

Kessler v Carnegie Park Assoc., L.P.

2017 NY Slip Op 31445(U)

July 7, 2017

Supreme Court, New York County

Docket Number: 153085/2016

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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BEVERLY KESSLER, ROBERT KESSLER, JERROLD
GENDLER, JOSEPH QUENQUA, JANE DOES 1-100,

Plaintiffs,

- v -

CARNEGIE PARK ASSOCIATES, L.P., CARNEGIE PARK
TOWER, LLC, THE RELATED COMPANIES, L.P., 200 EAST
62ND OWNER, LLC, HFZ 90 LEXINGTON AVENUE OWNER,
HFZ 88 LEXINGTON AVENUE OWNER LLC, HFZ 235 WEST
75TH STREET OWNER LLC, HFZ 344 WEST 72ND STREET
LLC, CLASSON ESTATE ONE LLC, 380 PROSPECT
PARTNERS LLC, 466 FIFTEENTH STREET PARTNERS LLC,
JOHN DOES 1-100,

Defendants.

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INDEX NO. 153085/2016

MOTION DATE 12/21/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

HON. SALIANN SCARPULLA:

In this action to recover damages for, inter alia, breach of contract, defendants HFZ 90 Lexington Avenue Owner, LLC ("HFZ 90"), HFZ 88 Lexington Avenue Owner LLC ("HFZ 88"), HFZ 235 West 75th Street Owner LLC ("HFZ 235"), and HFZ 344 West 72nd Street LLC ("HFZ 344") (collectively, the "HFZ Defendants") move (in motion sequence number 001) to dismiss the class action amended complaint (the "Amended Complaint") for failure to state a cause of action, statute of limitations, and based on documentary evidence. The HFZ Defendants also seek a change in venue.

Plaintiffs Beverly Kessler ("Beverly"), Robert Kessler ("Robert"), Jerrold Gendler, M.D. ("Jerrold"), Joseph Quenqua ("Joseph"), and Jane Does #1-100 commenced this proposed class action on behalf of themselves and those similarly

situated – specifically, all other individuals who were either disabled or 62 years of age or older when they resided in a New York City rental building that was converted into a condominium or a cooperative during their tenancy – against defendants Carnegie Park Associates, L.P. (“CPA”), Carnegie Park Tower, LLC (“CPT”), The Related Companies, L.P. (“Related”), 200 East 62nd Owner, LLC (“200 East 62nd Owner”), HFZ 90, HFZ 88; HFZ 235, HFZ 344, Classon Estate One LLC (“Classon”), 380 Prospect Partners LLC (“380 Prospect”), 466 Fifteenth Street Partners LLC (“466 Fifteenth”), and "John Does #1-100" (collectively “Defendants”).

On or about April 30, 2014, CPT submitted a non-eviction Offering Plan (the “Carnegie Plan”) to the Office of the Attorney General of the State of New York (“OAG”) to convert the rental building located at 200 E. 94th Street into a condominium.¹ Beverly, Robert, Jerrold, and Joseph were tenants residing at 200 E. 94th Street at the time of the Carnegie Plan’s submission. The OAG accepted CPT’s Carnegie Plan for filing on December 22, 2014 and the plan was declared accepted on August 14, 2015.

It is Plaintiffs’ contention that the offering plan was a unilateral option contract which contained terms for resident tenants under which they could either purchase their apartments or remain in occupancy as tenants. Plaintiffs’ allege that the contractual provisions granted an option to tenants, who were 62 years of age or older or disabled and apartment occupants on the date that the OAG accepted the offering plan for filing, to elect, within 60 days of that date, to become non-purchasing tenants. They also allege

¹ CPT acquired ownership of 200 E. 94th Street from CPA.

that if they opted to become non-purchasing tenants under the offering plan, then Plaintiffs could not be evicted and could remain as tenants with rents protected from unconscionable increases.

The Amended Complaint alleges that because Plaintiffs were senior citizens on the date that CPT's offering plan was filed with the OAG, CPT should have given them the option to become non-purchasing tenants but CPT failed to give them a form to make such an election. Plaintiffs assert that if they had been given an election form they would have opted to become non-purchasing tenants.

CPT instead refused to offer renewal leases, with terms extending beyond the date when the offering plan was to be declared effective, to Plaintiffs. CPT told Plaintiffs that they had to vacate their apartments once their leases expired. Plaintiffs claim that upon their lease expirations, they received termination notices from CPT and subsequently vacated their apartments. CPT then sold or contracted to sell approximately 87% of the condominium units in the building.

