Dylan House, Ltd. v Borges
2016 NY Slip Op 31426(U)
July 19, 2016
Supreme Court, New York County
Docket Number: 163070/15
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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DYLAN HOUSE, LTD.,

Plaintiff,

-against-

MARGARET A. BORGES,

Defendant.

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Index No. 163070/15

Mot. seq. nos. 002

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Thomas V. Juneau, Jr., Esq.
Schechter & Brucker, PC
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New York, NY 10118
212-244-6600

For defendant:
Jay Stuart Dankberg, Esq.
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212-967-1114

Defendant moves pursuant to CPLR 3211(a)(1), (3), and (8) for an order dismissing the action, disqualifying plaintiff's counsel and law firm, awarding legal fees, court costs, and disbursements incurred in defending the proceeding, or alternatively, pursuant to CPLR 3211(f) extending her time to answer. (NYSCEF 47). Plaintiff opposes.

I. PERTINENT BACKGROUND

It is alleged in plaintiff's complaint (NYSCEF 2) that in December 1979, defendant acquired shares in plaintiff, a cooperative corporation, and was assigned a proprietary lease appurtenant to the shares, with the right to occupy combined apartments 13F and 13R.

In 2013, plaintiff became aware of water leakage from a terrace appurtenant to defendant's apartments into an apartment on the twelfth floor. Defendant initially refused to grant plaintiff access to permit contractors to inspect and prepare bids for performing remedial work, thereby causing further damage to the ceiling of the apartment below, however, during the

course of a proceeding brought against her, she agreed to provide access for the inspection. Significant leaks were discovered and further testing was necessary. Defendant obstructed plaintiff's efforts, thereby resulting in further damage not only to the apartment below, but to the building.

By affidavit dated June 2, 2014 and filed in connection with a proceeding relating to defendant's apartment and commenced by defendant in this court, defendant swore that she solely owned apartment 13F and has always resided in it, as well as in 13R, identifying the two as combined apartments, one as the front and the other as the rear, and as "one contagious [sic] apartment." (NYSCEF 56). By affidavit dated March 8, 2015, filed in connection with the same proceeding, defendant swore that she solely owned and resided in the combined apartments. (NYSCEF 54).

II. PERTINENT PROCEDURAL BACKGROUND

By notice dated October 27, 2015, plaintiff demanded access to defendant's terrace in order to inspect and repair the drain on November 4, 2015. She denied access.

Plaintiff commenced this action against defendant for breach of the amended proprietary lease, and seeks a judgment declaring that it may enter the unit for the purpose of performing the work that it, in its business judgment, deems necessary to bring defendant's terrace into a state of good repair and to prevent further damage to the building. Plaintiff also seeks to permanently enjoin defendant from preventing it from entering the unit to perform the work. In support, it alleges that defendant violated paragraphs 18(b) and 25 of the amended proprietary lease providing that she is "solely responsible for the maintenance, repair and replacement of [an appurtenant] balcony or terrace, and [ ] keep it in good repair and in full compliance with any and

all applicable laws or governmental regulations," by denying plaintiff and its authorized workers access to the unit at any reasonable hour on notice to inspect it for violations of the amended proprietary lease or make repairs as may be required. Given these violations, plaintiff alleges that defendant is in default of the proprietary lease. (NYSCEF 2).

On December 30, 2016, another justice of this court ordered defendant to appear and show cause before me as to why an order should not issue directing her to grant plaintiff access for the purpose of replacing the masonry and waterproofing. He also ordered "personal service" on defendant of the order and pleadings. (NYSCEF 40).

On January 6, 2016, on the record, I signed an amended order to show cause temporarily enjoining defendant from preventing access to the apartment to the extent of ordering defendant, pending the hearing and determination of plaintiff's motion for preliminary injunctive relief, to grant plaintiff's contractor immediate access to the apartment and terrace for the purpose of "patching the drain through which plaintiff alleges the leak flows into the apartment directly below . . ." (NYSCEF 42). Then, by decision and order dated February 1, 2016, I denied plaintiff's motion for a preliminary injunction, and scheduled a hearing at plaintiff's request for a permanent injunction. (NYSCEF 46).

