Kolanu Partners LLP v Sparaggis
2016 NY Slip Op 30987(U)
May 31, 2016
Supreme Court, New York County
Docket Number: 157289/13
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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KOLANU PARTNERS LLP,

Plaintiff, **Index No. 157289/13**

-against-

TAKIS SPARAGGIS, **DECISION/ORDER**

Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff Kolanu Partners LLC initiated this action to recover monies owed to it by defendant Takis Sparaggis for the expenses it incurred in obtaining a partial real estate tax abatement (the "Reimbursement") pursuant to section 421-a of New York Real Property Tax Law (the "Tax Abatement") for defendant and all of the other residential unit owners (the "Unit Owners") in the Crossing 23rd Condominium (the "Condominium").

In a decision and order dated September 16, 2014 (the "Order"), this Court granted plaintiff partial summary judgment as to the issue of defendant's liability for his breach of contract for failing to pay plaintiff its reimbursement monies for obtaining the Tax Abatement. The Order specifically granted plaintiff entitlement to an inquest on the amount of damages, and also the right to recover attorneys' fees and costs in commencing the instant action. On September 10, 2015, this Court requested further briefing to decide what impact, if any, the decision in *Kolanu Partners, LLC v Perry*, 46 Misc 3d 1226[A], 2015 NY Slip Op 50308[U] [Civ Ct, NY County 2015]), which denied summary judgment to a similarly situated defendant, should have upon the Order, and whether this Court should consider altering the Order.

Defendant now moves, pursuant to CPLR 3025, for an order granting him leave to amend the Second Verified Amended Answer, Affirmative Defenses and Counterclaims in order to assert an affirmative defense that plaintiff lacks standing to bring its claims.

Background

The Parties

Plaintiff is a limited liability company that developed the Condominium, and obtained the Tax Abatement. Plaintiff was the sponsor that originally sold the 95 residential units in the Condominium.

Defendant owns and resides in Unit PH-C in the Condominium. Defendant entered into the Purchase Agreement with plaintiff, and took possession of his unit on January 4, 2008, which was nearly a year after plaintiff procured the Tax Abatement on January 18, 2007. Defendant became president of the Board in May 2008.

Aaron Perry was the original purchaser of Unit 8B in the Condominium. Mr. Perry purchased Unit 8B on June 23, 2005, approximately a year and a half before plaintiff obtained the Tax Abatement.

The Tax Abatement

After the Condominium was developed, plaintiff obtained the Tax Abatement, but the Board refused to collect the Reimbursement from the Unit Owners. Plaintiff decided to collect directly from the Unit Owners, rather than litigate with the Board, and settled (Affidavit of Jonathan M. Davidoff, Esq. ["Davidoff Aff."], Exhibit "F", "Settlement Agreement").

As president of the Board, defendant signed the Settlement Agreement that relieved the Board's obligation of collection (*id.*).

Procedural History of This Action

On August 8, 2013, plaintiff initiated this action through the service of a summons and notice of motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, alleging that (1) the governing documents established defendant's obligation to reimburse plaintiff for the Reimbursement; (2) it was entitled to summary judgment against defendant for breach of contract; and (3) it was entitled to an equitable lien on defendant's residential unit.

On October 23, 2013, defendant filed his opposition to the motion (Davidoff Aff., Exhibit "A"), asserting that "[a]s a matter of law and equity, the unit owners certainly have defenses of estoppel, laches, waiver and unclean hands" (*id.* at 2). Defendant argued against the motion on the basis that: (1) CPLR 3213 was unavailable to plaintiff because the documents plaintiff relied on were not "instruments for the payment of money only"; (2) defendant had meritorious defenses to plaintiff's claims; and (3) a lien was unwarranted (*id.*). Defendant did not raise the affirmative defense of standing in his opposition.

With respect to his defenses, defendant effectively conceded that plaintiff had a right to collect the disputed payments, but argued that it waived that right when it "controlled the Board that was charged with collecting the reimbursement payments . . . but no attempt whatsoever was made to collect the reimbursement payments from the unit owners" (*id.* at 21). Defendant seemingly acknowledged that the Board was charged with collecting reimbursement payments as agent for plaintiff, but never argued that the Offering Plan prevented plaintiff itself from directly collecting the payments independently, or otherwise impacted plaintiff's standing to seek

damages for breach of contract. Instead, defendant argued that plaintiff lacked standing only to assert a lien on defendant's unit (*id.* at 21-22).

On January 7, 2014, plaintiff and defendant stipulated to convert their respective papers into a complaint and answer, and to grant the parties time to file amended pleadings. Thus, defendant adopted his opposition papers as his answer.

On February 21, 2014, plaintiff filed an amended complaint alleging causes of action for breach of contract and unjust enrichment, and seeking an equitable lien on the defendant's unit.

