

**Whalebone Landing Homeowners' Assn., Inc. v
Lynch**

2019 NY Slip Op 30179(U)

January 22, 2019

Supreme Court, Suffolk County

Docket Number: 15-000285

Judge: Sanford N. Berland

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SHORT FORM ORDER

INDEX NO.: 15-000285

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

WHALEBONE LANDING HOMEOWNERS'
ASSOCIATION, INC.,

Plaintiff(s),

-against-

RUSSEL LYNCH, ALETHEA LYNCH, BINKIS
LANDSCAPE, INC., and JASON BINKIS

Defendant(s).

ORIG. RETURN DATE: January 22, 2015
FINAL RETURN DATE: March 20, 2018
MOT. SEQ. #: 001 MG

ORIG. RETURN DATE: January 30, 2018
FINAL RETURN DATE: March 20, 2018
MOT. SEQ. #: 003 MG

PLAINTIFF ATTORNEYS:
MARGOLIN BESUNDER LLP
1050 Old Nichols Road, Suite 200
Islandia, NY 11749

CRUSER, MITCHELL, NOVITZ, SANCHEZ,
GASTON & ZIMET
Attorneys for plaintiff on the counterclaims
341 Conklin Street, 2nd Fl.
Farmingdale, NY 11735

DEFENDANT ATTORNEYS:
SHEARER PC
Attorneys for Lynch defendants
90 Forest Avenue
Locust Valley, NY 11560

MAZZARA & SMALL, PC
Attyns for Binkis defendants
1698 Roosevelt Avenue
Bohemia, NY 11716

Upon the reading and filing of the following papers in this matter: (1) Order to Show Cause (seq. 001) by plaintiff, dated January 6, 2015, and supporting papers; (2) Memorandum of law in support; (3) Supplemental affidavit in support by plaintiff, dated January 15, 2015, and supporting papers; (4) Affidavit in opposition by defendant Alethea Lynch, dated January 21, 2015, and supporting papers; (5) Memorandum of law in opposition by counsel for defendants Russell Lynch and Alethea Lynch; (6) Notice of motion (seq. 003) by counsel for plaintiff on the counterclaims, dated December 28, 2017, and supporting papers; (7) Affirmation in opposition by counsel for defendants Russell Lynch and Alethea Lynch; and (8) Reply affirmation, it is,

ORDERED, that the Order to Show Cause (seq. 001) made by plaintiff seeking an Order pursuant to CPLR §6301, awarding a preliminary injunction enjoining and restraining defendants, their agents, servants, employees and/or contractors from engaging in the actions specified in the Order to Show Cause¹, is GRANTED; and it is further

ORDERED, that this matter be set down for a hearing to determine the proper amount of an undertaking, if any, on **March 14, 2019 at 2:15 p.m.**; and it is further

ORDERED, that the motion (seq. 003) made on behalf of plaintiff seeking dismissal of defendants' counterclaims pursuant to CPLR § 3211 (a) (5) and (7) and § 3016 (b), is GRANTED.

ORDERED, that counsel for plaintiff shall serve a copy of the within Order upon counsel for the defendants pursuant to CPLR § 2103 (b) within 30 days of the date of this Order. **Proof of service must be filed with the County Clerk.**

This action involves a dispute concerning deforestation and construction on the property located at 47 Scrimshaw Drive in Southampton (the "property"), owned by defendants Russell Lynch and Alethea Lynch. It is undisputed that the property is part of a residential community known as "Whalebone Landing" (the "community") and is subject to covenants and restrictions as set forth in a declaration recorded with the Suffolk County Clerk's Office in 1978 (hereinafter the "declaration") (*see* Exhibit "A" attached to plaintiff's Order to Show Cause). Plaintiff alleges that defendants violated the covenants and restrictions of the declaration by, among other things, deforesting large areas of the property without approval of the plaintiff's Board of Trustees (hereinafter the "Board"). Plaintiff alleges that additional violations include defendants' unauthorized construction of a pool and fence on the property and the removal and relocation of a leeching pool and cesspool onto environmentally sensitive property owned by plaintiff.

