Liberty on Warren, LLC v Dragon Estates Condo
2017 NY Slip Op 31750(U)
August 17, 2017
Supreme Court, New York County
Docket Number: 650530/15
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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LIBERTY ON WARREN, LLC, NICOLENA NATOLI-OMANSKY and LAWRENCE A. OMANSKY,

Plaintiffs,

Index No.: 650530/15
DECISION/ORDER
Motion sequence No. 003

-against-

DRAGON ESTATES CONDO, BOARD OF DIRECTORS OF DRAGON ESTATES CONDO, STEVEN HARRIS and MARTIN KERA,

Defendants.

---X

Gerald Lebovits, J:

In this commercial-real-estate action, plaintiffs move for leave to renew and reargue the court's June 15, 2016, decision and order in which the court denied plaintiffs summary judgment and granted defendants' cross-motions for summary judgment. For the following reasons, plaintiffs' motion to reargue and renew is denied.

BACKGROUND

The court reviewed the facts of this case in its June 15, 2016, decision disposing of plaintiffs' summary-judgment motion (motion sequence number 002).

Briefly, plaintiff Nicolina Natoli-Omansky (Natoli) is the owner of two units, one residential and the other commercial, in defendant Dragon Estates Condominium (Dragon), which is located at 49-51 Warren Street in the County, City and State of New York. (*See* notice of motion, exhibit 17.) Natoli owns the residential unit personally, and the commercial unit through her sole ownership of co-plaintiff Liberty on Warren LLC (Liberty), the corporate record owner of that unit. (*Id.*) Dragon is a real-estate development sponsored by non-party Tribeca Realty LLC (Tribeca), of which co-plaintiff Lawrence Omansky is the sole principal. (*Id.*) Omansky drafted the by-laws for Dragon. (*Id.*) Defendant Martin Kera is Dragon's managing agent. (*Id.*) Defendant Steven Harris is the owner of a residential unit in Dragon, a licensed architect and a member of the defendant board of directors of Dragon (the Board). (*Id.*)

In July-August 2014, Natoli obtained a potential purchaser for both of her units, non-party Erica Lerner who was doing business as Erissa LLC (Erissa). (*Id.*) Pursuant to Dragon's by-laws, plaintiffs notified defendants of the potential sale to enable defendants to exercise their right of first refusal and permit them to purchase Natoli's units under the same terms and conditions that she had offered to Lerner and Erissa. (*Id.*) Defendants thereafter waived their right of first refusal, and invited Lerner to meet with the Board to discuss her intended use of the

units. (*Id.*) Lerner notified the Board that she intended to use the units for a dance studio, and that she would be seeking a public assembly permit for the space. (*Id.*) The Board thereafter notified Lerner that Dragon's temporary certificate of occupancy forbids more than ten people to occupy each unit at a time, that their review indicated that the stairs and elevators did not meet public assembly requirements, and that the by-laws prohibited the commercial unit from being used as a rehearsal studio. (*Id.*) Lerner did not purchase Natoli's units. (*Id.*)

Plaintiffs commenced this action on February 15, 2016, by filing a summons and complaint that set forth causes of action for: (1) tortious interference with contract (against all defendants); (2) fraud and negligent misrepresentation (against all defendants); (3) breach of contract (against Dragon, the Board and Harris); (4) a declaratory judgment (against Dragon and the Board); and (5) slander (against Dragon, the Board and Kera). (*See* notice of cross-motion by Dragon, the Board and Harris, exhibit A.) Dragon, the Board, and Harris filed a joint answer on April 1, 2015, and Kera filed a separate answer, appearing pro se, on April 6, 2015. (*Id.*; exhibit B.)

On September 11, 2015, plaintiffs filed a motion for summary judgment on the complaint, and thereafter Dragon, the Board, and Harris cross-moved for summary judgment to dismiss the complaint, as did Kera, separately (together, motion sequence number 002). The court disposed of these motions in a decision dated June 15, 2016, in which the court determined as follows:

> "Plaintiffs' first cause of action for tortious interference is dismissed. Tortious interference with a contract requires the existence of a valid contract between a plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom. Plaintiffs argue that defendants' refusal to allow Erissa to operate a dance studio in the units was intentional — to force Erissa to breach its contract with plaintiffs. But defendants had the right and fiduciary duty to enforce the condominium's declaration. Therefore, any breach that occurred with respect to the sale between plaintiffs and Erissa because of defendants' actions or communications with Erissa was justified.
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> "Plaintiffs' second cause of action for fraud and negligent misrepresentation is dismissed. To plead a cause of action for fraud, 'a plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.' Under CPLR 3016 (b), a claim rooted in fraud must be pleaded with the requisite particularity. When the facts themselves do not plainly show fraud, those facts may be 'supplemented by the circumstances

surrounding the alleged fraud.' Neither the allegations in the complaint nor the surrounding circumstances give rise to a reasonable inference that defendants participated in a scheme to defraud or misrepresent facts to Erissa to prevent the sale between plaintiffs and Erissa. Plaintiffs' argument hinges on their contention that the units could have been used as a dance studio under the certificate of occupancy and bylaws. Dragon's declaration and by-laws, however, forbid the units to be used as a dance studio. Defendants had the right to inform Erissa of Dragon's Declaration and by-laws. No reasonable inference can be made that Erissa relied on any misrepresentation or material omission of fact from defendants in canceling its purchase of the units.

