

**Boltin v Board of Mgrs. of the 447-453 W. 18th St.
Condominium**

2020 NY Slip Op 30317(U)

January 31, 2020

Supreme Court, New York County

Docket Number: 655633/2018

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LBOVITS

PART

IAS MOTION 7EFM

Justice

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INDEX NO. 655633/2018

CAROLYN BOLTIN,

12/19/2019,

Plaintiff,

MOTION DATE 12/19/2019

- v -

MOTION SEQ. NO. 001 004

BOARD OF MANAGERS OF THE 447-453 WEST 18TH STREET CONDOMINIUM, KIM PILLEMER, RYAN ASHER, MICKAEL OHANA, 447-453 WEST 18 LP, MADISON EQUITIES, LLC, JOHN DOE, JANE DOE,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 35, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to

AMEND PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 103, 104, 105, 108

were read on this motion to

COMPEL

Haskell & Wright PLLC, Mineola, NY (Brandon M. Zlotnick of counsel), for plaintiff.
Law Offices of Jay S. Markowitz, P.C., Williston Park, NY (Jay S. Markowitz of counsel), for defendant Mickael Ohana.

Gerald Lebovits, J.:

In this property-damage action, plaintiff Carolyn Boltin alleges that her condominium unit (Apartment 8D) sustained damage from a number of different water leaks, including leaks originating in the apartment directly above hers (Apartment 9B).

Boltin sued defendant Mickael Ohana, among others, alleging that he owned Apartment 9B. Ohana admitted ownership of the apartment in his answer. He now asserts, however, that this admission was incorrect, and that 9B is in fact owned by a third party, a corporation. Ohana seeks leave in motion sequence 001 to amend his answer to change the admission of ownership to a denial of ownership. Additionally, Ohana has refused to respond to Boltin's discovery requests, asserting that there is no basis on which to maintain a damages claim against him relating to leaks from Apartment 9B (or to seek discovery in support of that claim) because he does not own the apartment. In motion sequence 004, Boltin moves to compel Ohana to respond to her discovery requests.

Motion Sequences 001 and 004 are consolidated here for disposition.

DISCUSSION

I. Ohana's Motion for Leave to Amend

Ohana seeks leave on motion sequence 001 to amend his answer. The motion is granted, on condition that this court grants Boltin certain reasonable attorney fees and costs, in an amount to be determined at a later date.¹

CPLR 3025 (b) permits a party to amend a pleading "at any time by leave of court," and provides that "[I]leave shall be freely given upon such terms as may be just, including the granting of costs." Here, Ohana's argument in favor of amendment is simple: as public records reflect, Ohana does not, in fact, own Apartment 9B, and only admitted to owning the apartment due to an (unspecified) misunderstanding between him and his counsel.

Boltin does not dispute that, as a factual matter, a third party owns Apartment 9B, not Ohana. Instead, she argues that Ohana is legally estopped from denying ownership of the apartment; and that this court should decline to grant leave to amend because of the risk of prejudice to her. This court disagrees.

Boltin's estoppel argument is based principally on several emails sent to Boltin and building management regarding measures taken to ameliorate water leaks from Apartment 9B by an individual who identified herself as a property manager for the apartment, acting "[o]n behalf of Mr. Mickael Ohana" (NYSCEF No. 78, at 2). (See NYSCEF No. 77, at 2, 6.) The court is not persuaded that these emails constitute a clear representation by Ohana or his agents that he had title to the apartment, much less that these emails should estop Ohana from denying ownership now. (See; see also NYSCEF No. 78 [copy of email thread].) The emails are equally consistent with a scenario in which Ohana, although occupying Apartment 9B and retaining a property manager to deal with its day-to-day upkeep, is still not the formal title owner. And Boltin does suggest (or show) that the property manager's statement that her emails were sent "on behalf of Mr. Mickael Ohana" was intended to mislead Boltin or induce her to rely going forward on an assumption that Ohana owned Apartment 9B.

With respect to prejudice, Boltin argues that it is possible that as a result of that delay, Boltin will have difficulty collecting on any judgment obtained by her against the true owner of Apartment 9B, which would impair Boltin's ability to obtain full redress for the damage to her apartment caused by leaks from 9B. (See NYSCEF No. 77, at 5.) This court concludes that the

¹ The court notes that although Ohana provided a proposed amended answer, that document did not "clearly show[] the changes or additions to be made to the pleading," as CPLR 3025 (b) requires. Given the limited nature of the amendment that Ohana apparently seeks here, the court concludes that his failure to strictly comply with the terms of CPLR 3025 (b) is not a fatal defect. The court reminds counsel, though, that providing a proposed amendment in redline or other comparable form is not only more convenient for the court and the litigants, but also mandated by the CPLR.

contingent, hypothetical possibility of future prejudice to Boltin's ability to collect on any damages judgment does not warrant this court, in effect, treating Ohana as the title owner to Apartment 9B (and potentially liable on that basis) when it is undisputed that he is not the owner.

That said, Boltin persuasively describes how Ohana's belated acknowledgement that he does not own Apartment 9B forced Boltin to go to the trouble of commencing not one but two additional actions in this court to ensure that she had named the proper party defendant.² (*See id.* at 4-5.) Justice requires that Ohana provide Boltin compensation for these costs, which she should not have had to incur.

This court therefore grants Ohana leave to serve an answer that has been amended to change Ohana's admission of ownership of the apartment to a denial of ownership—but only on condition that Ohana ultimately pay Boltin the reasonable attorney fees, costs, and disbursements incurred in (i) preparing the unsuccessful stipulation of substitution referenced at ¶ 6 of the affirmation of Boltin's counsel (*see* NYSCEF No. 77, at 4), and discussing that stipulation with counsel for Ohana; (ii) commencing *Boltin v. Alphabet New York, Inc.*, Index No. 655954/2019, and preparing, filing, and serving the summons and complaint in the action; (iii) commencing *Boltin v. Alphabet NY, LLC*, Index No. 656635/2019, and preparing, filing, and serving the summons and complaint in the action; and (iv) preparing, filing, and serving any future motion to consolidate the *Boltin v. Alphabet NY, LLC* action with this action.³ These fees, costs, and disbursements will be carried with the case and determined following trial or the resolution of any dispositive motion as to Boltin's claims against Ohana and Alphabet NY.

II. Boltin's Motion to Compel

Boltin seeks on motion sequence 004 to compel Ohana to provide responses to her notice for discovery and inspection and demand for a verified bill of particulars. (*See* NYSCEF Nos. 63, 64.) Ohana filed an untimely opposition,⁴ asserting that since he is not the owner of Apartment 9B there is no basis to hold him liable for the water damage to Boltin's apartment, and therefore no basis to require him to respond to Boltin's discovery.

As an initial matter, Ohana fails to provide any reason why this court should consider his answering papers notwithstanding their untimely service. (*See* CPLR 2214 [c].) But even if this

² Ohana has not disputed Boltin's account of her additional efforts to name the true owner of Apartment 9B as a defendant, once Ohana admitted that it was not him.

³ *See Mirabella v Banco Indus. de la Republica Argentina* (34 AD2d 630, 631 [1st Dept] [granting leave to serve an amended answer upon condition of the payment of reasonable attorney fees and costs]); *accord Whiteman Osterman & Hanna LLP v Albany-Troy Neurosurgical Assoc., P.C.* (50 AD3d 1305, 1305 [3d Dept 2008] [noting that “[g]ranted a party permission to amend a pleading may be subject to certain conditions, including costs and reasonable counsel fees”]).

⁴ Given the seven-day demand included in Boltin's motion papers (*see* NYSCEF No. 63, at 2), Ohana's opposition was due by December 12, 2019. *See* CPLR 2214 (b). The opposition was not filed until December 17, 2019. *See* NYSCEF No. 103.

court were to exercise its discretion to take those answering papers into account, the court would conclude that Boltin's motion to compel should be granted.

This court holds in this decision and order that Ohana should be conditionally permitted to amend his answer to deny ownership of Apartment 9B. (See Point I, supra.) This court is not, however, also holding thereby that Ohana is or should be dismissed from this action. Ohana may well move in the future to dismiss Boltin's claims against him on the ground that he cannot be held liable since he does not own Apartment 9B. But he has not yet filed such a motion. Ohana remains a party to this action, and must respond to proper discovery requests like any other party. Ohana's conclusory assertions that there is no basis to hold him liable for Boltin's water damage are not sufficient to establish that Boltin's discovery requests to him fail to seek material and necessary information—and Ohana provides no other basis for denying the motion to compel.

Accordingly, for the foregoing reasons, it is


ORDERED that defendant Ohana's motion for leave to amend his answer (motion sequence 001) is granted on condition that Ohana pay certain costs (as described above); and it is further

ORDERED that the amount of those costs shall be referred at the close of the case to a Special Referee to hear and report as described above; and it is further

ORDERED that plaintiff Boltin's motion to compel Ohana to provide responses to Boltin's notice for discovery and inspection, and her demand for a verified bill of particulars (motion sequence 004) is granted; and it is further

ORDERED that Boltin serve a copy of this decision with notice of its entry on all parties, and that Ohana provide discovery responses to Boltin within 30 days from service of notice of entry.

1/31/2020
DATE



GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE