

**New York State Div. of Human Rights v Woodview
Condominium Assoc., Inc.**

2015 NY Slip Op 32659(U)

September 30, 2015

Supreme Court, Richmond County

Docket Number: 150213/15

Judge: Charles M. Troia

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This opinion is uncorrected and not selected for official publication.

FILE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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NEW YORK STATE DIVISION OF HUMAN RIGHTS,
On the Complaint of John F. Mulvey,

Plaintiff,

- against -

WOODVIEW CONDOMINIUM ASSOCIATES, INC.
And DAWNING REAL ESTATE INCORPORATED,
Defendants.

DCM 1M
Present:
HON. CHARLES M. TROIA

DECISION AND ORDER
Index No.: 150213/15
Motion Nos: 1155-001
1994-002

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The following papers numbered 1 to 5 were fully submitted on the 12 day June, 2015:

	Papers Numbered
Notice of Motion to Dismiss the Complaint (dated March 16, 2015).....	1
Notice of Cross-Motion for Disclosure and to Amend the Caption (dated May 21, 2015).....	2
Plaintiff's Affirmation In Support of Cross-Motion, with Exhibits (dated May 21, 2015).....	3
Defendants' Affirmation in Opposition to Cross-Motion, with Exhibits (dated May 27, 2015).....	4
Plaintiff's Reply, with Exhibits (dated June 9, 2015).....	5

Upon the foregoing papers, defendants' motion, *inter alia*, to dismiss the complaint pursuant to CPLR 3211(a)(1), 3211(a)(2) and 3211(a)(7) is denied. Plaintiff's cross motion to compel discovery and to amend the complaint is granted.

Plaintiff, New York State Division of Human Rights on the complaint of John F. Mulvey (hereinafter "plaintiff"), commenced this proceeding pursuant to, *inter alia*, Human Rights Law Sections 292.21, 296, 297. Specifically, plaintiff alleges that defendants have failed to provide plaintiff with a reasonable accommodation for his disability. On or about March 31, 2014,



plaintiff made a determination finding there was probable cause. Defendants notified plaintiff, on April 8, 2014 that they wanted the claims adjudicated in a state court, pursuant to New York Executive Law Section 279.9. Plaintiff filed and served the complaint upon defendants on March 17, 2015.

Defendants move to dismiss plaintiff's complaint. Specifically, defendants contend that plaintiff lacks standing to commence this action. In addition, defendants contend that the action is time barred and that they have suffered prejudice. Further, defendants contend that plaintiff has named the wrong party and that this action should be dismissed.

In support of their motion, defendants argue that plaintiff is not a person with disabilities as defined under New York Executive Law Section 292.21 and that he lacks privity with defendants. Defendants argue plaintiff is not a tenant of either defendant, but a tenant of the Condominium Unit owner, John Rizotti. Defendants argue that the Board of Managers of the Condominium (hereinafter "condominium") was not provided with prior written notice as required by the By-Laws, prior to Rizotti having leased his unit to plaintiff. Hence, defendants argue that they fail to qualify as an "owner, lessee, sublessee, assignee, or managing agent of or other person having the right of ownership of, or possession of, or the right to rent or lease housing accommodation..." pursuant to Section 296.18(2) of the Executive Law,

As to this matter being time barred, defendants contend that plaintiff commenced this action approximately one year beyond the time limitation set forth in Executive Law Section 297.4(a). Moreover, defendants assert that the defendant condominium is improperly named and is thus a wrong party, the correct name for defendant being "The Board of Managers of Woodview Condominium." Further, defendants contend that defendant Dawning Real Estate,

Inc. (hereinafter "Dawning") has no decision making authority and is merely a managing agent for the board . Finally, defendants assert that plaintiff's request for elevator service on the 4th floor is unreasonable as a new certificate of occupancy would have to be acquired and that the renovations are cost prohibitive.

Plaintiff opposes the motion and cross moves to compel discovery and for leave to amend the complaint. Plaintiff argues that the disabled individual has lived in his unit located in the condominium for approximately twenty years and that defendants had actual and/or constructive notice of the disabled individuals' tenancy.

The disabled individual maintains that he later began to suffer and continues to suffer from various health conditions, including but not limited to arthritis, coronary heart disease, and lupus. According to plaintiff, the tenant has difficulty walking, climbing stairs, carry items and standing for extended periods of time. Plaintiff maintains that the tenant is a person, under New York Executive Law Section 292.21, with a disability.

In order to accommodate his disabilities, the tenant maintains that he has made repeated requests to defendants to have elevator service and a trash chute on the 4th floor, including but not limited to having made oral requests to the superintendent in 2012. It is undisputed that floors 1, 2, 3, 5, and 6 are all serviced by 2 elevators. However, neither elevator stops on the 4th floor and the only entrance to the tenant's unit is on the 4th Floor. The closest trash chute is on either the 3rd or the 5th floor. Plaintiff maintains defendants' denial of elevator access on the 4th floor denies the tenant his equal opportunity to use and enjoyment of the unit.

On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit

of every possible favorable inference (*Granada Condominium III Assn. v. Palomino*, 78 AD3d 996 [2nd Dept. 2010]). Here, inasmuch as the tenant purportedly has difficulty walking and climbing stairs, carrying items, standing for extended periods time and that he often uses a cane or walker to ambulate raises a question of fact as to whether he is a person, under New York Executive Law Section 292.21, with a disability. There are also issues of fact as to whether the disabled individual may be deemed to be a tenant of the defendants. The tenant resided in this unit for approximately 20 years. Defendants may be on notice that the tenant was residing in unit and failed to raise any objection or take any action to remove him as tenant (*c.f. Schwartz v. Certified Mgmt. Corp.*, 117 AD2d 521-523 [1st Dept. 1986]). Knowledge of the tenancy may be imputed to defendants (*c.f. Schwartz* at 522).

As to this action being time barred, the statutory time limitations set forth in section 297 of the Executive Law is directory rather than mandatory (*see State Div. Of Human Rights v. Board of Edu. Of School Dist. Of City of Niagra Falls*, 59 AD2d 1048 [4th Dept. 1977]). This Court finds that one year passage of time was certainly not egregious and defendants have failed to identify any real prejudice they suffered from the delay.

As to amendment of the complaint, generally, leave to amend a pleading should be freely given provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see, Ortega v Bisogno & Meyerson* 2 AD3d 607 [2nd Dept. 2003]). Again, defendants have not substantiated the claims of prejudice. Accordingly, leave to amend the complaint is granted.

Finally, as the discovery sought by plaintiff is reasonable and necessary for it to prosecute this matter, the branch of the cross motion seeking discovery is granted. Defendants are directed to provide this information within thirty (30) days of service of this order on defendants

This constitutes the decision and order of the Court.

Dated: September 30, 2015

ENTER,



J. S. C.

Hon. Charles M. Troia
Justice of the Supreme Court

GRANTED
SEP 30 2015

CLERK

