SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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BONNIE LOREN and PROCESS STUDIO THEATRE, INC.,

Plaintiffs,

Index No. 152558/13

-against-

CHURCH STREET APARTMENT CORP.,

Defendant.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3025(b), 305(c) and 1003, plaintiffs Bonnie Loren (Loren) and Process Studio Theatre, Inc. (Process Studio) move for leave to amend the summons and complaint to add as defendants Ashkenazy Acquisition Corp. (AAC) and 257 Church Retail, LLC (257 CR). They also seek to add Ushca Pohl, Francesca Monari, Ming Lü, shareholders, officers or directors of Church Street Apartment Corp. (CSA) (CSA Defendants), and Michael Ashkenazy, Ben Ashkenazy, Izzy Ashkenazy and Ben Alpert, shareholders, officers or directors of AAC (AAC Defendants). They further move to amend the complaint to assert causes of action against all of the defendants.

AAC, 257 CR and the AAC Defendants oppose the motion. CSA opposes the motion to amend and cross-moves, in the event that the motion is granted, to dismiss the amended complaint pursuant to CPLR 3211 based on collateral estoppel, res judicata, the existence of a release and passage of the statute of limitations.

Background

Since 1982, Loren has occupied space in the basement and sub basement at 257 Church Street in Manhattan (Premises) pursuant to a 43-year and 6-month lease (Affirmation in Support [Supp], Ex B, Proposed Amended Complaint [PAC], Ex A). She subleases space to Process Studio for use as a theater.

Rights to the Premises

Initially Loren and her husband were tenants of Solomon Levine (PAC, Ex A). At some point prior to 1993, CSA became the owner of the building and in 1993 it leased the "ground floor commercial space, cellar and sub-cellar" to Solomon Levine for 99 years (PAC, Ex B). In June 2012, through a bankruptcy proceeding, Levine's leasehold interest with CSA was to be sold to AAC or its assignee subject to Loren's lease (PAC at ¶¶ 26-27; Affirmation in Opposition [Opp], Ex D at 3). In July 2012, Levine's leasehold interest was transferred to 257 CR under those terms (Opp Ex E).

Prior Litigation

In 2002, plaintiffs commenced an action against CSA and Solomon Levine by C. Jaye Berger, Bankruptcy Trustee, in Supreme Court, New York County (the 2002 Action), seeking millions of dollars in damages (Affirmation in Opposition to Motion and in Support of Cross-Motion [Cross], Ex B at ¶ 55). That complaint asserted claims against CSA sounding in

negligence and breach of lease arising out of a flood that occurred in 2000. Plaintiffs alleged that the flood occurred because of a ruptured sprinkler pipe, that there was a leak before the pipe burst, that defendants were negligent in not preventing the pipe from bursting and that as a result of the flood, theater construction had to be suspended and property was damaged (Cross, Ex B at ¶¶ 24-33). Plaintiffs alleged that water was not properly removed from the Premises causing mold and illness (*id.* at ¶¶ 34-40). Plaintiffs explained that in order to prepare the Premises for mold remediation, it was necessary to repair the sidewalk that had previously caved in and that plaintiffs undertook to repair the sidewalk but defendants interfered with the repairs (*id.* at ¶¶ 44-51). They urged that defendants caused plaintiffs to "abandon the leasehold and give up valuable rights" (*id.* at ¶¶ 52-54).

The 2002 Action was eventually removed to the U.S. Bankruptcy Court and made part of a Chapter 11 proceeding (Bankruptcy Proceeding) (Cross, Ex C).

In December 2012, after more than a decade of litigation, the parties resolved their disputes and a Stipulation and Consent Order (Settlement) was so-ordered by the Bankruptcy Court (*id.*, Ex D at 3 [Recital M]). Pursuant to the Settlement, Loren received $52,500 (*id.* at ¶ 2[c]). She "fully, absolutely, unconditionally" released CSA of any

claim[1] to the extent that it "derives from the Bankruptcy Code and arises out of or is related to [the Bankruptcy Proceeding]" that she "ever had, [then had], claims to have had, now claims to have, or hereafter can, shall or may have or claim to have against [CSA] from the beginning of the world and through the date of execution of this release" (*id.* Ex D at ¶ 3).

This Action

In March 2013, mere months after execution of the Settlement, plaintiffs commenced this action against CSA. They now move to amend their complaint to add parties and causes of action. In their 139-paragraph proposed pleading, plaintiffs allege "a series of several instances that comprise a clear pattern of negligence, grossly negligent, and willfully and wantonly intentional conduct committed by [CSA and all the proposed additional defendants] against plaintiffs by virtue of [their] desire to harass and constructively evict [plaintiffs] from the [Premises] and commit wrongful and tortious acts upon Bonnie Loren" (PAC at ¶ 1).