On December 1, 2015, Plaintiffs brought an action in Supreme Court, Kings County (the "Kings County Action"), naming CPT, CPA and Related as defendants.² As the action is a proposed class action, Plaintiffs also sued several other owners of New York City apartment buildings who converted those buildings from rental apartments to condominiums or cooperatives, pursuant to non-eviction offering plans, and whom allegedly also failed to offer tenants aged 62 or older or disabled (who were not

² The Kings County Action, Index No. 514588/2015, is before Justice Sylvia Ash.

named/identified), the opportunity to become non-purchasing tenants with protection from eviction and unconscionable rent increases. These other named defendants include the HFZ Defendants.

HFZ 90 sponsored the conversion of 90 Lexington Avenue, in New York County, to condominium ownership, and submitted its non-eviction offering plan (the "90 Lex Plan") to the OAG on November 26, 2013. The 90 Lex Plan was accepted for filing on May 18, 2015. HFZ 88 sponsored the conversion of 88 Lexington Avenue, in New York County, to condominium ownership, and submitted its non-eviction offering plan (the "88 Lex Plan") to the OAG on November 26, 2013. The OAG accepted the 88 Lex Plan for filing on May 18, 2015. HFZ 235, who was the sponsor of the conversion of 235 West 75th Street, in New York County, to condominium ownership, submitted its non-eviction offering plan (the "Astor Plan") to the OAG on November 13, 2013. The Astor Plan was accepted for filing on November 20, 2014 and declared effective on November 25, 2015. HFZ 344 sponsored the conversion of 344 West 72nd Street, in New York County, to cooperative ownership and submitted its non-eviction offering plan (the "Chatsworth Plan") to the OAG on June 14, 2013 which was accepted for filing on August 22, 2015.³

³ 90 Lexington Avenue, 88 Lexington Avenue, 235 West 75th Street, and 344 West 72nd Street will be collectively referred to as the "Buildings" and the 90 Lex Plan, the 88 Lex Plan, the Astor Plan and the Chatsworth Plan will be collectively referred to as the "Plans."

Each of the Buildings' Plans contained language on the cover page stating:

THIS IS A NON-EVICTION PLAN. NO NON-PURCHASING TENANT WILL BE EVICTED BY REASON OF CONVERSION TO CONDOMINIUM [COOPERATIVE] OWNERSHIP.

In addition, all Plans contained a section entitled "Rights of Existing Tenants" that set forth the non-purchasing tenants' rights under the Plans:⁴

The following summary of rights of existing tenants is set forth in accordance with GBL Section 352-eeee, a copy of which is set forth in Part II of this Plan. Bona fide tenants in occupancy derive substantial protections under GBL Section 352-eeee. Since this Plan is a non-eviction Plan it is not presented subject to the rights of "Eligible Senior Citizens" and "Eligible Disabled Persons" to continued occupancy as afforded by GBL Section 352-eeee. Therefore, such rights are not set forth in this Plan.

(A) No eviction proceedings will be commenced at any time after the effective date against Non-Purchasing Tenants for failure to purchase...

The HFZ Defendants now move to dismiss the action and/or for a change of venue of this action from Kings County to New York County.

Discussion

1. Motion for Venue Change

A movant seeking a transfer of venue under CPLR § 511 must show that the plaintiff's choice of venue was improper and identify a proper venue to which the action may be legally transferred. *See Castro v. New York Hosp. Med. Ctr. of Queens*, 52 A.D.3d 251 (1st Dept. 2008).

⁴ The "Rights of Existing Tenants" sections of the Plans are found on 88 Lex Plan p. 53, 90 Lex Plan p. 55, Astor Plan p. 67 and Chatsworth Plan p. 103.

The HFZ Defendants move for a venue change, pursuant to CPLR § 507, from Kings County to New York County because the relief sought by Plaintiffs affects the title, possession, use or enjoyment of real property in New York County. The HFZ Defendants timely served their Demand for Change of Place of Trial on Plaintiffs on April 1, 2016 before the deadline to serve their answer.

Plaintiffs' Amended Complaint states that venue is proper in Kings County pursuant to CPLR § 503 (a) "because the real property in question and some of the parties in the instant action are in Kings County and because the acts, misrepresentations and/or omissions giving rise to the cause of action alleged herein occurred in Kings County." Plaintiffs note that two of the named defendants – 380 Prospect and 466 Fifteenth – and three of the subject properties are in Kings County.⁵ Plaintiffs also argue that class actions may be brought in any county where a named defendant or plaintiff reside.

Under the CPLR, "where a motion challenging venue is promptly brought, the determination of proper venue will precede the application to certify the class." *Kidd v. Delta Funding Corp.*, 270 A.D.2d 81, 82 (1st Dept. 2000). Thus, the residence of named parties to the action instead of potential members will determine proper venue. *Wright v. New York State Div. of Lottery*, 22 Misc. 3d 1135(A) (Sup. Ct. N.Y. Jan. 27, 2009) (motion to change venue granted where neither plaintiff nor defendant resided in county in which action was brought). Venue is proper where a member of the class resides in the

⁵ On December 16, 2016, Judge Ash granted 380 Prospect's motion to dismiss. Additionally, 466 Fifteenth's motion to dismiss, dated April 17, 2017, is currently pending before Judge Ash.

county were an action was brought. *Mazsocki v. State Farm Fire & Cas. Co.*, 170 Misc.2d 70, at *72 (Sup. Ct. N.Y. Oct. 10, 1996) (“Although there is no decision on point, it appears self-evident to this court that under the New York venue statute a class action is properly venued if at least one member of the class resides in the county where the action was brought.”).

In this case, the Buildings owned by HFZ Defendants are all located in New York County. Each of the named plaintiffs also resided in New York County. And, the “parties” to a class action “do not include absent class members” but are instead “[o]ne or more members of a class’ suing as ‘representative parties’ on behalf of all the members.” *Kidd*, 270 A.D.2d at *83 (citations omitted). Therefore, Plaintiffs’ allegations that some unknown persons may be part of the purported class because they may have been harmed by the HFZ Defendants cannot serve as a basis for venue.

Venue is not proper in Kings County where the only parties residing in Kings County are two defendant building owners (one of whom is no longer part of the action) with no named plaintiffs having resided there, especially given CPLR § 507’s clear venue requirements.

Lastly, Plaintiffs counter that the venue rules for class action cases are the same as for non-class action cases involving multiple properties located in different counties, stating that “[i]n such cases venue is proper in any county where any of the properties is found.” However, the cases cited by Plaintiffs in support of this proposition are inapposite. For example, in *Diamond v. Papreka*, 2005 WL 782704 (Sup. Ct. N.Y. Apr. 4, 2005), plaintiff sought a partition of her ownership interest from that of her former

domestic partner, in four properties, located in three counties. The court in *Diamond* granted the venue change request because defendant showed that the change would: move the case to the county in which two of the four subject real properties were located; be convenient for non-party witnesses; and serve the interests of justice. *Id.* at *4-5.

Here, unlike in *Diamond*, none of the named Plaintiffs has an ownership interest in properties in the venued county. In fact, only 3 of the 11 originally named defendant building owners own properties located in Kings County and no named Plaintiffs were residents of those properties. Venue in Kings County for the HFZ Defendants does not serve the interests of justice their Buildings and the named Plaintiffs' residences are all in New York County. Further, the action's only connection to Kings County is property owned by three other defendants – one of whom has already been granted dismissal and another of whom's dismissal motion is pending and may be granted based on the law of the case.

Absent any controlling caselaw addressing the issue of proper venue in a proposed class action where choice of venue is a county other than where a defendant's real property is located, and the only tie to the chosen county is through another defendant's property locale where there were no named plaintiffs residing at that locale, I find that the HFZ Defendants have shown that Plaintiffs' choice of venue was improper and thus grant their motion for a venue change to New York County from Kings County.

Having deemed venue changed to New York County, I now address the HFZ Defendants' motion to dismiss.

2. Motion to Dismiss Plaintiffs' Complaint

CPLR § 3211 (a) requires the court to accept the facts alleged in a complaint as true and grant the plaintiff every favorable inference, deciding only “whether the facts as alleged fit within any cognizable legal theory.” *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001); *See also Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, (2002). For a motion based on CPLR § 3211 (a) (5), the defendant has “the initial burden of establishing prima facie that the time in which to sue has expired.” *Savarese v. Shatz*, 273 A.D.2d 219, 220 (2d Dept. 2000).

