

Board of Mgrs. of 1255 Fifth Condominium v Foschi
2017 NY Slip Op 31691(U)
August 8, 2017
Supreme Court, New York County
Docket Number: 653512-2012
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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THE BOARD OF MANAGERS OF 1255 FIFTH
CONDOMINIUM

Plaintiff,

Index No. 653512-2012
Motion Seq: 010

-against-

SANDRA FOSCHI,

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendant.

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The motion for leave to file an amended verified answer and for sanctions against plaintiff and its attorneys is denied.

Background

On March 6, 2012, a major fire took place in an apartment owned by defendant (Unit 6-L). Plaintiff, the condo board at the building, then commenced this action to gain access to defendant's apartment in order to make repairs. The Court granted plaintiff's motion to compel access on November 20, 2012 via a decision by Justice Rakower. Defendant filed a verified answer with counterclaims on January 3, 2013 and sought declaratory and injunctive relief as well as money damages against plaintiff. Defendant claims plaintiff failed to repair and restore the apartment (6-L) promptly as required by the Condo's bylaws.

Defendant maintains that the proposed verified answer merely amplifies allegations with respect to defendant's causes of action for declaratory and monetary relief and deletes the second cause of action for injunctive relief to compel the Board to repair and restore Unit 6-L as moot.

Defendants also add allegations arising out of events that occurred after the filing of the instant complaint including claims that plaintiff has baselessly imposed two condo common charges liens in February 2014 for legal fees in this action and plaintiff's alleged unreasonable refusal to cooperate in the renovation of 6-L. Defendant argues that plaintiff will not be prejudiced by the amendment because defendant has yet to be deposed and the claims are meritorious.

Defendant seeks sanctions against plaintiff because of the common charges liens for unpaid legal fees. Defendant claims that the filing of these liens was frivolous conduct because the fees are not actually collectible under the bylaws.

In opposition, plaintiff claims that defendant waited too long to file this proposed amended answer and that the liens were permitted under the building's bylaws. Plaintiff insists that some of defendant's new allegations are time-barred and others fail to state a cause of action.

Discussion

"Leave to amend pleadings is to be freely given absent prejudice or surprise directly resulting from the delay" (*Cseh v New York City Tr. Auth.*, 240 AD2d 270, 271, 658 NYS2d 618 [1st Dept 1997] [citing CPLR 3025[b]]). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment" (*Valdes v Marbrose Realty, Inc.*, 289 AD2d 28, 29, 734 NYS2d 24 [1st Dept 2001]).

"On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or

clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500, 901 NYS2d 522 (Mem) [1st Dept 2010] [citations omitted]).

Here, the proposed amended answer contains too many allegations that are either irrelevant to the instant action or fail to state a claim— accordingly, the motion to amend is denied.

For example, defendant seeks to include allegations relating to plaintiff’s alleged refusal to allow defendant to have tenants in her other apartment in the building (PH-B) (proposed amended complaint, ¶¶ 46-51). Plaintiff claims that these allegations are barred by the statute of limitations for a breach of fiduciary duty (three years). Rather than dispute this assertion, defendant claims that these allegations are included to show a continuing course of conduct and to show plaintiff’s harassment of defendant. This is not a good enough reason to allow amendment more than three years after these alleged incidents occurred. To the extent that defendant is actually asserting a distinct cause of action for breach of fiduciary duty, such a claim is time barred.

Further, defendant drafts additional paragraphs about defendant’s proposed alterations to Unit PH-B and that defendant commenced another litigation against plaintiff regarding this other apartment. These allegations, about another apartment and about litigation disposed in 2013, do not belong in an amended answer.

The purpose of amendment is to allow parties to assert new allegations they may have inadvertently omitted from an earlier pleading or to include new causes of action that may have arisen after the original pleadings were filed. It is not to provide more context or to force an opposing party to admit or deny certain allegations. A counterclaim need only state a cognizable

cause of action. It does not have to include the entire history of the parties' relationship or every detail about the events discussed in the pleading. Those details can be explored at depositions and through the discovery process— assuming, of course, that they are relevant.

It would be inappropriate for this Court to fashion an amended answer for the defendant. For the reasons stated, however, the proposed amended answer is acceptable. Therefore, the branch of the motion to amend is denied. However, defendant may file a new motion for leave to amend.

Sanctions are Not Appropriate

The parties clearly disagree over whether plaintiff was permitted to assert a common charges lien against defendant in order to recover legal expenses. Article V, Section 9 of the bylaws provides that:

“The violation of any rule or regulation adopted by the Board of Managers, or the breach of any By-Law contained herein, or the breach of any provision of the Declaration, shall give the Board of Managers the right to, in addition to any other rights set forth in these By-laws: (a) to enter the Unit in which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Unit Owner, any structure, thing or condition that may exist therein contrary to the intent and meaning of the provisions . . . or (b) to enjoin abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach” (NYSCEF Doc. No. 244).

Plaintiff claims that this provision, in conjunction with Article V, Section 16 (which provides the Board with a right of access to perform repairs), permitted imposition of the liens because plaintiff was forced to go to Court to get access to the apartment to perform repairs (i.e., the commencement of the instant lawsuit). Plaintiff was required to make repairs to defendant's apartment after the fire pursuant to Article V, Section 3 (Repair or Restoration After Fire or Other Casualty) (*id.*).

Defendant emphasizes that the only provision in the bylaws that allows for the recovery of attorney's fees is Article V, Section 6 (Default in Payment of Common Charges). Defendant also cites to the deposition of plaintiff's witness Jacquelynn Duggan, who testified that she was not aware of any provision in the bylaws which would allow for the collection of legal fees in the instant action.

Although the parties disagree over the meaning of these bylaw provisions, disagreement is not a basis for sanctions. Plaintiff has presented a rational interpretation of the bylaws that permits it to assert these liens— that it was forced to bring a lawsuit to comply with its obligations under a bylaw provision that states that such acts would be at the expense of the defaulting Unit Owner. Whether plaintiff ultimately prevails on this theory is immaterial— plaintiff need not win on this point in order to avoid sanctions.

Defendant appears to conflate winning (or losing) an argument with frivolous conduct. Frivolous conduct involves taking actions or positions that are plainly devoid of any merit— that is not the case here. Courts do not sanction parties, even if a party's argument ultimately fails, simply because one party does not like another party's position.

Accordingly, it is hereby

ORDERED that defendant's motion for leave to amend her verified answer and to impose sanctions against plaintiff is denied.

This is the Decision and Order of the Court.

Next Conference: September 14, 2017 at 10 a.m.

Dated: August 8, 2017
New York, New York



ARLENE P. BLUTH, JSC