G Family Holdings, LLC v Washington-W. 11th St. Owners Corp.
2020 NY Slip Op 33985(U)
December 4, 2020
Supreme Court, New York County
Docket Number: 158636/2014
Judge: Kelly O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KELLY O'NEILL LEVY** **PART** **IAS MOTION 19**

Justice

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G FAMILY HOLDINGS, LLC, SCHATZI CORP. D/B/A WALLSE

Plaintiff,

- v -

WASHINGTON-WEST 11TH ST. OWNERS CORP.,

Defendant.

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INDEX NO. 158636/2014

MOTION DATE 09/04/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Hon. Kelly O'Neill Levy:

On December 19, 2019, this Court granted Defendant's motion for summary judgment with respect to Plaintiffs' first, second and fourth causes of action and G Family Holdings, LLC's fifth cause of action, but did not dismiss Shatzi Corp.'s claim for unjust enrichment and allowed Plaintiffs' third cause of action to survive as a claim for private nuisance. Defendant Washington-West 11th St. Owners Corp. now moves for reargument of this Court's December 19, 2019 Decision and Order pursuant to CPRL § 2221. Plaintiffs oppose.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." *See* CPLR § 2221(d)(2); *see also, e.g., People v. D'Alessandro*, 13 N.Y.3d 216 (2009).

Defendant first argues that this court misapprehended the law relating to private nuisance when it allowed the third cause of action to survive and overlooked that Defendant was obligated by Local Law to erect and maintain the scaffold and sidewalk shed at issue in this case. It is undisputed that Defendant must comply with all local laws and that such compliance "as is

reasonably necessary can in no sense be a nuisance." *West v. City of New York*, 265 N.Y. 139, 144 (1934); *see also 22 Irving Place Corp. v. 30 Irving, LLC.*, 60 N.Y.S.3d 640 (Sup. Ct. N.Y. Cty. 2017) ("the existence of the sidewalk bridge **alone** cannot be unreasonable" (emphasis added)). As the court explained in its December 19, 2019 Decision and Order when it considered these arguments, the private nuisance cause of action survives because "there is a question of fact as to whether defendant knew that the delay that led to the scaffolding remaining was resulting in an invasion of Shatzi's use and enjoyment of the land." It is the *delay* and not the scaffolding itself that is at issue. *See, e.g., Lombard v. Station Square Inn Apts. Corp.*, 27 Misc.3d 1237(A) (Sup. Ct. Queens Cty. 2010) ("in light of the continuing nature of the condition upon which plaintiff's nuisance claim is based, namely, the continued presence of the scaffolding and netting, the wrong is continuous or recurring."). As the court held in its December 19, 2019 Decision and Order, Plaintiff may be able to establish that *the delay* was "unreasonable in character" and "caused by another's conduct in…*failing to act*" and thereby satisfy two prongs of a private nuisance claim. *See, e.g., Copart Indus. v. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 570 (1977).

Defendant relies on the case of *Purple & White Supermarkets, Inc. v. Ulm 1 Holding Corp.*, 2009 N.Y. Slip Op. 33082(U) (Sup. Ct. N.Y. Cty. 2009). The facts of *Purple & White* are instructively distinct from the facts of this case. In *Purple & White*, a building was required to erect scaffolding pursuant to Local Laws and erected a safe shed and scaffolding. *See id.* "[A]fter receiving the permit, it erected the shed and then hired engineers to formulate a plan of repair. Thereafter, it received bids, hired a contractor, ordered replacement stone, obtained a work permit and effectuated the repairs." *Id.* The entire process, from notice of the unsafe condition to completion of the repairs and removal of the scaffolding was less than two years.

See id. The court rejected a frivolous argument that Local Law 11's mandate that that the building "immediately commence such repairs" meant that "ULM was required to commence work immediately." *See id.* ULM commenced the process of repairs immediately and finished them in a reasonable amount of time. *See id.*