On March 7, 2014, defendant submitted a verified answer in which he specifically asserted six affirmative defenses for (1) waiver; (2) equitable estoppel; (3) laches; (4) unclean hands; (5) statute of limitations; and (6) failure to a state a claim. Again, defendant failed to assert the defense of standing, but instead, relied on claims that plaintiff waived its right to collect and abused the process, which is contrary to the theory of standing.

On April 7, 2014, plaintiff filed a motion for partial summary judgment. On May 12, 2014, defendant opposed the motion. Although defendant effectively conceded that he was obligated to reimburse plaintiff for the costs in obtaining the Tax Abatement, he argued that plaintiff waived its right to collect. Defendant also argued, for the first time, after Mr. Perry's new counsel raised standing in Mr. Perry's second opposition to plaintiff's summary judgment motion on March 13, 2014, that plaintiff lacked standing to pursue its breach of contract claim. The entire standing argument, which was made without defendant seeking leave to amend his answer, consisted of two paragraphs, with no reference to case law supporting defendant's claim.

On September 8, 2014, the parties argued the summary judgment motion before this Court (Davidoff Aff., Exhibit "L"). During oral argument, defendant conceded his liability to plaintiff (*id.* at 12), and only briefly touched on the standing issue, stating:

> "First of all, it's important to know that the way the documents are written was for the Board to collect this fee, not for each – not for them – not for the Sponsor to collect it. The Board was supposed to collect it . . . Also, if you look at the offering plan, it also says the Board, not the sponsor. The board is permitted to– put down late charges and file a lien against the unit that doesn't pay the fees. That's the board and not the Sponsor. And then there is no attorney's fees provision . . ."

(*id.* at 15).

Although defendant never specifically articulated a standing defense, this Court raised the issue (*id.* at 21). In response, plaintiff argued that the Offering Plan designated the Board as its collection agent, but never contractually limited its right to collect on its own behalf (*id.* at 21-23). Plaintiff further asserted that the Offering Plan established its contractual right to collect attorneys' fees expended in its collection efforts (*id.* at 23).

On September 16, 2014, this Court granted the summary judgment motion in favor of plaintiff, and entered the Order.

On January 17, 2015, defendant filed his third answer, a Second Verified Amended Answer, after seeking leave of this court (*see* December 9, 20141tr at 53-54, Davidofff Aff., Exhibit "M"), again without raising standing.

The Perry Action

On August 2, 2013, via a motion for summary judgment in lieu of complaint pursuant to CPLR 3213, Kolanu initiated an action against Perry in Civil Court of the City of New York, New York County under Index No. 18039/2013. On September 2, 2013, Perry opposed that

motion. At that time, Perry was represented by Gil Feder, Esq. of Reed Smith, defendant's current counsel. The opposition papers raised identical defenses as defendants' October 23, 2013 papers in opposition to the summary judgment motion in this action, and similarly failed to assert standing. On December 4, 2013, Kolanu's CPLR 3213 motion was denied, but the papers were converted to a complaint and answer.

On January 17, 2014, Kolanu moved for summary judgment against Perry. Perry submitted two oppositions. On February 14, 2014, Perry submitted a pro se opposition, as he was no longer being represented by Reed Smith. On March 13, 2013, Perry's second opposition was submitted by his new counsel.

In his second opposition, Perry asserted in passing that the foundation of Kolanu's claims was defective, because in addition to defective demands for the Reimbursement, "the Offering plan . . . only permits the Board – and not Plaintiff – to collect those monies" and "does not permit the commencement of a plenary action to recover [those] amounts" (*see* March 13, 2013 opposition, ¶ 6, Exhibit "CC" in support of Order]). When Mr. Perry specified that the court should grant him relief, it was on the grounds that: (1) Kolanu was not entitled to recover attorneys' fees; (2) Kolanu was not entitled to interest; (3) Kolanu's bad faith is preventing the parties from resolving this matter; and (4) Kolanu's demand for an equitable lien is improper and moot (*id.*, ¶ 22).

Significantly, Perry admitted that the Board was Kolanu's collection agent for the Reimbursement, and neither argued that Kolanu lacked standing to commence this action, nor relied on any governing contract interpretation to justify his contention that the governing

documents did not allow a plenary proceeding for the collection (*id.*). In fact, Perry asked the court to deny Kolanu summary judgment, and require it to accept the settlement he proposed.

On March 11, 2015, the Hon. James E. D'Auguste denied Kolanu's motion for summary judgment (*see* Perry decision, Exhibit "DD" in support of Order). Judge D'Auguste rejected the plain language of the governing documents that appointed the Board as Kolanu's collection agent, and determined that the governing documents established that Kolanu was contractually limited and prohibited from collecting the Reimbursement on its own. Thus, Kolanu lacked standing to collect the Reimbursement and bring the action against Perry. In doing so, the court also rejected the agency/principal argument made by Kolanu, and dismissed all of the claims.

On September 16, 2015, the *Perry* court denied Kolanu's motion for renewal and reargument. Subsequently, Kolanu appealed the decision to the Appellate Term, First Department. That appeal is currently pending.

On September 10, 2015, after this Court granted plaintiff's motion to dismiss defendant's amended counterclaims, this Court requested additional briefing to reconcile the contradictory decisions between this Court's finding of defendant's liability, and the *Perry* decision.

Defendant then filed this motion seeking leave to file a fourth answer, and assert standing as a defense in this action.

Discussion

Defendant's Motion to Amend

Defendant's motion for leave to amend his answer to assert the affirmative defense of lack of standing is denied, as he has waived this defense.

Although CPLR 3025 (b) grants courts wide discretion to allow parties to amend their pleadings, this discretion is not unfettered, and courts routinely deny such motions, especially in circumstances where, as here, there has been an extended delay in moving for the relief (*see e.g. Standard Fruit & S.S. Co. Div. of Castle & Cooke, Inc. v Russo*, 67 AD2d 970, 970 [2d Dept 1979]). For a court to grant such an amendment, the movant must demonstrate that prejudice will not result, and that the amendment will be meritorious (*id.*).

In this case, since defendant has long waived his affirmative defense of lack of standing, such an amendment would prejudice plaintiff.

Under CPLR 3211 (e), the affirmative defense of lack of standing must be asserted in a answer or timely motion to dismiss the complaint, or it is waived (*see Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007] ["where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief"]; *see also Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991] [holding standing is a threshold determination that, when challenged, must be considered at the outset of any litigation]).

Defendant has waived the affirmative defense of lack of standing by failing to assert it in this three previous answers, and by not timely moving to amend his answer and affirmative defenses when he first became aware of such defense.

Since defendant never asserted standing in his initial papers which were converted to an answer, defendant waived the defense. Additionally, defendant failed to assert standing in his two subsequent amended answers, including the final one which he asserted after this Court found him liable to plaintiff. Indeed, although defendant did amend his answer for a third time

after arguing standing during oral argument on the partial summary judgment motion, he still failed to assert standing as an affirmative defense. Thus, contrary to defendant's claim that he has "maintained [the affirmative defense of lack of standing] since the onset of this litigation" (Defendant's Memorandum at 1), it is plain that defendant never raised the affirmative defense in any of his prior answers.

Moreover, defendant never once mentioned in any of his papers that plaintiff lacked standing until he filed his opposition papers to plaintiff's motion for summary judgment, which was after the *Perry* action was filed. Indeed, for two years prior to even mentioning such affirmative defense, defendant and his counsel both asserted that plaintiff needed to collect from the Condominium's Unit Owners itself because the Board was unable to do so. Such defenses are contrary to the defense of standing. Importantly, defendant has never asked this court to dismiss the claims in this case, which he could have done if he believed that plaintiff lacked standing.

Therefore, as standing was never asserted, and defendant never previously moved to amend his answer, defendant has waived the affirmative defense of standing.

In addition, despite defendant's arguments to the contrary, plaintiff will be prejudiced if defendant is now allowed to assert standing. This Court granted plaintiff summary judgment as to the issue of defendant's liability over a year ago. Although defendant's proposed defense was known to him since 2007, two years prior to the onset of this litigation, defendant never before asserted it in his answer and his affirmative defenses. Furthermore, even though defendant argued standing in his opposition to plaintiff's motion for summary judgment, he still did not include standing in the answer he amended after making that standing argument.

This Court rejects defendant's argument that plaintiff will not be prejudiced because discovery has yet to be completed, as all of the cases cited by defendant involve litigants who sought to amend their answers prior to their liability being determined. Although defendant also contends that plaintiff cannot be prejudiced because he has maintained a standing defense since the onset of the litigation (Defendant's Memorandum at 2), this contention lacks merit. At best, defendant's initial papers, which later became his first answer, argued only that plaintiff had no right to place a lien against his unit, not that plaintiff lacked standing to seek damages for breach of contract.

Moreover, defendant has an affirmative duty to explain his delay, but has failed to do so. In exercising discretion to grant a belated motion to amend a pleading, a court should consider: (1) whether the movant offers a reasonable excuse for the delay in asserting the amendment; and (2) how long that party was aware of the substance of the proposed amendment at the time it served its motion to amend (*Oil Heat Inst. of Long Is. Trust v RMTS Assocs.*, 4 AD3d 290, 293 [1st Dept 2004]). "'Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay,'" (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003] [citation omitted]). Where, as here, the movant fails to proffer a reasonable excuse for explaining the delay, denial of the motion is warranted (*Oil Heat Inst. of Long Is. Trust*, 4 AD3d at 293; *see also Birdsall v City of New York*, 60 AD2d 522, 522 [1st Dept 1977] [upholding denial of third-party defendant's motion to serve an amended answer when the factual basis of the proposed amended answer was known at the time of the original answer and leave to amend was sought two years later]).

Significantly, a movant seeking amendment faces an enhanced requirement to reasonably explain its delay when the amendment is sought following an adverse determination of liability via summary judgment (*Standard Fruit & S.S. Co. Div. of Castle & Cooke, Inc.*, 67 AD2d at 970). In *Standard Fruit & S.S. Co. Div. of Castle & Cooke, Inc.*, in an action to recover for goods sold, the defendant failed to answer the plaintiff's cause of action. After plaintiff obtained summary judgment, the defendant, who conceded that the defense was known and available at the time his original answer was interposed, waited nine months before moving to vacate the judgment and asserting a defense. Based on the defendant's failure to offer a reasonable excuse for his delay, the court reinstated the order denying the motion to amend.

Similarly, in *HSBC Bank USA v Philistin*, (99 AD3d 667, 667 [2d Dept 2012]), the defendant failed to assert standing in his unsuccessful pre-answer motion to dismiss. After the plaintiff subsequently obtained summary judgment, the defendant waited more than seven months before it moved to dismiss the complaint based on lack of standing (or to amend his answer to assert the defense). The court, however, rejected the request due to the defendant's unexcused delay.

Here, defendant fails to offer any justification for his delay in seeking to amend his answer. Further, when defendant amended his answers in the past, including after making the standing argument in his opposition to plaintiff's motion for partial summary judgment, he failed to include standing as an affirmative defense. Defendant concedes that he was aware of the defense of standing from the onset of this litigation. Accordingly, his motion to amend must be denied.

Reconsideration of the Order

This Court holds that the Order will stand, as the *Perry* decision has no impact upon the Order.

Initially, it is important to point out that the *Perry* decision is not binding but is only persuasive authority which has been reviewed and considered in re-evaluating its prior Order *(Mears v Chrysler Fin. Corp.*, 243 AD2d 270, 272 [1st Dept 1997] [holding that the Appellate Term, which reviews Civil Court decisions, has no power to review a Supreme Court ruling]).

Moreover, the reasoning, analysis, facts and law that this Court used to conclude that plaintiff is entitled to summary judgment on the issues of liability and attorneys' fees and costs as to the Reimbursement is not affected by the decision that was rendered in the *Perry* case. In *Perry*, Judge D'Auguste concluded that Kolanu lacked standing to collect the Reimbursement that was due from the Unit Owners. *Perry* is completely distinguishable from the instant matter as defendant here has waived the affirmative defense of standing. Therefore, as the *Perry* decision was premised only on lack of standing, this Court need not alter its decision granting summary judgment as to defendant's liability.

In addition, it should be pointed out that are several factual differences between this action and the *Perry* action. Here, defendant purchased his unit after plaintiff obtained the Tax Abatement for the Unit Owners, while Mr. Perry purchased his unit prior to the granting of the abatement. Most importantly, unlike Mr. Perry, who was merely a board member, defendant here actually signed the Settlement Agreement as president of the Board, which conceded that plaintiff had the right to collect the Reimbursement directly from the Unit Owners, including defendant himself.

Accordingly, the Order, which held defendant liable to plaintiff for breach of contract, still stands.

Finally, plaintiff's "request" that this Court award it costs and sanctions because defendant engaged in frivolous conduct is denied. It would be procedurally improper to grant this request, as plaintiff failed to include this request for relief in a notice of motion or cross motion (CPLR 2214 [a]; *Arriaga v Laub Co.*, 233 AD2d 244, 245 [1st Dept 1996] [as plaintiffs failed to formally and specifically demand in notice of motion that counterclaims be stricken, the trial court did not err in denying such relief]). In any event, the imposition of sanctions is not appropriate here, as there is no indication that defendant's position, which is based on the *Perry* decision, is completely frivolous and without merit (*Benishai v Benishai*, 83 AD3d 420 [1st Dept 2011]; *Matter of L&M Bus Corp. v New York City Dept. of Educ.*, 83 AD3d 432, 433 [1st Dept 2011]).

Conclusion

For the reasons stated above, it is hereby

ORDERED that defendant's motion for leave to amend his Second Verified Amended Answer, Affirmative Defenses and Counterclaims is denied.

Dated: May 31, 2016

ENTER:

J.S.C.
SHLOMO HAGLER
J.S.C.