Preliminary Injunction

Plaintiff now seeks a preliminary injunction during the pendency of this litigation, enjoining defendants from the further removal of trees and the construction of any new structures on the property. Plaintiff contends that defendants have and continue to irreparably alter the character of the property, which, in turn, deprives the community of the "uniform, rural and rustic appearance" that was promised in the declaration. It is plaintiff's position that without injunctive relief, the character and integrity of the community will be irreparably damaged.

It is well settled that a preliminary injunction is a drastic remedy which will not be granted unless the movant establishes "'a clear right thereto . . . under the law and the undisputed facts upon the moving papers'" (*Abinanti v. Pascale*, 41 A.D.3d 395 [2d Dept. 2007], *quoting Peterson v. Corbin*, 275 A.D.2d 35 [2000]), *quoting Nalitt v City of New York*, 138 AD2d 580, 581 [1988]). The party moving for a preliminary injunction must establish a likelihood of success on the merits, irreparable injury in the event the injunctive relief is denied and that a balancing of the

¹ Defendants may engage in construction pertaining to the driveway at the subject property as set forth and agreed upon between the parties in the Stipulation so-ordered by this Court on May 26, 2016.

equities favors the granting of the injunction (*Aetna v. Capasso*, 75 N.Y.2d 860 [1990]; *W.T. Grant Co., v. Sgroi*, 52 N.Y.2d 496 [1981]). Where the moving party has an adequate remedy at law by “which his or her rights can be protected and properly conserved,” an injunction will not be granted (67A NY Jur 2d, Injunctions §24; *Gaynor v. Rockefeller*, 15 N.Y.2d 120 [1965] at 132).

Based upon a review of the arguments and evidence presented, plaintiff sufficiently established a potential for irreparable harm, likelihood of success on the merits, and a balance of the equities in its favor, satisfying its burden for the granting of a preliminary injunction during the pendency of this action. Importantly, it is clear that a denial of injunctive relief at this stage in litigation would render a final judgment ineffectual. In particular, with respect to further deforestation on the property, once the large trees are cut down, they cannot be replaced, constituting irreparable harm. (see *Green Harbour Homeowners' Ass'n, Inc. v. Ermiger*, 67 A.D.3d 1116 [3d Dept. 2009] citing *Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498, 637 N.Y.S.2d 383 [1st Dept. 1996]; *Sforza v. Nesconset Fire Dist.*, 184 A.D.2d 631, 632, 584 N.Y.S.2d 885 [2d Dept. 1992]; *Wiederspiel v. Bernholz*, 163 A.D.2d 774, 775, 558 N.Y.S.2d 739 [3d Dept. 1990]).

Further, plaintiff has proffered evidence showing, *prima facie*, that the declaration prohibits certain improvements to and construction on the property absent Board approval, which has not been obtained by defendants, and that it is, therefore, entitled to enforcement of the covenants and restrictions contained in the declaration to which the property is subject, thus demonstrating a likelihood that it will succeed on the merits in this action.

Finally, although in opposition to the application for a preliminary injunction, counsel for defendants the homeowner defendants, Russell Lynch and Alethea Lynch, asserts that prohibiting completion of the construction would render the property unusable by the Lynches, that assertion is entirely conclusory and unsubstantiated and without evidentiary support in the record. Inasmuch as there is no competent evidence showing that defendants will be prejudiced by merely preserving the status quo, the balance of the necessarily equities tilts in favor of plaintiff, which will be prejudiced if a preliminary injunction is not granted.

Dismissal of defendants Russell Lynch's and Alethea Lynch's Counterclaims

Plaintiff commenced this action with the filing of its summons and verified complaint on January 8, 2015 (see Exhibit “A” of the Notice of Motion). On April 7, 2017, plaintiff served a supplemental summons and amended verified complaint (see Exhibit “B”). On May 10, 2017, defendants Russell Lynch and Alethea Lynch served a verified answer (see Exhibit “C”). On November 6, 2017, defendants Russell Lynch and Alethea Lynch then served an amended answer with counterclaims against plaintiff alleging damages for intentional infliction of emotional distress and breach of fiduciary duty (see Exhibit “D”).