"Plaintiffs' third cause of action for breach of contract and fourth cause of action for a declaratory judgment on the basis of breach of contract are also dismissed. Plaintiffs' basis for these causes of action is found in Article 8 of the Declaration: 'The Condominium Board may not exercise any right to amend the Certificate of Occupancy prohibiting or limiting the permitted use of any Commercial Unit once same has been purchased or if same is held by sponsor.' Even though this provision prevents the Board from limiting the preexisting uses of the units, a different provision in the Declaration provides that only the Board may amend the certificate of occupancy to expand the units' permissible uses. Whether the Board should expand the certificate of occupancy to permit additional uses for the units is not for this court to decide. A court may not question the reasonableness of a board of directors' decisions '[a]bsent proof of a breach of fiduciary duty to the cooperative corporation.' No proof exists that defendants breached a fiduciary duty; therefore, this court will not question the Board's decision to maintain the current permitted uses under the Declaration. Because plaintiffs have not demonstrated that defendants breached the contract, the third and fourth causes of actions are dismissed.

"Fn 1. Plaintiffs' fifth cause of action for slander against defendant Martin Kera was dismissed on the record during oral argument on April 20, 2016.

"Accordingly, it is hereby ORDERED that plaintiffs' motion for summary judgment is denied and that defendants' two cross-motions for summary judgment are granted."

(*See* notice of motion, exhibit 17 [internal citations and footnotes 2 & 3 omitted].)

DISCUSSION

Different burdens exist under CPLR 2221 for motions to renew and motions to reargue. A motion to renew must be based on "material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court." (*See Matter of Weinberg*, 132 AD2d 190, 209-210 [1st Dept 1987], citing *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979].) And "[r]enewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." (*Chelsea Piers Management v Forest Elec. Corp.*, 281 AD2d 252, 252 [1st Dept 2001], citing *Rubinstein v Goldman*, 225 AD2d 328 [1st Dept 1996].) In contrast, a motion for leave to reargue may be granted only upon a showing "'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], quoting *Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988].) A motion for reargument "is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." (*Id.* at 27, citing *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984].) Nor does a reargument motion provide a party "'an opportunity to advance arguments different from those tendered on the original application.'" (*Rubinstein v Goldman*, 225 AD2d 328, 328 [1st Dept 1996], quoting *Foley v Roche*, 68 AD2d at 568.)

Plaintiffs make no attempt to address either of the foregoing legal standards in their motion. Plaintiffs made no attempt to distinguish between their moving, opposition and reply papers either, choosing to label them all as "affidavits in support" and failing to state which documents applies to the corresponding request for relief.

First, in the memorandum of law accompanying their motion, plaintiffs argue that "once plaintiff Omansky withdraws the fifth cause of action no conflict of interest should arise!" (*See* plaintiffs' mem of law, ¶¶ 2-6 [emphasis in original].) This argument is irrelevant. Plaintiffs neither address the standards set forth in CPLR 2221, nor acknowledge the fact that the court dismissed plaintiffs' fifth cause of action at oral argument on April 20, 2016. Therefore, the court rejects this argument.

Next, plaintiffs argue that they "have shown sufficient facts to warrant the denial of defendants' motion to dismiss the fifth cause of action!" (*See* plaintiffs' mem of law, ¶¶ 7-11 [emphasis in original].) This argument appears to address the standards that govern motions to renew; i.e., it is an assertion that there exist "new facts not offered on the prior motion that would change the prior determination." (CPLR 2221 [e] [2].) But plaintiffs do not identify any "new facts," but instead allege that: "1) Omansky is willing to withdraw [the fifth cause of action for slander] and will pursue [it] under a separate complaint and new index number, 2) issues of fact remain . . . and discovery has not been completed, and 3) Kera did in fact make defamatory and slanderous statements and plaintiffs' [cause of] action has merit . . . ." (*See* plaintiffs' mem of law, ¶ 7.) None of these reasons can be construed as constituting a "new fact not offered on the prior motion." Therefore, the court finds that plaintiffs have failed to meet their burden of proof under CPLR 2221, and rejects plaintiffs' argument for leave to renew with respect to plaintiffs' fifth cause of action.