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[1] The Settlement provided that "the term 'Claim' shall have the meaning ascribed to it in Bankruptcy Code § 101(5)" (Cross, Ex D at ¶ 1). The Bankruptcy Code defines a claim as "a right to payment [or an equitable remedy], whether or not such right is reduced to judgment . . . contingent, matured, [or] unmatured" (11 USC § 101[5]).

In their proposed amended complaint, plaintiffs recount years of problems at the Premises. Plaintiffs assert that for decades there have been floods and infestations of vermin, mold and bacteria. They maintain that more recently they have been harmed as well. For example, they claim that:

- defendants have used facade repairs as a pretense to prohibit theater signage since October 2013 (PAC at ¶ 35);
- CSA and AAC have been improperly salting the sidewalk in the winter causing plaintiffs to suffer damage including collapse of the sidewalk in 2014 (*id.* at ¶¶ 51-56);
- in 2013 defendants sealed the side door to the Premises, damaging the door and creating an unsafe condition (*id.* at ¶ 57);
- CSA and AAC have failed to properly maintain the elevator shaft, causing tenants to be trapped and the Fire Department to break locks ("hundreds of times")(*id.* at ¶¶ 59-64).
- AAC gained access to the premises and connected electrical lines in order to steal plaintiffs' electricity (*id.* at ¶¶ 67-71);
- AAC's agents left "dust debris and large amounts of other contracting waste" at the Premises, did work on the first floor that caused construction debris to damage the Premises and "concrete, moldy wood and other moldy substances of various kinds, oily or fatty liquids and other debris" was discharged from the first floor through the theater's ceiling and into the Premises (*id.* at ¶¶ 72-75); and
- since October 2014 AAC permitted the depositing of urine, feces and construction debris into the Premises (*id.* at ¶ 76).

CSA, AAC, 257 CR and the AAC Defendants oppose plaintiffs' motion to amend, urging that the proposed amendments have no merit. Because some of the amendments are not clearly devoid of merit, plaintiffs' motion is granted to the extent set forth.

Analysis

Motion to Amend the Complaint

Pursuant to CPLR 3025(b), leave to amend a pleading should be freely given unless it would result in prejudice or surprise(*McGhee v Odell*, 96 AD3d 449 [1st Dept 2012]). "The movant need not establish the merit of her proposed new allegations, but only that 'the proffered amendment is not palpably insufficient or clearly devoid of merit'" (*Fairpoint Companies, LLC v Vella*, 2015 WL 9464842, ___ AD3d ___ [1st Dept Dec. 29, 2015] quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). The court has discretion to determine whether to grant leave to amend (*Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 [1983]).

The proposed amended complaint contains causes of action that cannot be said to be devoid of merit. Plaintiffs plead facts that are sufficient to state claims for, among other

things, breach of lease, constructive eviction, trespass, conversion (based on AAC/257 CR's alleged use of her electricity before the parties entered into an agreement), negligence and gross-negligence (based on property damage allegedly caused by AAC/257 CR).[2] Their causes of action against defendants seek relief related to the facts that they plead. The court therefore grants leave to amend except as to (1) the fifth and sixth proposed causes of action as the case has already been dismissed as against Lisa Liebert (*see* Decision and Order dated July 22, 2015 NYSCEF DOC. NO. 101) and (2) all of the claims as to all of the individual defendants (*see infra*).

Amendment to Add Parties

"Parties may be added at any stage of the action by leave of court . . . upon such terms as may be just" (CPLR 1003).

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[2] As examples, defendants are alleged to have (1) intentionally and willfully caused the Emergency Sidewalk Egress door to the Plaintiffs' Premises to be sealed with concrete," damaging the door (PAC at ¶ 57); (2) improperly removed signs in October 2013 (*id.* at ¶ 35); (3) been responsible for flooding between 2012 and "present day," causing infestation of mold and bacteria (*id.* at ¶¶ 38, 39, 41), (4) obstructed handicapped access to the premises (*id.* at ¶ 50), (5) improperly cleaned snow and ice from sidewalk (*id* at ¶ 55) and (6) destroyed locks, leaving the Premises vulnerable to criminals/vagrants (*id.* at ¶¶ 59, 64).

The motion to amend to include the CSA Defendants and the AAC Defendants is denied because there are no factual allegations that justify their inclusion in this case.

