

Gallo v Bell

2015 NY Slip Op 32220(U)

October 29, 2015

Supreme Court, Putnam County

Docket Number: 2127/14

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

Dispo

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF PUTNAM

-----X

JOHN R. GALLO,

Plaintiff,

-against -

JOHN W. BELL, Individually, JAMES P. MULLEN, Individually, and JASON STRAUCH, Individually,

Defendants.

-----X

LUBELL, J.

DECISION & ORDER

Index No. 2127/14

Sequence No. 1 & 2

Motion Date 8/3/15

The following papers were considered in connection with Motion Sequence #1 by defendants for an Order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(7) and granting summary judgment; and Motion Sequence #2 by plaintiff for an Order pursuant to CPLR 3025(b), granting plaintiff leave to file and serve an amended summons and complaint, along with such other and further relief as to this Court may deem just and proper:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-F	1
AFFIRMATION IN RESPONSE AND OPPOSITION/EXHIBIT 1-3	2
REPLY AFFIRMATION	3
MEMORANDUM OF LAW	4
MEMORANDUM OF LAW	5
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS 1-8	6
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Plaintiff, an owner of a residential condominium unit at the condominium development known as The Retreat at Carmel - Phase II

("Condo II"), brings this action against the various defendants in their individual capacities (although all are members of the Board of the Retreat at Carmel Condominium II) seeking a permanent injunction ordering non-party, The Retreat at Carmel Home Owners Association, Inc., to designate an accessible/handicap parking space in the parking garage of Condo II, a permanent injunction against the defendants requiring permanent removal of artificial turf and a walkway in the common area of Condo II, compensatory and exemplary damages, and costs, disbursements and counsel fees in connection with the action.

Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(7) and an Order granting summary judgment thereon. Plaintiff cross moves pursuant to CPLR 3025(b) for leave to file and serve an amended summons and complaint.

CROSS-MOTION TO AMEND

"CPLR 3025(b) provides that leave to amend pleadings 'shall be freely given upon such terms as may be just.' Thus, motions for leave to amend are liberally granted absent prejudice or surprise" (Long Is. Tit. Agency, Inc. v. Frisa, 45 A.D.3d 649, 649, 846 N.Y.S.2d 253, quoting CPLR 3025[b]). "A court hearing a motion for leave to amend will not examine the merits of the proposed amendment 'unless the insufficiency or lack of merit is clear and free from doubt ... In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied'" (Long Is. Tit. Agency, Inc. v. Frisa, 45 A.D.3d at 649, 846 N.Y.S.2d 253, quoting Ricca v. Valenti, 24 A.D.3d 647, 648, 807 N.Y.S.2d 123).

(Young v. Estate of Young, 84 AD3d 1359, 1360 [2d Dept 2011]).

The motion to amend the pleadings is denied. The Court finds that the proposed amendments are palpably insufficient and totally devoid of merit such that leave should not be granted (see Long Is. Tit. Agency, Inc. v. Frisa, 45 A.D.3d at 649).

At the forefront, plaintiff's attempt to prosecute this action as a class action is misplaced. At the very least and for this reason alone, plaintiff, as the "class representative", cannot establish that "the class is so numerous that joinder of all

members is impracticable" (CPLR 901[a][1]). Additionally, given the nature of many of the claims advanced by plaintiff, the Court is hardly persuaded that "there are questions of law or fact common to the class which predominate over any questions affecting only [plaintiff]" (CPLR 901[a][2]) and, given the history of the underlying controversies, it can hardly be said that plaintiff, as the representative party, "will fairly and adequately protect the interests of the class" (CPLR 901[a][4]). Finally, there is no showing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901[a][5]) which, again, and for the most part, appears personal to plaintiff.

The contentions raised by plaintiff regarding alleged final site plan and building code violations are supported by the April 21, 2015 letter of the Building Inspector of the Town of Carmel. However, the allegations are properly and adequately refuted in the responsive letters of April 28, 2015 and May 5, 2015 from counsel to Pulte Home New York, LLC, a proposed additional defendant, to the Building Inspector. In any event, there is no indication that any such violations have been filed by the Building Inspector and, furthermore, these are matters best first addressed at the local level.

Defendants opposition to plaintiff's motion makes further note that some of the additional defendants sought to be added to the action, such as the property management company, Stillman Management Inc., and its employee, Robert Conca (sought to be sued in his individual capacity), appear to be nothing more than agents for disclosed principals who acted on behalf and at the behest of the Board (Crimmins v Handler & Co., 249 AD2d 89, 91-92 [1998]).

The Court makes further note that plaintiff has failed to name a necessary party, i.e., the condominium owner who now owns and occupies the garage parking spot once designated for handicap parking.

MOTION TO DISMISS

Defendants' motion to dismiss the First Cause of Action wherein plaintiff alleges a violation of the Fair Housing Act (42 USC §3601, et seq.) and the Second Cause of action wherein plaintiff alleges a violation of Executive Law §296 is granted.

To the extent relevant to the Court's determination, the complaint fails to raise an inference that the removal of the handicap parking spot from the inside garage where all residents,

including plaintiff, have assigned parking spots "occurred under circumstances giving rise to an inference of discrimination" (Sayeh v. 66 Madison Ave. Apt. Corp., 73 AD3d 459, 461 [1st Dept 2010] citing Dunleavy v. Hilton Hall Apts. Co., LLC, 14 AD3d 479, 480 [2005]; Mitchell v. Shane, 350 F3d 39, 47 [2003]).

Furthermore, plaintiff does not allege that he enjoyed any special or personal entitlement to the removed parking spot over and above that of any other person or person with a disability. Nor does plaintiff allege that defendants "refuse[d] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [him] equal opportunity to use and enjoy [his] dwelling" (Lindsay Park Hous. Corp. v. New York State Div. of Human Rights, 56 AD3d 477, 478 [2d Dept 2008], Executive Law §296 [18][2]). This is especially pertinent given the fact that he, like other owners, have use and access to an assigned parking spot in the garage in which the handicap parking spot was removed.

Plaintiff concedes that "[he] does not object to the individual changes to the common area, but rather the funds spent on it and the associated noise" (Affirmation in Response of Jonathan M. Victor, Esq. dated December 30, 2014, par "20"). The Third Cause of Action is, in any event, dismissed as protected by the Business Judgment Rule, *i.e.*, these are decisions regarding the expenditure of funds about which the Court will not interfere absent special circumstances not here shown to be present.

Finally, the Fourth Cause of Action, although couched in terms of "Breach of Fiduciary Duty", is, in fact, a reiteration of the causes of action hereinabove found deficient. As such, the Fourth Cause of Action is dismissed.

There being no merit to these or any other arguments advanced in opposition to defendants' motion to dismiss, it is hereby

ORDERED, that plaintiff's motion to amend the complaint is denied and defendants' motion to dismiss the action is hereby granted in all respects.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
October 29, 2015

S/

HON. LEWIS J. LUBELL, J.S.C.

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