Plaintiffs next argue that "defendants individually and jointly tortiously interfered with the Erissa contract warranting summary judgment!" (*See* plaintiffs' mem of law, ¶¶ 12-16 [paragraphs incorrectly numbered] [emphasis in original].) This argument pertains to their first cause of action for tortious interference with contract. Plaintiffs state that their allegations are "evident" based on: 1) the inclusion of "illegal restrictive covenants in the waiver of the right of first refusal"; 2) Kera's "slander" of Omansky; 3) Harris's alleged statement to Lerner that he would prevent the approval of the Erissa purchase; 4) the alleged inclusion in Dragon's by-laws of an "easement" permitting the emergency use of the elevator and stairs appurtenant to the subject commercial unit; 5) Natoli's purported continuous personal use of said elevator and stairs; and 6) the allegation that the Board's decision regarding use of Dragon's common areas would impede access to tenants' mailboxes. (*Id.*, ¶ 12.) These factual allegations are appropriate for consideration on a motion to renew. But a review of the record shows that Natoli made the same allegations and referred to the same evidence (i.e., documents and deposition testimony) in her previous summary judgment motion. Thus, none of the items set forth above can be considered to constitute a "new fact not offered on the prior motion." The court finds that plaintiffs have failed to meet their burden of proof under CPLR 2221, and rejects plaintiffs' argument for leave to renew with respect to plaintiffs' first cause of action for tortious interference with contract.

Plaintiffs next argue that "the Board fraudulently and negligently misrepresented facts to Erissa, constituting tortious interference and causing Erissa to default under the contract!" (*See* plaintiffs' mem of law, ¶¶ 14-17 [paragraphs incorrectly numbered] [emphasis in original].) This argument pertains to plaintiffs' second cause of action for fraud and negligent misrepresentation. As evidence of this alleged fraud and/or negligent misrepresentation, plaintiffs refer to: 1) a letter, dated October 24, 2014, that the Board sent to Natoli to request information about the proposed use that Lerner and Erissa intended for the commercial unit; 2) a letter, dated December 19, 2014, from the Board's counsel to Natoli's attorneys stating the Board's position that Lerner's and Erissa's proposed use of the commercial unit as a dance studio was improper under Dragon's governing documents; 3) copies of Erissa's brochures; 4) copies of Dragon's declaration, by-laws and certificate of occupancy; and 5) the experts report, dated November 6, 2015, of architect Giuseppe Anzalone. (*Id.*; notice of motion, exhibits 2, 5, 6, 8, 9, 10, 11, 15 [exhibits incorrectly numbered in memorandum].) This is all factual evidence pertinent to a motion to renew. But a review of the record shows that plaintiffs presented this evidence in conjunction with their previous motion for summary judgment. Thus, this evidence does not constitute proof of a "new fact [] not offered on the prior motion," and cannot serve as the basis for plaintiffs' current request for relief pursuant to CPLR 2221. Accordingly, the court denies plaintiffs' request for leave to renew with respect to their second cause of action for fraud and negligent misrepresentation.

Plaintiffs next argue that "the decisions of the board of managers do not qualify as exemptions under the business judgment rule!" (*See* plaintiffs' mem of law, ¶¶ 18-26 [paragraphs incorrectly numbered] [emphasis in original].) This argument again refers to plaintiffs' second cause of action for fraud and negligent misrepresentation. But because it is a legal argument rather than a factual one, it is appropriately directed to a motion to reargue rather than a motion to renew. The court notes that plaintiffs raised the same argument, word for word,

in their reply papers in support of their earlier motion for summary judgment (motion sequence number 002). Plaintiffs do not explain how "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d at 27.) Plaintiffs' argument is an attempt to improperly secure a "successive opportunit[y] to reargue issues previously decided," which is impermissible under CPLR 2221. (*See id.*) Therefore, the court rejects this argument.

Plaintiffs next raise the following rhetorical argument: "[A]re defendants Harris and Kera personally liable for their actions, based upon their breach of fiduciary duties to plaintiffs Natoli and Liberty? Plaintiffs say yes!" *See* plaintiffs' mem of law, ¶¶ 27-29 [paragraphs improperly numbered] [emphasis in original].) Plaintiffs' legal argument relates to the court's prior dismissal of plaintiffs' third and fourth causes of action on the ground that plaintiffs failed to establish that defendants violated any such fiduciary duties. The court notes that plaintiffs' current argument is restated verbatim from the reply memorandum of law that plaintiffs submitted in support of their earlier summary judgment motion. Likewise, plaintiffs do not explain how "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." The court rejects this argument.

Plaintiffs' final argument consists of the rhetorical statement that "yes, punitive damages are warranted!" (*See* plaintiffs' mem of law, ¶¶ 30-32 [paragraphs incorrectly numbered] [emphasis in original].) This argument is identical, word for word, from the reply memorandum of law that plaintiffs submitted in support of their previous summary judgment motion. Because it contains no new legal argument, the court disregards it for the same reasons, as discussed above. The court further notes that plaintiffs argue that "punitive damages are warranted in cases where an intentional tort has been committed." (Id., ¶ 30.) But the instant complaint does not include a cause of action for prima facie tort. Therefore, the instant argument is also irrelevant, and the court rejects it on that ground as well.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 2221, of plaintiffs Liberty on Warren, LLC, Nicolena Natoli-Omansky and Lawrence A. Omansky (motion sequence number 003) is denied, and the court's decision dated June 15, 2016 stands.

Dated: August 17, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.