

Board of Mgrs. of Dragon Estates Condominium v Natoli
2018 NY Slip Op 30286(U)
February 15, 2018
Supreme Court, New York County
Docket Number: 159541/2016
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7**

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BOARD OF MANAGERS OF DRAGON ESTATES
CONDOMINIUM,

Plaintiff,

-against-

Index No. 159541/2016

DECISION/ORDER

Motion Seq. Nos. 001, 002

NICOLENA NATOLI a/k/a LINDA OMANSKY,
ROBERT OMANSKY, ROBIN E. GROSS and
WARREN GOLD LLC,

Defendants.

-----X
Recitation as required by CPLR 2219 (a), of the papers considered in reviewing the motions of defendants Robin Gross (001) and Nicolena Natoli and Robert Omansky (002), to dismiss the complaint of plaintiff Board of Managers of Dragon Estates Condominium and plaintiff's cross motion to amend the complaint.

Papers

Numbered

Defendant Robin Gross's Notice of Motion and Affirmation in Support.....	1
Plaintiff's Memorandum of Law and Affirmation in Opposition.....	2
Defendant's Memorandum of Law and Affirmation in Reply.....	3
Defendants Nicolena Natoli and Robert Omansky's Notice of Motion and Affirmations in Support.....	4
Plaintiff's Notice of Cross Motion and Affirmation in Support.....	5
Proposed Amended Complaint.....	6
Defendant Robin Gross's Affirmation in Opposition to Cross Motion.....	7
Defendants Nicolena Natoli and Robert Omansky's Affirmations in Opposition to Cross Motion and in Further Support of Motion.....	8
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Martin S. Kera, Esq., Hudson, NY, for plaintiff.

Lawrence Omansky, Esq., New York, NY for defendants Robert Omansky and Nicolena Natoli.

Law Offices of Lawrence Fabian, New York, NY (Lawrence E. Fabian of counsel), for defendant Robin E. Gross.

Gerald Lebovits, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

This is an action by plaintiff Board of Managers of Dragon Estates Condominium (Board), seeking to hold defendants Nicolena Natoli, Robert Omansky, Robin Gross and Warren Gold LLC (Warren Gold) liable for a judgment (2015 Judgment) that was entered in this court on May 26, 2015, in favor of the Board against non-parties Tribeca Realty LLC (Tribeca Realty) and Lawrence Omansky in the amount of \$538,670, in a related action titled *Board of Managers of Dragon Estates Condominium v Lawrence A. Omansky and Tribeca Realty LLC*, index number 603511/09.

In motion sequence 001, Gross moves under CPLR 3012 (b) and 3211 (a)(1), (a) (5), (a) (7) and (a) (8), for an order dismissing the complaint. In motion sequence 002, Natoli and Robert Omansky move under CPLR 308, 3012 (b), 3211 (a) (5), (7) and (8), for an order dismissing the complaint. The Board cross-moves for an order granting leave to amend the complaint to add a new party, L.G.R.R.A. Realty, LLC. The Board also cross-moves for an order disqualifying Lawrence Omansky as attorney for defendants and for sanctions.

Background

According to the complaint, Dragon Estates Condominium (Dragon Estates) is a condominium formed in 2004. Plaintiff is its Board of Managers. Tribeca Realty was the Sponsor and Lawrence Omansky was the managing member of Tribeca Realty.

Plaintiff alleges that page 37 of the Condominium Offering Plan provides the following:

“Sponsor will obtain a Temporary Certificate of Occupancy prior to closing of the first unit and will escrow a sufficient sum of money to insure the completion of the renovations in order to obtain a permanent Certificate of Occupancy.”

Plaintiff alleges that Tribeca Realty never escrowed sufficient money to insure the completion of the renovations in order to obtain a permanent Certificate of Occupancy. It also alleges that Tribeca Realty never completed the renovations necessary to obtain a permanent Certificate of Occupancy.

In November 2009, the Board commenced an action in this court against Tribeca Realty and Lawrence Omansky titled *Board of Managers of Dragon Estates Condominium v Lawrence A. Omansky and Tribeca Realty LLC*, 603511/09. The complaint asserted six causes of action. Among other things, the Board alleged that Tribeca Realty failed to obtain a permanent Certificate of Occupancy, failed to complete certain renovations required to obtain such a

certificate, and failed to escrow sufficient funds to ensure that such renovations could be completed. The complaint also alleged that the defendants had transferred certain units for inadequate consideration. Further, the Board alleged that it had incurred expenses to complete certain construction on the building to obtain temporary Certificates of Occupancy.

The complaint also asserted a claim against Lawrence Omansky for breach of fiduciary duty in his capacity as President of the condominium and as a member of the Board of Managers. Finally, the complaint alleged claims for breach of warranties and for failure to disclose certain material defects in the building's construction.

On May 26, 2015, following a jury trial in this court, Judge Joan Kenney, a judgment was entered in favor of the Board against Tribeca Realty and Lawrence Omansky in the amount of \$538,670.

The Board commenced the instant action in November 2016, against Natoli, Robert Omansky, and Warren Gold. The gravamen of the complaint is that each of the defendants was a member of Tribeca Realty and, therefore, defendants are jointly and severally liable for payment of the 2015 Judgment. The complaint alleges, among other things, that defendants improperly distributed assets from Tribeca Realty, rendering it insolvent and unable to satisfy the underlying judgment.

Motion 001

In motion sequence 001, defendant Gross moves under CPLR 3012 (b), 3211 (a) (1), (a) (5), (a) (7) and (a) (8) for an order dismissing the complaint.

As a threshold matter, Gross argues that the complaint was not filed in a timely manner. Gross asserts that, after being served with a summons with notice, Gross's attorney served an amended notice of appearance on November 20, 2016, along with a demand for a complaint. Gross asserts that a complaint was due on December 20, 2016, but was not served until January 6, 2017.

Plaintiff does not dispute these assertions. Instead, plaintiff asserts that its attorney notified Gross that more time was needed due to time constraints because of holidays and other work that the attorney was doing, and Gross failed to object.

"To avoid dismissal of [an] action for failure to serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012(b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action." *Khamis v Corporate Transp. Group, Ltd.*, 135 AD3d 825, 826 (2d Dept 2016) (internal quotation marks and citation omitted). "The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court." *Id.* (internal quotation marks

and citation omitted). Even assuming that plaintiff adequately demonstrated that it failed to timely serve the complaint because of law office time burdens, plaintiff has failed to demonstrate a meritorious cause of action.

Plaintiff's causes of action against Gross all rely on plaintiff's assertion that Gross is, or was, a member of Tribeca Realty, and, therefore, is responsible for payment of the 2015 Judgment. But Gross submits an affidavit stating that Gross is not and has never been a member of Tribeca Realty.

In opposition to Gross's assertion, plaintiff offers no facts, either in the complaint or in its opposition to the instant motion, to support its allegation that Gross was a member of Tribeca Realty. In fact, plaintiff concedes that it has no information to support such an assertion, other than testimony by Lawrence Omansky during a related litigation, in which Lawrence Omansky allegedly stated that Gross was a member of L.G.R.R.A.

Even assuming the truth of such an assertion, plaintiff has not demonstrated how it supports plaintiff's assertion that Gross was a member of Tribeca Realty. Nor has plaintiff demonstrated that further disclosure is warranted on this issue, particularly in light of the significant disclosure and fact-finding already conducted in the action which resulted in the 2015 Judgment.

Therefore, the motion to dismiss the complaint, sequence 001, is granted, and the complaint is dismissed as to defendant Gross.

Motion 002

In motion sequence 002, Natoli and Robert Omansky move under CPLR 308, 3012 (b), 3211 (a) (5), (7) and (8), for an order dismissing the complaint. Natoli contends that the complaint was not properly served, and both parties contend that the complaint fails to state a cause of action.

The Board cross-moves for an order granting leave to amend the complaint to add L.G.R.R.A. as a new party. The Board alleges that L.G.R.R.A. is the alter ego of Tribeca Realty and that defendants improperly commingled the assets of Tribeca Realty and L.G.R.R.A. As such, the Board contends that L.G.R.R.A. is responsible for payment of the underlying judgment.

The Board also cross-moves for sanctions against Natoli and Lawrence Omansky and to disqualify Lawrence Omansky as attorney for defendants on the ground that he will likely be a witness in this action.

Amended Complaint

The Board seeks leave to amend the complaint to add L.G.R.R.A. as a defendant, and to re-serve the complaint. The court will consider the cross-motion to amend first, because, if granted, the amended complaint will become the operative pleading in this action and will moot the motion to dismiss the original complaint. *See Gay v Farella*, 5 AD3d 540, 541 (2d Dept 2004).

“Leave to amend a complaint is typically freely granted, but is committed, however, to the sound discretion of the trial court.” *Velarde v City of New York*, 149 AD3d 457 (1st Dept 2017) (citations omitted). “To obtain leave, a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment.” *Id.* (citations omitted).

As a threshold matter, defendants contend that the cross-motion to amend is moot because, according to Lawrence Omansky, the company has been dissolved. This is unpersuasive.

First, plaintiff submits records from the New York Department of State demonstrating that L.G.R.R.A. remains an active company, which has not been dissolved. Defendants do not dispute or disprove this assertion.

Moreover, even if L.G.R.R.A. had been dissolved, Business Corporation Law § 1006 (a) (4) provides that a dissolved corporation may sue or be sued in its corporate name, and process may be served by or upon it. Personal jurisdiction over a dissolved corporation can be obtained by service on the Secretary of State. *See Bruce Supply Corp. v New Wave Mech.*, 4 AD3d 444, 445 (2d Dept 2004).

The Board contends, in its proposed fourth cause of action, that L.G.R.R.A. is a company of which Lawrence Omansky is the managing member. The Board asserts that, in January of 2005, Tribeca Realty deeded Unit 5E to L.G.R.R.A. for \$380,000. Shortly thereafter, L.G.R.R.A. deeded Unit 5E to a third party for \$1,833,500.00.

The Board alleges that this transaction enabled the defendants to take approximately \$1,450,000 out of Tribeca Realty and to leave Tribeca Realty with an unreasonably small amount of capital to complete construction of the Condominium and obtain the permanent Certificate of Occupancy.

The Board also alleges that L.G.R.R.A. was the owner of record of Unit 1W in the Condominium, and, subsequent to the dissolution of Tribeca Realty in 2008, that Lawrence Omansky continued to pay the common charges for Unit 1W with checks drawn on the Tribeca Realty checking account, further reducing the capital of Tribeca Realty. The Board alleges that, through such transactions, the parties commingled the funds of Tribeca Realty and L.G.R.R.A.

and disregarded their status as separate entities.

The Board's cross-motion to amend is granted and the Board shall serve the amended complaint within 10 days of service of a copy of this order with notice of entry. The court notes, however, that, as described above, this action is essentially one to enforce the underlying judgment by demonstrating that the instant defendants are responsible for payment of such judgment and that funds were impermissibly removed from Tribeca Realty. To the extent that the Board seeks to relitigate the claims which resulted in the underlying judgment, such a course is not permissible.

In light of the court's decision to permit the Board to amend the complaint, the motions to dismiss the original complaint, by Natoli and Robert Omansky, are denied as academic, and both defendants may renew such motions to dismiss, should they choose, within thirty days of service of the amended complaint.

Attorney Disqualification

The Board moves to disqualify Lawrence Omansky as attorney for Robert Omansky and Natoli. Defendants have stated that, in the event this action continues, they agree that Lawrence Omansky cannot continue such representation and to retain a different attorney. Therefore, this portion of the cross-motion is denied as academic and plaintiff may renew the motion if defendants fail to change counsel.

Sanctions

The Board cross-moves for sanctions against Lawrence Omansky arising from alleged falsehoods on his part. However, the Board fails to set forth adequate, specific facts to support such a request. Therefore, this portion of the cross-motion is denied.

Accordingly, it is

ORDERED that the motion to dismiss the complaint by defendant Robin Gross (sequence 001) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and defendant must serve all parties with a copy of this decision and order and also serve the County Clerk's Office, which is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the cross-motion to amend the complaint (sequence 002) is granted to

the extent set forth above and the amended complaint shall be served within 10 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the motion to dismiss the complaint by defendants Nicolena Natoli and Robert Omansky is denied as academic with leave to renew after service of the amended complaint.

Dated: February 15, 2018



J.S.C.

HON. GERALD LEOVITS
J.S.C.