Plaintiff now seeks an Order dismissing the Lynch defendants' counterclaims pursuant to CPLR § 3211 (a) (5) on the ground that such claims are barred by the applicable statute of limitations, or, in the alternative, pursuant to CPLR § 3211 (a) (7) and § 3016 (b) for defendants' failure to state a cause of action and for their failure to plead their counterclaim for breach of fiduciary duty with particularity.

The Lynch defendants' cause of action for intentional infliction of emotional distress is predicated upon their allegation that "[i]n suing the Lynches for performing work that was applied for and approved by [plaintiff] prior to commencement of the work and in falsely claiming that the Lynches removed removed from common areas," the plaintiff acted maliciously and engaged in conduct that "was and is extreme and outrageous and was and is designed and intended to cause severe emotional distress to the Lynches." (see Exhibit "D" at p. 14). With respect to their counterclaim for breach of fiduciary duty, the Lynch defendants allege that plaintiff breached its fiduciary duty by commencing this action after "approving and requiring installation of the in-ground swimming pool on the eastern side of the backyard" and "approving removal of trees" (*Id.*)

Plaintiff asserts that by letter dated October 27, 2014, the Board advised defendants for a final time that it did not approve the removal of trees from the property and that such removal constituted a violation of the covenants and restrictions of the declaration. The Board also informed defendants that it intended to commence appropriate legal action concerning defendants' removal of trees within the community (see Exhibit "F"). Plaintiff then commenced this action on January 8, 2015.

Statute of Limitations. Plaintiff takes the position that the statute of limitations for defendants' counterclaims began to run no later than October 27, 2014. Since a one-year statute of limitations governs the counterclaim for intentional infliction of emotional distress and a three-year statute of limitations applies to the counterclaim of breach of fiduciary duty, the time by which to assert those causes of action expired on October 27, 2015 and October 27, 2017, respectively². Plaintiff argues that defendants' counterclaims are therefore time barred as they were not asserted until November 6, 2017.

In opposition, counsel for defendants contends that the counterclaims asserted by defendants are based upon plaintiff's actions prior to the filing this action, the filing of this action, and the continued prosecution of this matter. Therefore, counsel contends that the statute of limitations periods are tolled based upon the "continuing tort doctrine."

Where, as here, a party moves to dismiss a complaint pursuant to CPLR § 3211 (a) (5) on the ground that it is barred by the statute of limitations, that party bears the initial burden of establishing the affirmative defense by *prima facie* proof that the time in which to sue has expired (see *Assad v. City of New York*, 238 A.D.2d 456 [2d Dept. 1997]). Once the movant makes such a showing, the burden shifts to the opponent to aver evidentiary facts establishing that the action was timely commenced or falls within an exception to the statutory period (see *Savarese v. Shatz*, 273 A.D.2d 219, 220 [2d Dept. 2000]).

CPLR 203(d) provides as follows:

² Notably, defendants do not dispute that their counterclaims for intentional infliction of emotional distress and breach of fiduciary duty are governed by the one-year and three-year statutes of limitations of, respectively, CPLR § 215 (3) and CPLR § 214.

Defense or counterclaim. A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

Here, the action was commenced by plaintiff on January 8, 2015. At that time, both counterclaims subsequently asserted by the Lynch defendants would have been timely. Although the Lynches might have been limited in asserting their counterclaim for the alleged intentional infliction of emotional distress to the amounts demanded by plaintiff in the original complaint had they sought leave to amend their original answer to interpose those counterclaims (*see, e.g., U.S. Fid. and Guar. Co. v Delmar Dev. Partners, LLC*, 22 AD3d 1017, 1020 [3d Dept 2005]); *Enrico & Sons Contr., Inc. v Bridgemarket Assoc.*, 252 AD2d 429, 430 [1st Dept 1998]. *See generally Balanoff v Doscher*, 140 AD3d 995, 996 [2d Dept 2016]), by amending its complaint, the plaintiff effectively invited, or in any event opened the door to, the assertion by the Lynch defendants in their responsive pleading of the two counterclaims as affirmative claims for relief (*cf., Mendrzycki v Cricchio*, 58 AD3d 171, 174-75 [2d Dept 2008] (“an amended complaint is deemed to supersede an original complaint”); *Diematic Mfg. Corp. v Packaging Indus., Inc.*, 412 F Supp 1367, 1373 [SDNY 1976](applying New York law)).

CPLR § 3211 (a) (7) Irrespective of the statute of limitations issue, defendants have failed to set forth facts to set forth cognizable claims for intentional infliction of emotional distress and have failed to state a claim for breach of fiduciary duty with the requisite particularity.

“[I]n considering a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court should ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*Sinensky v. Rokowsky*, 22 A.D.3d 563,564 [2d Dept. 2005] quoting *Leon v. Martinez*, 84 N.Y.2d 83,87-88 [1994]; *Simos v. Vic-Armen Realty, LLC*, 92 A.D.3d 760 [2d Dept. 2012]).

To set forth a claim of liability for intentional infliction of emotional distress against the plaintiff homeowners’ association, the Lynches must allege that plaintiff’s conduct was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society” (*Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 303). The tort involves four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal relationship between the conduct and the injury; and (4) severe emotional distress (*Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121).

Here, the factual allegations made against plaintiff, even if taken as true and viewed in the light most favorable to the pleader, do not rise to the level of outrageous conduct necessary

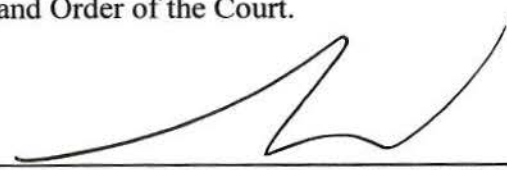
to sustain a cause of action for intentional infliction of emotional distress. Moreover, the allegations are insufficient to show that plaintiff's alleged conduct was intended to cause the Lynches severe emotional distress or that it did so (see *Klein v. Metropolitan Child Servs., Inc.*, 100 A.D.3d 708; *Shelia C. v. Povich*, 11 A.D.3d 120; *Geller v. Harris*, 258 A.D.2d 421).

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (see *Deblinger v. Sanipine Prods. Co., Inc.*, 107 A.D.3d 659, 967 N.Y.S.2d 394 [2d Dept. 2013]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept. 2010]). Further, pursuant to CPLR § 3016 (b), "where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." In this case, defendants are alleging that the misconduct committed by plaintiff was in leading them to believe that their project, as amended to conform to the plaintiff's express requirements, had been approved and then bringing this lawsuit against them alleging that there had been no approval. To the extent their contention is that this action is meritless and that they have, as a consequence, been subjected to needless costs and expenses, their remedy is not a counterclaim but an application to the court for the award of costs and the imposition of sanctions at the appropriate juncture (see 22 NYCRR § 130-1.1; see generally *Glenn v Annunziata*, 53 AD3d 565, 566 [2d Dept 2008]; *Testa ex rel. Testa v Koerner Ford of Syracuse, Inc.*, 261 AD2d 866, 868-69 [4th Dept 1999]; *Watson by Watson v City of New York*, 178 AD2d 126, 128 [1st Dept 1991]). To the extent they are alleging a breach of fiduciary duty on the part of the plaintiff apart from the commencement and prosecution of the current action, their conclusory allegations are insufficient to meet the particularity requirement of CPLR § 3016 (b).

Accordingly, the plaintiff's motion, brought by Order to Show Cause, for a preliminary injunction pursuant to CPLR §6301, and the plaintiff's motion seeking an Order dismissing the defendants' counterclaims for intentional infliction of emotional distress and breach of fiduciary duty, CPLR § 3211 (a) (5) and (7) and § 3016 (b), are granted, with leave granted to defendants Russell Lynch and Alethea Lynch to replead their purported counterclaim for breach of fiduciary duty against the plaintiff, if they are so advised, within 20 days after service of this Order upon them.

The foregoing constitutes the decision and Order of the Court.

Dated: 1/22/2019
Riverhead, New York


HON. SANFORD NEIL BERLAND, A.J.S.C.

 FINAL DISPOSITION XX NON-FINAL DISPOSITION