Assuming Plaintiff's allegations to be true for purposes of summary judgment, the facts of this case paint a very different situation than the facts of *Purple & White*. Here, Defendant was made aware of the unsafe conditions as early as January 2013. Defendant was repeatedly warned of the need to conduct hazardous material testing and was presented with proposals by their architect to do so as early as December 2013. However, authority to even perform the required hazardous materials testing was not given by Defendant until Spring 2015. Defendant also, allegedly, repeatedly refused to pay the individuals responsible for critical aspects of the repairs causing major delays despite alleged access to a $500,000 line of credit and other means to fund the project. Whereas in *Purple & White* the repairs were completed and the shed removed within two years – here the Defendant allegedly had not even selected a contractor to begin the repairs after more than two years. To be sure, Defendant argues that this delay was reasonable – and the court is by no means indicating otherwise – but whether the delay was reasonable or not is a question of fact. Scaffolding can often reasonably be in place for years. *See id.* Defendant's contention that, as a matter of law, no amount of unreasonable delay in repairing a building façade can form the basis of a private nuisance action is unsupported by law, public policy, or the purpose of Local Law § 11 to effectuate timely repairs of unsafe conditions. *See* Local Law § 11(5) ("the person in charge of the building shall immediately commence such repairs or reinforcements and any other appropriate measures…as may be required to secure the safety of the public and to make the building's walls and appurtenances thereto conform to the

provisions of the Administrative Code."). The court has considered Defendant's remaining arguments, including the argument that the private nuisance cause of action is merely duplicative of the cause of action alleging breach of contract, and finds them unpersuasive.[1] *See, e.g., MAC Presents, LLC. v. C Lewis Group, LLC.*, 2019 Slip Op. 32807(U) (Sup. Ct. N.Y. Cty. 2019) ("While the defendants argue that the private nuisance cause of action is merely duplicative of the cause of action alleging breach of contract, this argument is unavailing. A breach of contract does not give rise to a tort unless an independent legal duty has been violated.").

Defendant next argues that the court erred by not dismissing Shatzi Corp.'s claim for unjust enrichment. Defendant argues that the unjust enrichment claim cannot survive when there is a valid and enforceable written contract governing. *See, e.g., Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382 (1987). This argument was presented in the papers underlying the motion for summary judgment, but was only applied to G Family Holding, LLC.'s unjust enrichment claim because Defendant's papers went to great lengths to emphasize that no contractual relationship existed between Defendant and Shatzi, Corp. *See, e.g.,* Defendant Reply, p.7-9 ("it is undisputed that WASHINGTON-WEST has no contractual relationship to SHATZI…SHATZI is not in privity with WASHINGTON-WEST and cannot assert any causes of action sounding in contractual obligations…GFH seeks to alter the lease it has with WASHINGTON-WEST in an effort to create privity between SHATZI and WASHINGTON-WEST and to confer upon SHATZI the rights WASHINGTON-WEST has agreed to extend only

[1] For example, Defendant's argument that this court did not account for the holdings of *Empire Room, LLC v. Empire State Building Co., LLC*, 159 A.D.3d 648 (1st Dep't 2018) and *Bd. of Mgrs. of the Saratoga Condo. V. Shuminer*, 148 A.D.3d 609 (1st Dep't 2017) is unpersuasive. Those cases turned on exculpatory language in the controlling lease. In *Saratoga*, it read "Landlord is not liable for inconvenience, annoyance or injury to business caused by the erection of scaffolding and sidewalk sheds." Here, a similar paragraph which read that "there shall be no allowance to the Tenant for the diminution of rental value and no liability on the part of the Owner by reason of inconvenience, annoyance or injury to business arising from Owner, Tenant or others making, or failing to make any repairs, alterations, additions or improvements in or to any portions of the building or the demised premises or in and to the fixtures, appurtenances or equipment thereof..." – but that provision was expressly crossed out.

to GFH…SHATZI cannot assert any claims against WASHINGTON-WEST based upon WASHINGTON-WEST's lease with GFH."; *see also* Defendant's Memorandum of Law in Support, p. 20. Only now that the court has dismissed many of Shatzi, Corp.'s causes of action based on the absence of a contractual relationship between Shatzi and Defendant does Defendant argue that Shatzi's unjust enrichment cause of action must be dismissed because there is a controlling contract. Defendant is estopped from doing so and may not present such arguments for the first time in a motion to reargue.

The court has considered Defendant's remaining arguments that Shatzi, Corp.'s unjust enrichment claims should be dismissed and Defendant's request is denied. The parties agree on very few facts relating to the installation of the air conditioner and the court cannot grant Defendant summary judgment on its claims because Defendant believes Plaintiffs are being "misleading" in their characterization of certain communications relating to the repairs. Plaintiffs have demonstrated that there are questions of fact relating to the installation of the air conditioner. Summary judgment – whether on Plaintiff's unjust enrichment claim or on Defendant's counterclaims – would be inappropriate and the court correctly declined to dismiss the claims and counterclaims relating to those questions of fact.

Defendant's motion for reargument is denied.

Date: December 4, 2020

ENTER:

Kelly O'Neill Levy

Kelly O'Neill Levy, J.S.C.

KELLY O'NEILL LEVY
JSC