III. CONTENTIONS

In an affidavit, defendant swears that during four prior summary proceedings commenced in the Civil Court, she heard plaintiff's attorneys "concede" that neither they nor their client possessed or knew of the whereabouts of the original and amended proprietary leases, or the stock certificate, or other relevant documents which would demonstrate its capacity to bring this action. She also takes issue with affidavits of process servers attesting, in connection with those

prior proceedings, that she was served with various predicate notices. She also swears that, as she swore during the course of those prior proceedings, there are two separate units, and that plaintiff thus illegally served her with only one process. Defendant denies that plaintiff personally served her with the order to show cause and pleadings, as plaintiff's attorney left the legal papers outside the door to her apartment, which service does not constitute personal service. Moreover, as plaintiff's attorney claims to have served her personally, both he and his firm must be disqualified from representing plaintiff pursuant to the "advocate-witness rule." (NYSCEF 48).

In opposition, plaintiff observes that absent a responsive pleading and discovery, it is premature to entertain a dismissal of its case, maintains that defendant is judicially estopped from arguing that her apartment is not a combination of two units, and argues that absent a denial that she owns and occupies the unit, she cannot deny being governed by the amended proprietary lease. It also maintains that "personal service," as specified by the justice who ordered defendant to show cause, does not require service pursuant to CPLR 308(1). Rather, service was appropriately effected pursuant to CPLR 308(2), the particulars of which, attested to by plaintiff's attorney, are not refuted by defendant. Plaintiff also denies any need for disqualification under these circumstances. (NYSCEF 54, 59).

IV. ANALYSIS

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a cause of action based on documentary evidence provided that the evidence conclusively establishes, as a matter of law, a viable defense to the asserted claims. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). While the court must construe pleadings liberally, it "is not required to accept factual allegations that are

plainly contradicted by documentary evidence" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). To qualify as documentary evidence, the evidence must "conclusively" establish a defense as a matter of law. (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). It must be "unambiguous, authentic, and undeniable" (*Attias v Costiera*, 120 AD3d 1281, 1292 [2d Dept 2014], quoting *Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]), and unequivocal (*Blank Rome LLP v Parrish*, 44 AD3d 573 [1st Dept 2007]).

Here, defendant offers her own self-serving affidavit by which she attests to what she heard plaintiff's lawyers, none of whom are unidentified, say on unspecified dates and in unspecified contexts. Not only does her affidavit not qualify as documentary evidence (*see eg Anglero v Hanif*, __ AD3d __, 2016 WL 3265931, 2016 NY Slip 04682 [2d Dept] [affidavit does not constitute documentary evidence within meaning of CPLR 3211(a)(1)]; *Mamoon v Dot Net Inc.*, 135 AD3d 656 [1st Dept 2016] [affidavit not documentary evidence]), but the alleged concessions are plainly deniable. As defendant fails to come forward with evidence supporting her allegations, plaintiff need not offer any evidence to the contrary.

In contrast, plaintiff offers defendant's affidavits in which she attests to her residence in the combined units and ownership of the shares appurtenant thereto, thereby demonstrating that she is judicially estopped from claiming otherwise. (NYSCEF 56, 57).

Service of the order and pleadings was properly made pursuant to CPLR 308(2) (personal service on natural person may be made by delivery to person of suitable age and discretion at person's dwelling place or usual place of abode and mailing process to person), and defendant sets forth an insufficient basis for disqualification of plaintiff's counsel or his law firm (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244 [1st Dept 2008] [plaintiff failed to carry

burden of demonstrating that counsel lied so as to warrant counsel's disqualification]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Margaret A. Borges's motion is denied in its entirety; and it is further

ORDERED, that defendant shall file and serve an answer to the complaint within 20 days of the date of this order.

ENTER:

Barbara Jaffe, JSC

DATED: July 19, 2016
New York, New York