A. GBL § 352-eeee

General Business Law (“GBL”) § 352-eeee, or the Martin Act, governs conversions of apartment buildings to cooperative or condominium ownership in New York. GBL § 352-eeee (2) (c) applies to non-eviction plans and GBL § 352-eeee (2) (d) applies to eviction plans. For eviction plans, GBL § 352-eeee (2) (d) provides that “[n]o eviction proceedings will be commenced, except as hereinafter provided, at any time against either eligible senior citizens or eligible disabled persons.” These special protections are not found in the non-eviction plan subpart (2) (c) of GBL § 352-eeee. And, GBL § 352-eeee (2) (d), “by its terms, applies only to eviction plans.” *Walsh v. Wusinich*, 32 A.D.3d 743, 744 (1st Dept. 2006).

On November 10, 2015, the Department of Law adopted an emergency rule to amend the Martin Act and explained the rule in a Real Estate Finance Bureau Memorandum (the "November Memo"). The November Memo stated that:

In brief, the emergency rule allows market-rate tenants whose buildings are converting to condominium or cooperative ownership pursuant to non-eviction plans to have the option to elect eligible senior citizen or eligible disabled person status during the conversion process.

The rationale for the November Memo was:

...to make clear that the protections for senior citizen and disabled market-rate tenants apply to both eviction and non-eviction plans, thereby limiting the period during which eligible market-rate tenants subject to non-eviction plans are susceptible to displacement.

As per the November Memo, the emergency regulations applied "to any and all future 13 NYCRR Parts 18 and 23 offerings submitted to the Department of Law," as well as to "[o]ffering plans that the Department of Law ha[d] accepted for submission, but ha[d] not yet accepted for filing." These emergency regulations were in effect until February 8, 2016.

On February 8, 2016, the Department of Law issued a Real Estate Finance Bureau Memorandum (the "February Memo") stating that because it received many public comments concerning the language in the November Memo, it decided to let the emergency regulations expire and did not permanently adopt the November Memo's language. The February Memo also emphasized that "[t]he Department of Law never intended for its regulations to be retrospective in application." Finally, the February

Memo noted that it revised the proposed permanent regulations to clarify that “the regulations will affect only future condominium and cooperative conversion offerings.”

All of the HFZ Defendants’ Plans were accepted for filing prior to the November Memo’s emergency rule extending protections to eligible senior citizens and disabled tenants in non-eviction offerings.⁶ Because the HFZ Defendants’ pre-emergency rule Plans were non-eviction plans, there was no obligation to offer eligible senior citizens and disabled tenants renewal leases and protection from eviction when their leases expired or protection from unconscionable increases in rent.

B. The Kings County Action

As noted at oral argument, the HFZ Defendants’ grounds for dismissal are substantially like the grounds for dismissal in the motions to dismiss brought in the Kings County Action. On November 22, 2016, the Kings County Action was dismissed against 200 East 62nd Owner, CPT, CPA and Related by Justice Ash in *Kessler v. Carnegie Park Assoc., L.P.*, 2016 WL 6875431 (N.Y. Sup. Ct. Nov. 22, 2016) (the “Kings County Decision”). Subsequently, on December 16, 2016, the Kings County Action was dismissed against 380 Prospect “[b]ased on the reasoning set forth in [Justice Ash’s] Decision and Order dated November 22, 2016.”

Justice Ash stated that “plaintiffs’ claim that CPT breached the terms of its non-eviction offering plan is predicated on their contention that as eligible senior citizens and

⁶ The 90 Lex Plan was accepted for filing on May 18, 2015; the 88 Lex Plan was accepted for filing on May 18, 2015; the Astor Plan was accepted for filing on November 20, 2014; and the Chatsworth Plan was accepted for filing on August 22, 2015.

eligible disabled tenants, they had the right, under this plan, to become non-purchasing tenants and renew their leases.” *Id.* at *8. However, Justice Ash concluded that because the emergency rules were not in effect at the time CPT’s plan was accepted for filing, there were no additional protections for senior citizens or disabled persons under its non-eviction plan. *Id.*

Justice Ash further noted that the language in CPT’s plan “explicitly contravenes plaintiffs’ claim that CPT’s non-eviction plan gave them the special protections from eviction afforded to eligible senior citizens and eligible disabled persons in eviction plans.” *Id.* Indeed, the Kings County Decision held that “[a]ll of plaintiffs’ claims, in their amended complaint, are predicated upon and rely upon alleged contractual terms in the offering plan that do not actually exist therein.” *Id.* Justice Ash determined that all of plaintiffs’ cause of action against CPT fail because “under CPT’s non-eviction offering plan which pre-dated the revised regulations, [plaintiffs] were not entitled to the protections during the conversion process that are afforded to eligible senior citizens and eligible disabled persons in eviction plans.” *Id.* at *9.

The Kings County Decision dismissed as against defendant 200 East 62nd Owner on the same grounds, *i.e.*, because all of Plaintiffs’ claims were predicated on their assertion that they were entitled to renewal leases and protection from eviction as non-purchasing tenants who are eligible senior citizens or eligible disabled persons, and “plaintiffs, under 200 East 62nd Owner’s non-eviction offering plan, were not entitled to [these] protections... none of these causes of action state a viable claim as against 200 East 62nd Owner.” *Id.* at *11. Moreover, Justice Ash found that “200 East 62nd

Owner's offering plan unambiguously does not contain the terms upon which plaintiffs rely to support their causes of action.” *Id.* at *10.

While I am not bound by Justice Ash’s Kings County Decision, I find it persuasive and adopt the reasoning set forth therein.

C. Viability of Plaintiffs’ Causes of Action against HFZ Defendants

Plaintiffs’ allegations against the HFZ Defendants are the same as the allegations against CPT and 200 East 62nd Owner which were dismissed in the Kings County Action.

Contrary to Plaintiffs’ contentions, the HFZ Defendants were not required, under the Martin Act, to offer additional protections to eligible senior citizens or eligible disabled persons.⁷ Further, Plaintiffs cannot successfully assert a claim against the HFZ Defendants for breach of contract for failure to offer additional protections to eligible senior citizens/disabled persons because the Plans expressly stated that they were “non-eviction Plan[s]” and “not presented subject to the rights of ‘Eligible Senior Citizens’ and ‘Eligible Disabled Persons’ to continued occupancy as afforded by GBL Section 352-eeee.” The Plans stated that as a result, “such rights are not set forth in this Plan.” Thus, even though, on a motion to dismiss, Plaintiffs are entitled to the benefit of every favorable inference, the clear language of the Plans plainly contradicts Plaintiffs’

⁷ The Kings County Action reached the same conclusion regarding the HFZ Defendants, stating that:

Since all of these non-eviction offering plan were accepted for filing before November 10,2015, these defendants were not required to adhere to the requirements of the emergency regulations published in the State Register on November 10, 2015. Furthermore, none of these non-eviction offering plans contain terms which confer any special tenancy rights upon senior citizens or disabled persons. *Id.* at *12.

allegations. See *Madison Equities, LLC v. Serbian Orthodox Cathedral of St. Sava*, 144 A.D.3d 431, 431 (1st Dept. 2016) (citation omitted) (“[W]here a written agreement ... unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)”; *Taussig v. Clipper Group, L.P.*, 13 A.D.3d 166, 167 (1st Dept. 2004), *lv. denied* 4 N.Y.3d 707 (2005) (finding that “where factual allegations or legal conclusions are flatly contradicted by documentary evidence, they are not presumed to be true, or even accorded favorable inference”).

Plaintiffs additional causes of action are for: 1) eviction; 2) constructive eviction; 3) loss of quiet enjoyment; 4) breach of the covenant of good faith and fair dealing; 5) a declaratory judgment; 5) damages pursuant to RPAPL § 853; and 6) damages pursuant to RPAPL 601. None of these claims are viable because they all rely upon the same allegations that underlie the breach of contract cause of action. Hence, I reach the same conclusion as Judge Ash and dismiss Plaintiffs’ additional causes of action.

In accordance with the foregoing, it is hereby

ORDERED that the venue of this action as against defendants HFZ 90 Lexington Avenue Owner, LLC, HFZ 88 Lexington Avenue Owner LLC, HFZ 235 West 75th Street Owner LLC, and HFZ 344 West 72nd Street LLC is changed from the Supreme Court, County of Kings to this Court and the Clerk of the Supreme Court, County of Kings, is directed to transfer the papers on file in this action (Index No. 514588/2015), as pertain to the aforementioned defendants only, to the Clerk of the Supreme Court, County of New

York, upon service by movant of a certified copy of this order and payment of the appropriate fee, if any, and it is further

ORDERED that defendants HFZ 90 Lexington Avenue Owner, LLC's, HFZ 88 Lexington Avenue Owner LLC's, HFZ 235 West 75th Street Owner LLC's, and HFZ 344 West 72nd Street LLC's motion to dismiss plaintiffs' complaint is granted, the complaint is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

7/7/2017
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> DO NOT POST		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE