Board of Mgrs. of the 390 Lorimer St. Condominium v Lorimer 390 LLC
2019 NY Slip Op 30148(U)
January 9, 2019
Supreme Court, Kings County
Docket Number: 503232/15
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 11

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BOARD OF MANAGERS OF THE 390 LORIMER STREET CONDOMINIUM,

Plaintiffs, Decision and order

- against - Index No. 503232/15

MS #12

LORIMER 390 LLC, READ PROPERTY GROUP LLC d/b/a READ PROPERTY GROUP, ROBERT WOLF, AARON KLEIN, JOSH OSTREICHER, CHRISTOPHER DIERIG, R.A., S3 ARCHITECTURE LLC, TSF ENGINEERING, P.C., NEW INNOVATIVE WINDOW & DOOR SYSTEMS CORP., DJM PROPERTIES, INC. d/b/a APTSANDLOFTS.COM and DAVID MAUND INC., d/b/a APTS AND LOFTS.COM

Defendants, January 9, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant Innovative Window and Door Systems LLC [hereinafter 'Innovative'] has moved seeking to dismiss the complaint filed by the plaintiff on various grounds. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a previous order, this lawsuit concerns the sale of condominium units at a newly constructed condominium building located at 390 Lorimer Street in Kings County. Specifically, the plaintiff, on behalf of numerous unit owners initiated the current action on the grounds the units were essentially defective. The complaint alleges the construction was done in a defective manner, promises made by the product sponsor were never included within the units and the construction did not

comply with fire-rated construction requirements among other deficiencies. The defendant Innovative Window and Door Systems LLC has moved seeking to dismiss the complaint on the grounds it fails to state any cause of action. Specifically, they argue a settlement was reached between them and the sponsor in another lawsuit foreclosing any further litigation here.

Conclusions of Law

The doctrine of res judicata or claim preclusion prevents a party from relitigating an issue which has already been decided in a prior proceeding (Parker v. Blauvelt Volunteer Fre Oc., Inc., 93 NY2d 343, 690 NYS2d 478 [1999]). It is well settled the doctrine bars recovery on a different theory where the issues arise from the same facts and transactions (Tsabbar v. Delena, 300 AD2d 196, 752 NYS2d 636 [1st Dept., 2002]).

In the order dated May 25, 2017 the court granted TSF Engineering's motion to dismiss the complaint based on the fact that the plaintiff could not maintain a lawsuit against contractors where the plaintiff was not a party to the contract and the contract did not clearly intend to permit such lawsuits. Innovative argues that legal determination should govern their situation as well and thus the court should dismiss the complaint against them for similar reasons. Thus, the collateral estoppel really being sought is one based upon legal reasoning and

conclusions rather than upon similarity of parties, a doctrine known as law of the case. Thus, the plaintiff is certainly correct that "evaluating Plaintiff's claims against innovative Window, by contrast, involves the interpretation of an entirely different contract, with an entirely different party, involving entirely different work, and accordingly, an entirely different set of facts" (see, Plaintiff's Memorandum of Law in Opposition, page 5). However, if the legal posture of the contract mirrors the contract of TSF Engineering then the legal result should be the same. Thus, as noted, the estoppel derives from the legal principles compelled, not any similarity of the parties (see, Jones v. State of New York, 79 AD2d 273, 436 NYS2d 489 [4th Dept., 1981]). Thus, an examination of the contract with Innovative is required.

The contract between Innovative and Green Enterprises Associates Inc., the general contractor obviously did not include the plaintiff within the contract terms. Moreover, there is no intent within the contract permitting the lawsuit contemplated here. The plaintiff argues they maintain standing to pursue the lawsuit since they are third party beneficiaries of the contract between Innovative and the general contractor.

