

Levy v 103-25 68th Ave. Owners, Inc.

2020 NY Slip Op 30902(U)

February 5, 2020

Supreme Court, Queens County

Docket Number: 709388/18

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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**SALOMON LEVY, SIGALIT MOFAZ-LEVY,
SIGALIT MOFAZ-LEVY AS GUARDIAN FOR
SOPHIE LEVY,**

**Index No.: 709388/18
Mot. Cal. Date: 12/3/20
Mot. Seq.: 2 and 3**

Plaintiffs

-against-

**103-25 68th AVENUE OWNERS, INC., JOHN P.
LOVETT & ASSOCIATES, LTD a/k/a THE
LOVETT GROUP, CHARLES CHOU, YOSHIDA
MOTOKO, DAGNARA K. KRASA a/k/a D.K.
KRASA-BESTELL, MICHAEL L. MARKS,
BOARD PRESIDENT, PAT JENNINGS,**

Defendants,

FILED
FEB 13 2020
COUNTY CLERK
QUEENS COUNTY

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The following papers were read on this motion by plaintiffs for leave to renew and reargue, pursuant to CPLR 2221(d) and (e), and to amend the caption and amend the complaint, pursuant to CPLR 3025; and on the motion and cross-motion by defendants 103-25 68th Avenue Owners Inc., John P. Lovett & Associates, Ltd., a/k/a the Lovett Group, Dagmara K. Krasa a/k/a D.K. Krasa-Bestell, Michael L. Marks, Board President and Pat Jennings (collectively referred to herein as the Board defendants), pursuant to CPLR 3211 (a)(7) and 3025 (b), to dismiss the eleventh cause of action in the amended complaint, to award reasonable attorneys' fees, costs and sanctions, pursuant to CPLR 8303-a and 22 NYCRR 130-1.1; and on the cross-motion by defendants Charles Chou and Yoshida Motoko seeking the dismissal of the fourth, ninth and tenth amended causes of action, pursuant to CPLR 3211 (a) (7).

	PAPERS NUMBERED
Notice of Motions-Affidavits-Exhibits.....	EF 38-45; 46-56
Cross-Motion-Affidavits-Exhibits.....	EF 58-65; 66
Answering Affidavits.....	EF 68-77

As an initial matter the motion by plaintiffs and the cross-motion by the Board defendants and the cross-motion by defendants Cou and Kotoko, collectively designated as Motion Sequence No. 2, and the motion by the Board defendants, designated as Motion Sequence No. 3, are hereby consolidated for purposes of disposition.

Upon the foregoing papers, it is ordered that the motions and the cross-motions are determined as follows:

The branch of the plaintiff's motion seeking to renew and reargue the decision of this Court, dated August 2, 2019 and filed on August 7, 2019, is denied.

This Court, in its Order, dated August 2, 2019, addressed the prior motion by defendants Chou and Motoko seeking dismissal of the fourth and ninth causes of action of the complaint and the cross-motion by plaintiffs seeking leave to amend the complaint to include three additional causes of action and joinder of a party. This Court denied defendants Chou and Motoko's motion seeking dismissal of the fourth and ninth causes of action, and granted the cross-motion, solely to the extent of granting the plaintiffs leave to add a tenth cause of action, asserting a claim for private nuisance against defendants Chou and Motoko. Plaintiffs' application seeking leave to join Hila Levy, as a party to the action and to add an eleventh and twelfth cause of action was denied.

In said Order, this Court determined that the only cognizable claim contained in the fourth and ninth causes of action was one for private nuisance. Plaintiffs' application to amend the complaint, adding a tenth cause of action, pleading their claim for private nuisance with greater specificity was granted. The fourth and ninth causes of action were permitted to remain in the complaint, to the extent that they set forth additional allegations, relating to the claim of private nuisance. However, this Court denied the plaintiffs' proposed amendment to allow an eleventh cause of action based upon abuse of process as patently insufficient. Similarly, this Court denied the plaintiffs' proposed amendment to allow a twelfth cause of action, based upon negligent infliction of emotional distress as devoid of merit.

