Ripley LLC v Board of Mgrs. of the Avery Condominium
2018 NY Slip Op 30225(U)
February 6, 2018
Supreme Court, New York County
Docket Number: 155133/13
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

RIPLEY LLC, et al.

INDEX NO. 155133/13

MOT. DATE

- v -

MOT. SEQ. NO. 006

THE BOARD OF MANAGERS OF THE AVERY CONDOMINIUM

The following papers were read on this motion to/for reargue

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

This case arises from a dispute between plaintiffs, a commercial unit owner of the mixed-use condominium defendant, regarding representation of commercial unit owners on the condominium board and access to commercial common element services set forth in the condominium's declaration, by laws and related documents. The remaining causes of action in this case are for damages for loss of revenue resulting from an inability to access an electric meter room (fourth COA), a declaration that the defendant condominium board acted *ultra vires* in allocating maintenance charges to plaintiff's unit (fifth COA), and an injunction mandating the election of a non-residential representative to the condominium board (sixth COA).

In motion sequence number 006, defendants moved to renew and/or reargue a consolidated decision/order by the Honorable Joan Kenney dated February 3, 2017 which disposed of motion sequence numbers 004 and 005. In a decision/order dated July 28, 2017, Judge Kenney granted the motion "without any written opposition..."

Plaintiff, however, timely filed opposition to the motion to renew/reargue. This case was subsequently reassigned to this court, and Judge Kenney is no longer available to hear the motion within the meaning of CPLR § 2221. Therefore, on January 23, 2018, the court so-ordered a stipulation presented by both sides which vacated the 7/28/17 decision/order, restored motion sequence number 006 to the active calendar and marked same submitted to this court. The court's decision follows.

The facts in this case, as set forth in the 2/6/17 decision, are hereby incorporated by reference. In motion sequence number 004, plaintiffs moved for partial summary judgment on liability on the fourth, fifth and sixth causes of action. Defendants opposed that motion and cross-moved for summary judgment in their favor. Also, in motion sequence number 005, defendants moved for summary judgment dismissing the second and fifth causes of action. Plaintiffs opposed motion sequence number 005.

Dated: 2/6/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

In the 2/3/17 decision, Judge Kenney granted Plaintiffs' motion for partial summary judgment as to their Fourth, Fifth, and Sixth Causes of Action, and denied Defendants' motion to dismiss the Fifth Cause of Action.

Defendants now seek to reargue the prior motions on the grounds that the court improperly determined disputed issues of fact regarding defendants' denial of plaintiff's access to the electric meter room, that the court misapprehended the law on the applicability of RPAPL § 853 to plaintiffs' claims, that plaintiffs' fifth cause of action is governed by a four-month statute of limitations and that partial summary judgment on the sixth cause of action was not warranted. In support of renewal, defendants contend "that a change and/or clarification in controlling law following submission of the subject motions compels reconsideration and reversal of this Court's prior determination."

A motion to reargue is addressed to the court's discretion, and permission to reargue will only be granted if the court believes some error has been made (see CPLR § 2221[d][2]). In order to succeed motion for reargument, the movant must demonstrate that the Court overlooked or misapprehended the law or facts when it decided the original motion (*Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with another opportunity to re-litigate the same issues previously decided against him or her (*Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does a motion to reargue permit a litigant to present new arguments not previously advanced on the prior motion (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; see also *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715 [1st Dept 2005]).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]). The proponent of a motion to renew must offer a reasonable excuse for the failure to present the "new" facts on the prior motion (*In re Defendini*, 142 AD3d 500 [2d Dept 2016]).

In its amended complaint, plaintiff alleged that the defendants "neglected to furnish... access to the commercial common elements since August 19, 2011..." In the 2/3/17 decision, the court found that "[b]ased on the correspondence, affidavits and deposition testimony of the parties and their professionals, the preponderance of evidence leads to the conclusion that plaintiffs was (sic) denied access until September 15, 2014, which negatively impacted its use of the dental office, resulting in economic loss."

Defendants now point to, *inter alia*, an email dated December 12, 2011, from Raymond Murphy, defendant's Resident Manager, which states in pertinent part:

> We have identified your meter. Please let me know when you need access and I will set it up. I have not had up to now any requests come through me for access. Just notify me when you need to get in and I will take care of it. We also indentify (sic) your water feed so you will be able to proceed.
>
> If you need anything else please do not hesitate to contact me.

Defense counsel also points to Murphy's affidavit submitted in connection with the prior motions, as well as the individual defendant's deposition testimony, wherein each stated in substance that they never denied plaintiff access to the electric meter room.

Defendants have not established that the court overlooked these facts when it rendered the 2/3/17 decision. Judge Kenney clearly stated that the 12/12/11 email from Murphy was of no moment since the dispute regarding access to the electric meter room arose in 2013. Judge Kenney went on to examine the various emails, affidavits and other exhibits, and concluded that there could be no dispute that defendants denied plaintiff such access. By way of this motion, defendant seeks to relitigate the court's grant of partial summary judgment in favor of plaintiff, which is beyond the purview of a motion to reargue. Therefore, this argument fails.

Next, defendants argue that the court erred in denying the cross-motion for summary judgment dismissing the fourth cause of action because the court overlooked relevant caselaw rendered after the underlying motions were marked submitted but before the 2/3/17 decision. Specifically, defendants contend that RPAPL § 853 is inapplicable to condominiums, citing *Dinger v. Cefola*, 133 AD3d 816 (2d Dept 2016). Defendants further argue that the court erred in extending RPAPL § 853 to areas that are not part of the leasehold.

At the outset, the court notes that Judge Kenney clearly considered the subject argument when she stated that RPAPL § 853, "on its face, does not distinguish between landlord-tenant and/or condominium owner-condominium board relations" and "the statute has been applied to all real property rights, other than just leasehold rights..." Indeed, *Dinger* is not new law which was rendered after the 2/3/17 decision. Therefore, renewal is not available.

To the extent that the defendants argue that the court overlooked *Dinger*, which it did not expressly cite, the court will consider that issue. RPAPL § 853 provides as follows:

> If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.

In *Dinger*, the Second Department affirmed a trial court order which, *inter alia*, granted a defendants' CPLR § 3211[a] dismissal motion of a RPAPL § 853 claim because the complaint "did not allege that the plaintiff was a tenant entitled to possession of the premises at issue..." Defendants argue that this court is bound to follow *Dinger* absent any authority from the First Department to the contrary. Meanwhile, plaintiffs point to *In re Estate of Neustein*, 28 Misc3d 1236(A) (Kings Co, 2010) *aff'd in part, dism'd in part In re Neustein*, 97 AD3d 684 (2012), which was cited by the court in the 2/3/17 decision. Further, plaintiffs maintain the *Dinger* did not find that a Section 853 wrongful eviction claim requires a landlord/tenant relationship.

Contrary to plaintiffs' contention, the Court in *Dinger* clearly held that the particular RPAPL § 853 claim before it required an allegation that a landlord/tenant relationship existed. The Court stated that plaintiff was not a tenant and "thus was not entitled to the protection of RPAPL § 853." *Dinger* is limited in application to its facts, and does not stand for the broad proposition defendants urge this court to adopt. This holding makes sense given the statute itself. The statute does not state, on its face, that it only applies to leasehold interests. Further, it is part of Article 8 of the RPAPL, which is entitled Waste and Other Actions and Rights of Action for Injury to Real Property. Article 8 of the RPAPL sets forth a number of causes of action which do not all apply only to leasehold interests. Further, RPAPL § 853 provides for treble damages to a "person" wrongfully excluded from possession of real property. If the legislature had intended to limit Section 853 treble damages to leasehold interests, only, it would have expressly done so.

This holding is consistent with *In re Neustein*, wherein the Second Department affirmed a trial court's award of treble damages for violation of RPAPL § 853 to a fee simple owner. While defendants argue that this case is distinguishable because the trial court did not "even consider whether Section 853 applies to non-tenancy situations, as is the case here...", such a finding cuts both ways. Indeed, the *Dinger* Court did not state that Section 853 does not apply to fee simple owners, thereby expressly overruling *In re Neustein*, nor did the *Dinger* Court expressly state that Section 853 is unavailable to a condominium unit owner.

Relatedly, defendants' argument that Section 853 does not apply to plaintiffs' exclusion from common elements of the building is a new argument not properly advanced before the court on the prior motions. Otherwise, for the reasons herein stated, this court finds that *Dinger* was not overlooked. Therefore, reargument on this ground is also denied.

Next, defendants contend that the court overlooked or misapplied the law when it found that the fifth cause of action was not governed by a four-month statute of limitations. However, the court expressly addressed this argument: "... the Condominium Board is a private entity formed under Avery's 'governing documents,' and importantly, the dispute here is whether the Board, as formed, is a valid board with the authority to make assessment decisions." The court clearly found that the question was not whether the board's actions were "ministerial" but rather, turned on the composition of the board. Therefore, this argument is rejected because defendants' disagreement with the court's findings on the law is not a basis to reargue the prior motion.

Similarly, defendants' final argument, which "... urges that the Court reconsider and recognize the necessity of the Sponsor to effect the relief requested", is also rejected as a rehash of previously unsuccessful arguments which were rejected by Judge Kenney.

Accordingly, the motion to renew and/or reargue is denied in its entirety.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendant's motion to renew and/or reargue is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 2/6/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.