (2) to include allegations that the time frame of events extends beyond December 1, 2012 through February 23, 2013, and (3) to include a cause of action compelling defendants to comply with the Building Code.

Delgrange argues that the proposed amendments are meritorious. With respect to

Continental, Delgrange argues that it is properly a defendant given its role in the project including making applications for permits and ordering asbestos inspections. As for the time frame, Delgrange argues that its proposed amendment to clarify that the complaint is not limited to the period between December 2012 and February 2013, and that such clarification is required as defendants have limited their discovery responses to that period. In this connection, Delgrange argues that the February 28, 2013 end date in the amended complaint is a result of the action being filed on February 22, 2013 and amended on March 7, 2013, and that the exposure period and defendants' improper handling of asbestos containing material continued after that time. In particular, Delgrange contends that in June 2013, after a site inspection ordered by the court, Delgrange discovered partially demolished, exposed and disturbed ceiling plaster work, which tests subsequently revealed contained five times the allowable level of asbestos, and Delgrange submits of photograph of the area in question in support of these allegations. Moreover, Delgrange asserts that defendants' practices relating to performing inspections and investigations for asbestos for the full years of 2012 and 2013 are relevant to the question of whether Delgrange was exposed to asbestos. In support of this position, Delgrange submits an affidavit from an asbestos inspector, Robert Jordan, which was previously submitted in connection by the Madison defendants' opposition to Delgrange's motion for an attachment, and notes that Jordan states that the initial ACP-5, which he was responsible for filing, was based on his inspection of the Premises on July 1, 2011.

Next, Delgrange argues that its proposed cause of action seeking to compel defendants to comply with New York Building Code, has merit as the plan for the project, as evidenced by drawings attached to the motion papers, show that the construction violates the Building Code in several respects including by failing to provide for sufficient egresses, failing to have a separate stairway for residential, allowing the commercial elevator to open into the residential stairwell,

failing to have a required safety door, and allowing another door to block an exit. In addition, Delgrange argues that even though the subject plan were initially approved by the Building Department, which issued a permit for the work, such approval does not bar the proposed claim since the permit may be revoked if not in compliance with the Building Code. Moreover, Delgrange argues that violation of the Building Code has the same effect of a statutory violation for tort purposes.

While the Madison defendants oppose the motion on the various grounds, including that Delgrange's papers lack an affidavit of merit, the Madison defendants do not oppose the proposed amendment of the caption to identify Continental as one of the John Doe defendants, and at oral argument their counsel indicated that he did not object to the addition of paragraph 11 of the proposed second amendment complaint which alleges that Continental served as a construction manager and general contractor for the project.

With respect to expanding the time frame of the complaint, at oral argument, counsel for the Madison defendants did not object to (1) the addition of paragraph 6 relating to the condition of the ceiling plasterwork on the on the third floor as late as June 2013 and the levels of asbestos in the ceiling plasterwork, (2) an allegation added to paragraph 18 stating that the ACP-5 report was purportedly based on inspections of the Premises that purportedly took place in July 2011, (3) the addition of paragraph 25 which contains allegations relating to the presence of asbestos in the exposed plasterwork on the third floor ceiling at the Premises and that the condition continued at least through June 2013.[2]

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[2]The Madison defendants originally opposed the proposed amendment to expand the time period of the action until June 2013,based on statements in the affidavit of Brian Donohue, a Vice President at Continental that the work on the third floor apartment that was inspected in June 2013 was sealed and test readings for asbestos in June 2013 taken by the Madison defendants' consultant showed that there was no asbestos in the air on third floor of the Premises or the fourth floor where Delgrange's apartment is located.

However, the Madison defendants oppose the motion to the extent it seeks to add the proposed fifth cause of action against Madison, which alleges violations of the Building Code and seeks an injunction compelling defendants to rectify the alleged violations, and allegations related to such purported violations, including those contained in paragraphs 7 and 26. The Madison defendants point out that none of the alleged hazardous condition related to the alleged Building Code violations are relevant to the alleged asbestos exposure at issue in this action. In addition, the Madison defendants argue that Delgrange fails to provide any proof to support its claim of a Building Code violations, nor does he allege any actual injury or specific harm from the alleged violations such that would give rise to a cause of action for injunctive relief. They further argue that Delgrange must exhaust his administrative remedies before seeking relief here.

In reply, Delgrange argues that an affidavit of merit is no longer a requirement of a motion to amend and, in any event, notes that the proposed second amended complaint is verified by Delgrange. In addition, Delgrange argues that the there is no requirement that he exhaust administrative remedies or specify damages since the alleged violations involving health and safety issues, and, in any event, the allegations support a claim for a private nuisance.

Discussion

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). However, "if the proposed amendments are totally devoid of merit and legally insufficient leave to amend should be denied." Mosaic Caribe, Ltd. v. AllSettled Group, Inc., 117 AD3d 421, 422 (1st Dept 2014); see also, MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted).

Here, there is no assertion of prejudice or surprise related to the proposed amendments,

and as the Madison defendant do not object to the amendments as to Continental or as to time frame, the only issue is whether Delgrange has adequately demonstrated the merit of the proposed fifth cause of action concerning alleged violations of the building code and related allegations.

However, the court finds that Delgrange has not established a prima facie merit of the proposed fifth cause of action, which is based solely on the unsubstantiated statements of his attorney that the subject plans violated the Building Code and a copy of the drawings of the plans which purport to identify such violations. Notably, it is undisputed that the Department of Buildings has approved the plans which allegedly contain the violations and, while such approval is subject to review (see e.g., Matter of Parkview Assoc. v. City of New York, 71 NY2d 274, cert denied, 488 US 801 (1988)), in this instance, Delgrange provides no basis for his assertions that the plans do not comply with the Building Code. See e.g.. Mason v. 12/12 Realty Associates, 158 AD2d 334 (1st Dept 1990)(holding that counterclaim seeking declaration and injunction related to tenants' alleged failure to meet criteria of zoning resolution did not present justiciable issue where latest report of the Department of Buildings showed there were not violations of law and defendants' arguments that the latest inspection was erroneous were purely self-serving and unsupported by the record).

Moreover, in the absence of any specific injury to Delgrange arising out of such purported violations, the proposed fifth cause of action does not provide a basis for injunctive relief. See Ilson v. Incorporated Village of Ocean Beach, N.Y., 79 AD2d 697 (2d Dept 1980)("the law is settled that an individual property owner may not maintain an action for an injunction to restrain an alleged violation of an ordinance in the absence of a showing of special damage or injury occasioned thereby"). Similarly, Delgrange cannot state a viable tort claim as he fails to allege that he suffered any specified injuries or damages as a result of the purported Building Code

violations. Compare Read v. SL Green Operating Partnership, LP, 30 AD3d 189 (1st Dept 2006)(plaintiff stated a claim for negligence based on evidence the building owner's violation of Building Code related to protecting its sprinkling system caused sprinklers to freeze and burst resulting in $500,000 in damages to plaintiff's property).

Finally, as the purported Building Code violations are not alleged to have given rise to the type of recurring conditions that substantially interfere with Delgrange's use and enjoyment of his property, there can be no claim for private nuisance. Compare Berenger v. 261 West LLC, 93 AD3d 175 (1st Dept 2012)(triable issues of fact existed as to whether plaintiff penthouse owners had a viable claim for private nuisance based on allegations that noise which emanated from cooling towers on roof of condominium building in violation of the building code were excessive, recurrent and unreasonable such that it constituted an intentional interference with plaintiffs' use and enjoyment of their property).

Accordingly, the motion to amend to include the proposed fifth cause of action and related allegations is denied.

In view of the above, it is

ORDERED that the motion to amend is granted to the extent of permitting Delgrange to amend its amended complaint to (1) to identify one of the John Doe defendants as ZR Continental Corp. and to include allegations in the proposed second amended complaint related to Continental, and (2) to include allegations that the time frame of events extends beyond December 1, 2012 through February 28, 2013 to the extent alleged in the proposed second amended complaint; and it is further

ORDERED that the motion is denied to the extent that it seeks to add the proposed fifth cause of action and allegations related to that proposed cause of action, including paragraphs 7 and 25 of the proposed second amended complaint; and it is further

ORDERED that within 20 days of the e-filing of this decision and order, Delgrange shall efile a second amended complaint consistent with this decision and order; and it is further

ORDERED that defendants shall answer the second amended complaint within 30 days of its efiling; and it is further

ORDERED that a status conference shall be held on August 20, 2015 at 9:30 am in Part 11 room 351, 60 Centre Street, New York, NY.

DATED: May 21, 2015

HON. JOAN A. MADDEN
J.S.C.