With respect to the branch of the plaintiffs' motion seeking leave to reargue, the plaintiffs maintain that the Court may have overlooked facts relating to the proposed twelfth cause of action for a claim of emotional distress, in the prior decision. (*See Rodriguez v Gutierrez*, 138 AD3d 964 [2d Dept 2016]; *Markovic v J&A Realty, LLC*, 124 AD3d 846 [2d Dept 2015]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014]). This application is denied.

Here, the plaintiffs have failed to establish that this Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law, as required by CPLR 2221 (d). (*See Robinson v Viani*, 140 AD3d 845 [2d Dept 2016]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888 [2d Dept 2015]; *Central Mtge. Co. v McClelland*, 119

AD3d 885 [2d Dept 2014].)

A motion for leave to renew must be based upon “new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination”. (CPLR 2221 [e] [2]; *see Cioffi*, 129 AD3d 888; *Lindbergh v SHLO 54, LLC*, 128 AD3d 642 [2d Dept 2015]; *Central Mtge. Co.*, 119 AD3d 885.) Such a motion is not a second opportunity for parties who failed to exercise due diligence in making their first motion, or to argue the same facts as presented in the first motion. (*See HSBC Bank USA, Natl. Assn. v Green*, 175 AD3d 1273 [2d Dept 2019]; *Kamdem-Ouaffo v Pepsico, Inc.*, 133 AD3d 828 [2d Dept 2015]; *Cioffi*, 129 AD3d 888.)

The new evidence offered by the plaintiffs consisted of medical records, which could have been available to the plaintiffs at the time of the original motion, and for which no reasonable justification has been proffered for the plaintiffs’ failure to submit them at that time. (*See HSBC Bank USA, Natl. Assn.*, 175 AD3d 1273; *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585 [2d Dept 2012].) While the requirement that a motion for leave to renew be based on new facts “is a flexible one,” the facts alleged to support the instant motion should not be considered “newly discovered,” and the court will not exercise its discretion in considering such evidence herein. (*JRP Holding, Inc. v Pratt*, 113 AD3d 823, 824 [2d Dept 2014]; *see Caronia v Peluso*, 170 AD3d 649 [2d Dept 2019]; *Matter of Serviss v Inc. Vil. of Floral Park*, 164 AD3d 512 [2d Dept 2018].) Consequently, this branch of the motion seeking to renew and reargue is denied.

Moreover, the plaintiffs’ request for further leave to amend the complaint is denied. Any remaining application for relief asserted in plaintiffs’ motion and not specifically addressed herein is denied.

The Board defendants’ motion is granted in part and denied in part. The branch of their motion seeking to dismiss an eleventh cause of action, asserted in the plaintiffs’ amended complaint without court leave, is granted.

The branch of the Board defendants’ motion awarding them, *inter alia*, costs and reasonable attorneys’ fees is denied.

The cross-motion by the Board defendants to sanction the plaintiffs and to award them, *inter alia*, costs and reasonable attorneys’ fees seeking attorneys’ fees, costs and sanctions is denied.

Defendants Chou and Motoko’s cross-motion seeking to dismiss the fourth, ninth and tenth amended causes of action for private nuisance, based upon failure to state a cause of action, is denied. Defendants seek essentially the same relief sought in an earlier motion, which was addressed by this Court in its Order of August 2, 2019.

Accordingly, it is

ORDERED that the motion by plaintiffs is denied; and it is further

ORDERED that any applications for relief asserted in plaintiffs’ motion and not specifically addressed herein are denied; and it is further

ORDERED that the branch of the Board defendants’ motion seeking dismissal of the eleventh cause of action in the amended complaint is granted; and it is further

ORDERED, that the branch of the Board defendants’ motion awarding them, *inter alia*, costs and reasonable attorneys’ fees is denied; and it is further

ORDERED, that the cross-motion by the Board defendants to sanction the plaintiffs and to award them, *inter alia*, costs and reasonable attorneys’ fees is denied; and it is further

ORDERED that the cross-motion by defendants Chou and Motoko’s seeking to dismiss the fourth, ninth and tenth amended causes of action for private nuisance, based upon failure to state a cause of action, is denied.

The foregoing constitutes the decision and order of this Court.

Dated: February 5, 2020

TIMOTHY J. DUFFICY

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