The concept of a third party beneficiary arises due to the reality that "it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay" (Seaver v. Ransom, 224 NY 233, 120 NE 639

[1918]). It is well settled that only an intended third party may assert claims as a third party beneficiary (Port Chester Electrical Construction Corp., v. Atlas, 40 NY2d 652, 389 NYS2d 327 [1976]). It is often difficult to discern whether the requisite intent exists. Thus, in Amin Realty LLC v. K & R Construction Corp., 306 AD2d 230, 762 NYS2d 92 [2d Dept., 2003] the court held a homeowner was not a third party beneficiary between a contractor and a sub contractor hired to pour concrete since there was no evidence the parties intended the owner to be a beneficiary of the contract. In condominium cases it appears there might have been a conflict between the First Department and the Second Department whether unit owners could sue as third party beneficiaries (see, *Law of Condominium Operations*, §9:14 by Gary Poliakoff, Clark Boardman Callagham 2017). Thus, in Board of Managers of Riverview at College Point Condominium III v. Schorr Bros. Development Corp., 182 AD2d 664, 582 NYS2d 258 [2d Dept., 1992], cited by this court as the basis for the dismissal of TSF Engineering, the Second Department held that unit owners maintain no privity where the unit owners were not parties to the contract that gives rise to the allegations. However, shortly thereafter in Board of Managers of Astor Terrace Condominium v. Schuman, Lichtenstein, Claman & Efron, 183 AD2d 488, 583 NYS2d 398 [1st Dept., 1992], the First Department held there was sufficient evidence the plaintiff unit owners were intended beneficiaries of the contract between the sponsor and any

subcontractors. Although Astor was overruled on other grounds (see, Sykes v. RFD Third Avenue 1 Associates LLC, 67 AD3d 162, 884 NYS2d 745 [1st Dept., 2009]) it was cited approvingly recently by the Second Department in Board of Managers of 100 Congress v. SDS Congress, LLC, 152 AD2d 478, 59 NYS3d 381 [2d Dept., 2017). In Congress, the court permitted the unit owners to maintain a third party beneficiary lawsuit against an entity, KEPC hired by a defendant, SDS to conduct inspections services of the premises. The unit owners did not contract with KEPC but the court held that "here, taking the allegations in the complaint as true and affording the plaintiff every favorable inference, the plaintiff sufficiently pleaded a cause of action against KEPC to recover damages for breach of contract on a third-party beneficiary theory...Moreover, KEPC failed to come forward with competent documentary evidence that refuted, as a matter of law, the plaintiff's allegation that it was a third-party beneficiary of its contract with SDS" (id).

Likewise, in this case, there has been no evidence presented why the plaintiff should not be a third party beneficiary of the contract between Innovative and Green Enterprises, especially at this stage of the proceedings. Innovative cites two cases in support of its motion seeking dismissal. The first is Riverview at College Point, (supra) which does not reflect the more modern trend espoused in later cases. Moreover, it is difficult to reconcile

Riverview at College Point in light of Congress (supra). The other case cited by Innovative is Board of Managers of NV 101 N. 5th Street Condominium v. Morton, 39 Misc3d 1212(A), 975 NYS2d 365 [Supreme Court Kings County 2013]). However, that case cannot control the outcome here in light of the Second Department's clear pronouncement in Congress to the contrary (see, also, Encore Lake Grove Homeowner's Association Inc., v. Cashin Associates P.C., 111 AD3d 881, 976 NYS2d 143 [2d Dept., 2013]). To the extent there are lower courts that still adhere to the stricter rule or that factually distinguish between various contract terms, the better course of action on a motion to dismiss is to permit the pleading to go forward and allow discovery to narrow and sharpen the issues. This decision need not conflict with the earlier decision dismissing the complaint against TSF Engineering which contract was of a different nature and import concerning the unit owners. Thus, the law of the case doctrine does not demand a similar result.

Consequently, based on the foregoing, Innovative's motion seeking dismissal of the complaint is denied.

So ordered.

ENTER:

DATED: January 9, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

KINGS COUNTY CLERK
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