In the proposed amended complaint, plaintiffs allege in a conclusory manner that "[v]arious owners, employees and agents of defendants and/or landlord and the [CSA Defendants and AAC Defendants] have been repeatedly illegally trespassing upon the premises, in tort and in violation of the lease" (*id.* at ¶ 62). Without naming who or how, plaintiffs generally further assert that the individuals exercised dominion of the organizational defendants and that through their domination of the organizations, the individuals abused the privilege of doing business in the corporate form to perpetrate wrongs and injustices against the plaintiffs (PAC at ¶¶ 79-81). Plaintiffs also assert that there can be personal liability based on "deposits of urine and feces in the . . . demised premises" (Reply Affirmation [Reply] at ¶ 53). They contend that they should be permitted to "conduct discovery in order to pierce the corporate veil and bring liability against the proposed added individual defendants in their individual capacities" (*id.*).

Because plaintiffs do not plead any facts demonstrating what any particular individual defendant did for which there could be personal liability or how any of them purportedly

abused the organizational form, there is no "just basis" upon which to add them as parties. The motion to amend to include the CSA Defendants and AAC Defendants is denied.

The Court will allow plaintiffs to add 257 CR and AAC as defendants and to serve them with the amended complaint. 257 CR by its own account "holds the interest to the ground floor, basement and sub-basement a/k/a/ sub-cellar" (Memorandum of Law For Non-Parties in Opposition to Plaintiffs' Motion [Non-Party Opp] at 3). Plaintiffs, moreover, allege that AAC occupies that space and AAC is a party to a different litigation, commenced by CSA, in which it is named as a co-defendant along with Loren, Process Studio and 257 CR (*Church Street Apartment Corp. v Loren*, 162286/2014). Because the proposed amended complaint sufficiently alleges causes of action against 257 CR and AAC, there is no basis for denying plaintiffs' motion to join them as parties.

CSA's Cross-Motion to Dismiss

In the event that plaintiffs' motion to amend was granted, and it was, CSA cross-moves to dismiss the Amended Complaint pursuant to CPLR 3211(a)(5) based on the statute of limitations, *res judicata* and the Settlement's release.

CSA asserts that any trespass, personal-injury and property-damage claims that accrued prior to March 20, 2010 must be dismissed as time barred by the applicable three-year statute of limitation (Cross at ¶¶ 17-23, 27-29; CPLR 214). The motion is granted except as to causes of action that are alleged to have been caused by "the latent effects of exposure to any substance" (*see* CPLR 214-c[2]). As to causes of action related to damage caused by toxic substances, because plaintiffs allege that there have been numerous floods that caused mold and bacteria, on this record, the Court cannot tell what alleged conditions were caused by which particular flood or whether the same conditions persisted in the same places throughout all of the flooding. Because there may be questions as to when plaintiffs discovered their injuries or through reasonable diligence should have discovered them, the claims related to exposure to substances cannot be subject to a time cutoff at the pleading stage and without any evidentiary showings.

To the extent that plaintiffs seek damages against CSA for any breach of lease prior to March 20, 2007, such claims are dismissed as time barred (*see* CPLR 213). Any claims for damages for constructive eviction that predate March 20, 2012 are also dismissed (see CPLR 215; *Kent v 534 East 11th Street*, 80 AD3d 106 [1st Dept 2010]).

Finally, CSA urges that any and all claims asserted against it in the Bankruptcy Proceeding that were "fully resolved and released in the Bankruptcy Proceeding" cannot be relitigated here (Cross at ¶ 34). The Court agrees and rejects plaintiffs' argument that because none of their claims have to do with the Bankruptcy Code all of their claims are "unaffected by the release" (Reply at ¶ 59). Based on the language of the Settlement and the Bankruptcy Code, which broadly defines "claims," it is clear, at the very least, that there can be no recovery in this action for any and all damages that accrued through December 18, 2012 (the date of the execution of the Settlement) that (1) relate to the 2000 flood or (2) stem from claims asserted in the Bankruptcy Proceeding.

Accordingly, it is

ORDERED that plaintiffs' motion to amend the complaint is granted to the limited extent set forth above. The caption is amended to reflect that the defendants are CHURCH STREET APARTMENT CORP., ASHKENAZY ACQUISITION CORP. and 257 CHURCH RETAIL LLC. Plaintiffs must serve a copy of this Order on the County Clerk and the Clerk of the Trial Support Office (60 Centre Street, Room 158), who are to amend the caption of this action to reflect the proper defendants. Plaintiffs' motion

is denied as to all of the proposed individual defendants; and it is further

ORDERED that plaintiffs must properly serve defendants ASHKENAZY ACQUISITION CORP. and 257 CHURCH RETAIL LLC with the Amended Summons and Complaint along with a copy of this Order within 30 days. As to CSA, the Amended Complaint attached to plaintiffs' motion papers as Exhibit B is deemed served; and it is further

ORDERED that CSA's cross-motion to dismiss is granted to the extent set forth above. CSA is to serve its amended answer within 30 days.

This constitutes the Decision and Order of the Court.

Dated: January 8, 2016

HON. JENNIFER G. SCHECTER