Andreas v Cushing
2019 NY Slip Op 33533(U)
November 27, 2019
Supreme Court, New York County
Docket Number: 156486/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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GERALDINE ANDREAS, CHRISTOPHER DARK, GERALDINE ANDREAS A/K/A GERI ANDREAS AND CHRISTOPHER DARK A/K/A CHRISTOPHER J.L. DARK AS A SHAREHOLDERS OF 186 TENANTS CORP.,

Plaintiff,

- v -

JUSTINE CUSHING, 186 TENANTS CORP.,

Defendant.

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INDEX NO. 156486/2016

MOTION DATE 11/04/2019

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 212, 213, 214, 215, 216, 217, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, plaintiffs move for an order directing defendants to separately state and number their counterclaims pursuant to CPLR 3013, 3014, and 3024(a). Defendants cross move for leave to amend their answer and a preliminary injunction directing plaintiffs to pay maintenance.

Upon this Court's decision and order dated August 12, 2019 in the related action (Index No. 157616/2018), the plaintiffs in that action, defendants 186 Tenants Corp. and O'Neil here, were directed to assert their claims in the related action as counterclaims in the forthcoming answer in this action. That answer has been served and filed here as NYSCEF Doc. No. 207, and it contains the same claims, now asserted as counterclaims, as directed. These claims are separately numbered and identified. Accordingly, the Court finds no basis to grant the relief plaintiffs seek. In any event, defendants cross move for leave to amend the pleading to divide the second counterclaim into two separate claims: one asserting a breach of fiduciary duty owed

to O'Neil and the other asserting a breach of fiduciary duty owed to the corporation. In granting this relief in part as outlined infra, plaintiffs' motion is mooted.

However, plaintiffs' motion papers discuss arguments that go beyond what was requested in the notice of motion. Specifically, plaintiffs discuss arguments for "future motion practice" — including, inter alia, the argument that "a corporate director does not owe fiduciary duties to shareholders, but rather only to the Corporation" such that defendant O'Neil has no standing to bring a counterclaim for breach of fiduciary duty against plaintiff Andreas (NYSCEF Doc. No. 213 [Jasilli aff] at ¶ 21, n 1). However, plaintiff is not moving to dismiss the counterclaim and the Court will not grant relief that was not requested or clearly moved upon.

Further, plaintiffs' moving papers provide no case law as to the impropriety of the second and third counterclaims. The Court noted in its decision in the related action that the two claims "appear[] to be duplicative . . . [but that] the Court will permit . . . leave to replead and [defendants] may use such opportunity to better distinguish the two claims . . . in the forthcoming answer" (NYSCEF Doc. No. 37 in the related action). The second and third counterclaims here are minimally further distinguished, but different from the original pleading, nonetheless. Originally, the two claims both generically alleged a "breach of fiduciary duty" or "duty of care" (see NYSCEF Doc. No. 4 in the related action). Now the second counterclaim is specifically asserted on behalf of O'Neil, claiming plaintiff Andreas, as a director, breached a fiduciary duty to him; and it also asserts a breach of fiduciary duty to the corporation, defendant 186 Tenants Corp. (see NYSCEF Doc. No. 207 at ¶¶ 26-30). The third counterclaim is a general negligence claim, alleging that plaintiff Andreas owed a duty of care to the corporation and its shareholders. Again, plaintiff has not moved to dismiss or strike the claims (nor do the CPLR provisions cited in the notice of motion provide the Court with such grounds to grant that relief

[NYSCEF Doc. No. 212). If plaintiffs sought dismissal, they should have moved accordingly rather than waste the Court's time by moving for an order directing defendants to separately state and number the counterclaims, when they were already clearly stated and numbered.

Defendants' cross motion to amend is granted in part as referenced above. In addition to splitting the second counterclaim, this amended pleading adds two new counterclaims against plaintiffs for refusing to pay maintenance — to wit, breach of contract and another for a permanent injunction.

It is well settled that "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (Y.A. v Conair Corp., 154 AD3d 611, 612 [1st Dept 2017]).

Plaintiffs challenge the merits of the second and fourth counterclaims. However, as defendants correctly note, the newly-labeled fourth counterclaim (originally, the third counterclaim) is not a new counterclaim per se and is therefore arguably not under review. The second counterclaim is only proposed as separately stated, not as a new claim. However, "in an effort to conserve judicial resources," the Court will engage in "an examination of the proposed amendment" as challenged by plaintiffs in opposition to the cross motion regarding the two claims (see Ancrum v St. Barnabas Hosp., 301 AD2d 474, 475 [1st Dept 2003]).

"Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment" (Hospital for Joint Diseases Orthopaedic Inst. v Katsikis Envtl. Contrs., 173 AD2d 210, 210 [1st Dept 1991]). The Court finds that the newly-labeled fourth counterclaim survives the "patently devoid of merit" review. Even if it is duplicative, at this juncture, there is

nothing prohibiting defendants from pleading in the alternative to a breach of fiduciary duty claim. As for the second counterclaim, the pleading does not indicate that there is any fiduciary duty between Andreas as a director and O'Neil as a shareholder. Any duty owed that may have been breached is plead in the first counterclaim for tortious interference of contract. It is difficult to otherwise discern how plaintiff Andreas, as a director, owed or breached a fiduciary duty to a shareholder, personally, as opposed to the duties she naturally owes to the corporation. Defendants failed to cite any case law in reply papers providing an example demonstrating that such privity or relationship exists that may serve as a basis for a cognizable cause of action (NYSCEF Doc. No. 252 at 6-7). Further, as defendants acknowledge, the alleged wrongs of Andreas were done individually and affected O'Neil individually (see NYSCEF Doc. No. 249 at ¶¶ 15-16) — thus the counterclaim appears to be entirely duplicative of the first. Finally, plaintiffs failed to cite to anything palpably improper about the newly asserted counterclaims regarding maintenance. Accordingly, defendants are denied leave to assert the second counterclaim in the proposed amended answer, and that branch of the motion for leave to amend is otherwise granted.

Defendants also seek a preliminary injunction regarding plaintiffs' refusal to pay maintenance. Their proposed amended answer alleges that the plaintiffs entered into a proprietary lease, which required them to pay monthly maintenance, but that plaintiffs have not paid any maintenance since February 2015 (NYSCEF Doc. No. 229 at ¶¶ 42-43). Defendants further contend that plaintiffs owe nearly $100,000.00 in arrears, which will continue to increase in the amount of $2,720.00 each month (id. at ¶¶ 44-45).

CPLR 6301 provides that a preliminary injunction may be granted:

> in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's

> rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the [trial court]" (Doe v Axelrod, 73 NY2d 748, 750 [1988]). Additionally, because a preliminary injunction is a "drastic remedy," the movant "must establish a clear right to that relief under the law and the undisputed facts" (Omakaze Sushi Rest., Inc. v Ngam Kam Lee, 57 AD3d 497, 497 [2d Dept 2008]).

For purposes of this motion, "all that must be shown is the likelihood of success [on the merits]; conclusive proof is not required" (Ying Fung Moy v Hohi Umeki, 10 AD3d 604, 605 [2d Dept 2004]; J. A. Preston Corp. v Fabrication Enters., 68 NY2d 397, 406 [1986] ["a preliminary injunction . . . depends upon probabilities, any or all of which may be disproven when the action is tried on the merits"]). Indeed, this decision is not considered as "the law of the case," "so as to preclude reconsideration of [the issues] at a trial on the merits" (Icy Splash Food & Beverage, Inc. v Henckel, 14 AD3d 595, 596 [2d Dept 2005], quoting Peterson v Corbin, 275 AD2d 35, 40 [2d Dept 2000], citing J. A. Preston Corp., 68 NY2d 397).

Defendants argue that the proprietary lease does not permit the plaintiffs to withhold maintenance, except in certain instances not applicable here (e.g., if a fire substantially damages the unit). Under the lease, defendants claim that damage to a unit from another tenant, or water, or radiators, is not the responsibility of the corporation and there shall not be any abatement of

rent, unless the corporation was negligent. Defendants also argue that the corporation will be irreparably harmed because plaintiffs own 24 of the 81 outstanding shares, such that their failure to pay maintenance (and continual refusal to pay) is devastating to the corporation's financial health, as it is a small four-unit cooperative. Finally, defendants argue that the balance of equities tip in their favor as plaintiffs are being asked to contribute to an asset, which they already own and plaintiff Andreas herself recently voted to increase maintenance fees because the building required more funding to run properly. Defendants also claim it is inequitable for plaintiffs to require their three neighboring units to bear the entire burden of maintaining the building without a single contribution from them, as equal shareholders, for four years.

Plaintiffs argue that an injunction is improper when monetary damages are an adequate remedy. However, this issue of maintenance fees goes beyond a monetary value and impacts the corporation's ability to keep the building and its finances in proper condition. Specifically, defendants note that the corporation currently owes $181,577.20 in back real estate taxes to the City of New York. Notably, plaintiffs themselves acknowledge that the building is in poor condition (see NYSCEF Doc. No. 241 at ¶ 33). Plaintiffs other arguments in opposition are unavailing.

Accordingly, the Court finds that the appropriate remedy would be to grant the injunction to the extent that plaintiffs are directed to pay their maintenance fees into an escrow account pending the outcome of this litigation.

It is hereby ORDERED that plaintiffs' motion for an order directing defendants to separately state and number their counterclaims is moot and otherwise denied; and it is further

ORDERED that the defendants' cross motion for leave to amend the answer is granted, in part, as follows: leave is granted to amend the all counterclaims except the second proposed

counterclaim and to this extent the proposed amended answer in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the answer is denied with respect to the proposed second counterclaim and that cause of action is stricken; and it is further

ORDERED that plaintiffs shall respond to the amended pleading within 20 days from the date of said service; and it is further

ORDERED that the branch of defendants' cross motion for a preliminary injunction is granted to the extent that all maintenance fees in arrears and all fees going forward shall be paid by plaintiffs into an escrow account pending litigation; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 623 of 111 Centre Street on December 11, 2019, at 9:30 AM.

This constitutes the decision and order of the Court.

11/27/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:		GRANTED	DENIED	X	GRANTED IN PART		OTHER
		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE