

St. Nicholas W. 126 L.P. v Republic Inv. Co., LLC

2020 NY Slip Op 30755(U)

March 3, 2020

Supreme Court, New York County

Docket Number: 156149/2017

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 LEOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 156149/2017

ST. NICHOLAS W. 126 L.P.,
Plaintiff,

MOTION DATE 02/14/2020

MOTION SEQ. NO. 005

- v -

REPUBLIC INVESTMENT COMPANY, LLC,
VERTIGO VENTURES LLC, JOSEPH NEHMADI, GAD
ASHOORI D/B/A GAD ASHOORI ENGINEERING, BAHARY
ARCHITECTURE P.C., BDB CONSTRUCTION
ENTERPRISE INC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 253, 254, 255, 256, 257, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278 were read on this motion to AMEND PLEADINGS

Goldstein Hall PLLC, New York, NY (Brian J. Markowitz of counsel), for plaintiff.
Koster, Brady & Nagler, LLP, New York, NY (William H. Gagas of counsel), for Defendants Vertigo Ventures LLC and Joseph Nehmadi.
Braverman Greenspun, P.C., New York, NY (Todd J. Manister of counsel), for Defendant BDB Construction Enterprise Inc.
John M. Giordano, P.C., New York, NY (John M. Giordano of counsel), for Defendant Bahary Architecture P.C.
Rivkin Radler LLP (Evan R. Schieber of counsel), for Defendant Republic Investment Company LLC.

Gerald Lebovits, J.:

Plaintiff owns the land and building located at 2364 8th Avenue in New York County. Defendant Vertigo owns adjacent land, located at 284 West 127th Street. This case stems from a development and construction project undertaken by Vertigo and the other defendants on Vertigo's parcel. Plaintiff, alleging that this project has resulted in damage to the structural soundness of its own building, has asserted claims against defendants sounding in negligence, trespass, private nuisance, and violations of the New York City Building Code.

Plaintiff now moves to amend its complaint to assert additional causes of action for diminution of value of air rights and attorney fees.

Plaintiff's motion arises, in essence, out of a discovery dispute between the parties. At a status conference in September 2019, plaintiff requested that the court direct defendants to

supplement (or in some instances to provide) responses to plaintiff's discovery requests. In response, defendants argued that they should not be required to do so because they had offered to pay the full amount of plaintiff's physical damages to its building, as claimed in supplemental discovery responses. Plaintiff replied that this offer was insufficient because plaintiff also had viable claims for diminution of the value of its property's air rights and for attorney fees. Defendants hotly contested whether plaintiff's complaint even included (much less stated) such claims.

The court concluded that this dispute between the parties was best resolved on papers. The court therefore entered a status conference order permitting plaintiff to move within 30 days for "leave to amend its complaint to clarify the basis for any claim of damages due to loss of air rights," and declined "at this time" to direct defendants to provide further discovery. (NYSCEF No. 250.)

Plaintiff did not move for leave to amend. Instead, at the next scheduled conference (held in December 2019), plaintiff renewed its request for further paper discovery from defendants and also suggested that the parties and the court should discuss an appropriate schedule for depositions. Defendants objected, essentially on the same grounds as at the September 2019 conference. Upon reviewing the complaint and hearing oral argument on the record, the court concluded that defendants were correct that the complaint, as pleaded, did not include claims either for diminution of value of air rights or for attorney fees. The court therefore entered a status conference order giving plaintiff 45 days to seek leave to amend its complaint "to assert a claim for attorney fees, and to clarify the basis for any claim of damages due to the loss of air rights." (NYSCEF No. 251.) "In the absence of such a motion," though, plaintiff "may not obtain further discovery from defendants," because plaintiff was not entitled to "obtain discovery on a cause of action never asserted, pleaded, or even mentioned in a bill of particulars." (*Id.*)

Plaintiff now moves for leave to amend its complaint, as permitted under this court's December 2019 order. Leave to amend is denied.

DISCUSSION

Under CPLR 3025 (b), leave to amend should be denied "where the proposed amendment is devoid of merit." (*Reyes v BSP Realty Corp.*, 171 AD3d 504, 504 [1st Dept 2019].) Here, plaintiff seeks leave to amend to make two sets of changes to its complaint.

