

Arnold v 4-6 Bleecker St., LLC
2017 NY Slip Op 31266(U)
June 13, 2017
Supreme Court, New York County
Docket Number: 158541/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PETER ARNOLD, ELI LAZARUS, SEAN ROCHA
and MICHAEL SCHILLER,

INDEX NO. 158541/13

Plaintiffs,

-against-

4-6 BLEECKER STREET, LLC, 316 BOWERY
REALTY CORP., WALSAM 316 LLC, WALSAM
316 BOWERY LLC, WALSAM BLEECKER LLC,
LAWBER BOWERY LLC, and 316 BOWERY
NEXT GENERATION LLC,

Defendants.

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JOAN A. MADDEN, J.:

Defendant 4-6 Bleecker Street LLC (Bleecker) moves to amend its answer and cross-claims.¹ Plaintiffs Eli Lazarus and Sean Rocha oppose the motion in part to the extent Bleecker seeks to amend its defenses to their claims. Plaintiffs Peter Arnold and Michael Schiller oppose the amendments to the defenses and the proposed new cross-claim for the appointment of a receiver. Co-defendants 316 Bowery Realty Corp. (“Bowery”), Walsam 316 LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC and 316 Bowery Next Generation LLC (collectively the “Walsam defendants” or the “Walsam entities”) (Bleecker and Walsam together as the “Bowery/Walsam defendants”) oppose the motion as “untimely” and object that the motion is “defective as a matter of law” in the absence of an affidavit of merit.

A motion for leave to amend a pleading should be “freely granted” as a matter of discretion in the absence of prejudice or surprise resulting directly from the delay. CPLR

¹Although defendant Bleecker previously moved to amend, the prior motion was for leave to amend the *complaint* to add the Walsam entities as co-defendants.

3025(b); Caso v. Miranda Sambursky Sloane Sklarin Ver Veniotis LLP, ___ AD3d ___, 2017 WL 1716361 (1st Dept 2017); Fairpoint Companies, LLC v. Vella, 134 AD3d 645 (1st Dept 2015); MBIA Insurance Corp v. Greystone & Co, Inc, 74 AD3d 499 (1st Dept 2010). “The movant need not establish the merit of [the] proposed new allegations, but only that ‘the proffered amendment is not palpably insufficient or clearly devoid of merit.’” Fairpoint Companies, LLC v. Vella, *supra* (quoting MBIA Insurance Corp v. Greystone & Co, Inc, *supra*); accord Caso v. Miranda Sambursky Sloane Sklarin Ver Veniotis LLP, *supra*; Higgins v. City of New York, 144 AD3d 511 (1st Dept 2016). Thus, contrary to the Bowery/Walsam defendants’ contention, Bleecker was not required to submit an affidavit of merit in support of its motion.

The proposed amendments to Bleecker’s answer and affirmative defenses are moot in view of this Court’s decisions and orders dated May 31, 2017, September 22, 2016 and October 14, 2015. Those decisions and orders granted plaintiffs summary judgment declaring that their apartments are protected by the Rent Stabilization Law, partial summary judgment as to liability on their rent overcharge claims, and summary judgment as to the methodology for determining their legal rent and the amount of damages to which they are entitled, including treble damages. The May 31, 2017 decision and order also determined that plaintiffs were entitled to attorney’s fees and that all defendants, Bowery as the former owner, Bleecker as the net lessee and the Walsam entities as the current owner, are liable for plaintiffs’ overcharges, treble damages and attorney’s fees. As a result of the Court’s prior decisions, the only remaining issue with respect to plaintiffs’ claims, is the amount of plaintiffs’ damages which the Court determined cannot be calculated in the absence of a prima facie showing on the issue of comparability. With the exception of that one issue, plaintiffs’ claims have been fully and finally resolved in their favor,

and any affirmative defenses Bleecker now seeks to amend or add are moot. Thus, the branch of Bleecker's motion to amend its answer is denied in its entirety.

The branch of Bleecker's motion to amend its cross-claims against co-defendants Bowery and Walsam, is granted in part and denied in part. Bleecker seeks to add factual allegations "common to all cross-claims" and to revise its existing cross-claims for rescission, breach of contract, indemnity and attorney's fees.² The only new cross-claim is for the appointment of a receiver.

The additional factual allegations relate to the substance and alleged effect of the Court's prior decisions in this action, and to defendants' rights and obligations under the original Purchase and Sale Agreement, and modifications thereof, with respect to the conversion of the building to a condominium. As noted in the Court's prior decisions, defendant Bowery was the original owner of the building and the landlord on plaintiffs' leases. Pursuant to a Purchase and Sale agreement dated August 10, 2012, Bowery agreed to convert the building to condominium ownership, and sell the residential portion to Bleecker. In the meantime, until the conversion was completed, Bowery agreed, pursuant to a Net Lease, to net lease the residential portion to Bleecker. As the net lessee, Bleecker thereafter collected the tenants' rent. By deed dated June 14, 2014, Bowery transferred its interest in the building to the Walsam defendants.

The motion to amend is denied to the extent Bleecker seeks to assert a new cross-claim for the appointment of a receiver. Pursuant to CPLR 6401, "[u]pon motion of a person having

²Bleecker has eliminated its First Counterclaim against plaintiffs for attorney's fees, and its First Cross-Claim for fraudulent misrepresentation, which sought \$4,000,000 in damages. The allegations of fraud are now incorporated into its revised cross-claim for rescission, which seeks to "recover back the payment of \$4,100,000."

an apparent interest in property . . . a temporary receiver of the property may be appointed . . . where there is a danger that the property will be removed from the state, or lost, materially injured or destroyed.” The “appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits.” Quick v. Quick, 69 AD3d 828 (2nd Dept 2010); see Matter of Armenti & Brooks, 309 AD2d 659 (1st Dept 2003). “A temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of property at issue and the need to protect a party’s interests in that property.” Quick v. Quick, supra; Eastbank, NA v. Malneut Realty Corp, 180 AD2d 442 (1st Dept 1992). “There must be a danger of irreparable loss.” Matter of Armenti & Brooks, supra at 661.

Here, Bleecker alleges that since Bowery/Walsam are “either incapable or resistant to honoring their obligations regarding [condominium] conversion, Bleecker Street is entitled to an order appointing a Receiver to take possession of the Building, collect rental income from commercial tenants, and apply all necessary resources to accomplish the conversion of the Building into a condominium regime.” Bleecker merely alleges a receiver is necessary to enforce its contractual rights under the Purchase and Sale Agreement, in which Bowery/Walsam agreed to convert the building to condominium ownership and sell the residential portion to Bleecker. Bleecker, however, fails to allege that the property is in danger and a receiver is necessary to conserve the property. Thus, the amendment adding a new cross-claim for the appointment of a receiver is denied as legally insufficient. See Quick v. Quick, supra; Matter of Armenti & Brooks, supra.

Amendment of the cross-claims is also denied with respect to paragraphs 35 and 46 in the Proposed Amended Verified Answer with Cross-Claims, as those paragraphs contain inaccurate factual allegations regarding the Courts' prior decisions. Paragraph 35 alleges that the Court's October 19, 2015 decision, which granted Bleecker's prior motion to amend, "was based in large part on the Court's recognition that under the Net Lease the New Owners are liable for and are required to hold harmless Bleecker Street for all rent overcharges and penalties." The Court did not make such a finding. Paragraph 46 states that Court's September 23, 2016 "Interim Decision relates only to Apartment 2E and Apartment 3E" and that the "Bowery Defendants did not seek reargument challenging the rent-stabilized status of Apartment No. 3 involving Sean Rocha and Eli Lazarus at 6 Bleecker." That statement is incorrect. In their motion to reargue and renew the Bowery/Walsam defendants objected to the Court's reliance on the affidavit submitted by non-party James Kinney, which specifically related to the Rocha and Lazarus apartments located in the 6 Bleecker portion of the building. Bowery/Walsam also objected generally to summary judgment as premature, and argued that they were entitled to discovery and that the Court "misapplied" the summary judgment standard.

Thus, with the exception of the new cross-claim for the appointment of a receiver, and proposed paragraphs 35 and 46, Bleecker's proposed amendments to the cross-claims are granted.

The Bowery/Walsam co-defendants object that the motion to amend the cross-claims is untimely and that this is Bleecker's second motion to amend. It is well established that mere lateness does not establish grounds to reject an amendment. See Edenwald Contracting Co, Inc

v. City of New York, 60 NY2d 957, 959 (1983). Instead, the delayed request must be accompanied by extreme prejudice as well. See id. In this context, prejudice is defined as “some special right lost in the interim, some change of position, or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.” Barbour v. Hospital for Special Surgery, 169 AD2d 385, 386 (1st Dept 1991) (citations omitted).

Here, the Bowery/Walsam defendants fail to identify any prejudice of that nature. As noted above, Bleecker’s prior motion to amend was limited to amending the *complaint* to add the Walsam entities as defendants after they purchased the property. As explained in the Court’s decision and order denying reargument and renewal, that motion to amend became necessary after Bowery failed to execute a stipulation agreeing to join the Walsam entities. Moreover, even though plaintiffs and defendants have moved for summary judgment, those motions involved plaintiffs’ rent overcharge claims, and defendants’ cross-claims related to those overcharge claims. None of the prior dispositive motions involved defendants’ contractual rights and obligations with respect to the condominium conversion of the building, and since discovery has yet to commence, defendants will have a full opportunity to do so in connection with any cross-claims relating to that issue.

Accordingly, it is hereby

ORDERED that Bleecker’s motion to amend is granted only to the extent of permitting the amendments to its cross-claims in accordance with this Decision and Order; and it is further

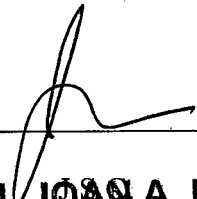
ORDERED that the motion is denied with respect to the amendments to the affirmative defenses; and it is further

ORDERED that within 15 days of the e-filing of this Decision and Order, Bleecker shall prepare, serve and file an amended pleading that conforms to this Decision and Order; and it is further

ORDERED that within 15 days of said service, co-defendants 316 Bowery Realty Corp., Walsam 316LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC, and 316 Bowery Next Generation LLC, shall serve their response to Bleecker's amended pleading.

DATE: June 13, 2017

ENTER:



HON. JOAN A. MADDEN
J.S.C.