First, plaintiff proposes to modify its causes of action for private nuisance and trespass to encompass also claims that defendants' conduct has caused a "diminution in value of Plaintiff's building" because plaintiff cannot "fully utilize" or "take full advantage of" its available air rights. (Proposed Am. Compl., NYSCEF No. 256 at 9, 10 [¶¶ 62, 74].) Plaintiff's proposed amended complaint does not, however, add any allegations that (i) plaintiff owns air rights above its building in the first place, (ii) those air rights have economic value, or (iii) the economic value of any air rights—and thus of plaintiff's building—was diminished due to the alleged damage to the building's structure from defendants' construction project.

At most, the proposed amended complaint alleges that plaintiff has been damaged because given “the improper, shoddy, negligent installation of the underpinning Plaintiff’s building has suffered a diminution in value due to the fact that Plaintiff can no longer take full advantage of its available air rights.” (*Id.* at 8 [¶ 56].) But this allegation merely begs the question of what air rights *were* available to plaintiff to begin with—and, if air rights were available, what their value was. The remainder of plaintiff’s proposed amended complaint does not answer that question.

Nor does plaintiff’s attorney affirmation in support of the motion supply an answer, either. That affirmation asserts that information from a private, open-source database indicates that the applicable *zoning* classification would permit plaintiff to increase its building’s square footage (presumably by adding floors). (*See* NYSCEF No. 254 at 8.) Setting aside the problems with plaintiff’s source of information for this assertion, that “a certain address is within a zoning area” (NYSCEF No. 274 at 8) simply does not speak to whether plaintiff holds title to the airspace above its building, nor what the value of those air rights might be. Absent any facts to support a claim for diminution of value related to the abridgement of plaintiff’s (asserted) air rights, plaintiff cannot maintain that claim.

Second, plaintiff proposes to add a claim for attorney fees. (*See* NYSCEF No. 256 at 8 [¶ 57], 13 [¶ 92].) But absent “a statute, agreement between the parties or court rule, the court [is] without authority to award [plaintiff] legal fees.” (*National Union Fire Ins. Co. of Pittsburgh v Odyssey Reins. Co.*, 143 AD3d 626, 626 [1st Dept 2016]); *see also Panish v Panish*, 24 AD3d 642, 643-644 [2d Dept 2005] [holding that “an attorney’s fee and other expenses incurred in prosecuting an action are considered an incident of litigation and, unless authorized by statute, court rule, or written agreement of the parties, are not recoverable”].) There was no agreement between the parties here. Nor does plaintiff identify any statute or court rule that would authorize this court to award attorney fees (or other professional fees) in a construction damages action sounding in strict liability, trespass, or nuisance.

Instead, plaintiff argues that this court may award attorney and engineering fees here under RPAPL § 881. (*See* NYSCEF No. 254 at 5-7; NYSCEF No. 274 at 3-5.) Section 881 does, to be sure, afford a court the discretion to award attorney and engineering fees “as justice requires.” (*See Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 518-519 [1st Dept 2017].) But that provision does not apply here. RPAPL § 881 allows a property owner to commence a special proceeding to obtain a compulsory license to enter adjoining property, if doing so is necessary for the owner to improve the owner’s property and if the owner has sought and been refused permission to enter the adjoining property. This case is not a § 881 special proceeding brought by the party seeking to enter onto another’s property for construction purposes (which here would be defendants, if anybody). Rather, it is an action for damages brought by the party whose property allegedly was entered upon.

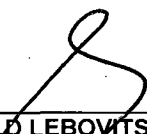
Plaintiff argues that notwithstanding the formal differences between its action and an RPAPL 881 proceeding, this court should for policy reasons treat this case as a sort of inverse-§ 881 action—*i.e.*, a suit for damages suffered due to the failure of defendants to seek a license to enter plaintiff’s property—and award attorney and engineering fees accordingly. (*See* NYSCEF No. 254 at 5-7; NYSCEF No. 274 at 3-5.) But those policy arguments notwithstanding,

this case is still an action for damages rather than a § 881 proceeding. Plaintiff does not identify any applicable rule or statute conferring authority on the court to award professional fees in a damages action for trespass, nuisance, and Building Code violations; and this court lacks inherent authority to award those fees. Plaintiff's proposed claim for attorney and engineering fees in this case is, therefore, devoid of merit.

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to amend its complaint is denied.

3/3/2020
DATE


GERALD LEBOVITS, J.S.C.

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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
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