Board of Mgrs. of the Porter House Condominium v Delshah 60 Ninth LLC
2022 NY Slip Op 30358(U)
February 9, 2022
Supreme Court, New York County
Docket Number: Index No. 157034/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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BOARD OF MANAGERS OF THE PORTER HOUSE CONDOMINIUM,

Plaintiff,

- v -

DELSHAH 60 NINTH LLC,

Defendant.

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INDEX NO. 157034/2018

MOTION DATE 02/08/2022

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

DELSHAH 60 NINTH LLC

Plaintiff,

-against-

ANTONIO DI ORONZO, BLUARCH LLC

Defendant.

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Third-Party
Index No. 595236/2020

The following e-filed documents, listed by NYSCEF document number (Motion 007) 232, 233, 234, 235, 236, 237, 238, 239, 242, 243, 244, 245, 246, 250, 251

were read on this motion to/for AMEND ANSWER.

The motion by defendant for leave to amend its answer is denied.

Background

Plaintiff owns a ten-story condo located at 66 Ninth Avenue. It claims that its predecessor entered into an agreement with the owner of the building next door (defendant Delshah's predecessor) which imposed a perpetual easement of light and air and restricted elevations on the upper and lower roofs of Delshah's building. Plaintiff claims that defendant breached the easement agreement during renovations in 2016 and that some of its unit owners

had their views obstructed. Delshah obtained a final certificate of occupancy for its building in May 2018.

Plaintiff argues that structures on the roof allegedly added by Delshah in 2016, including a stair bulkhead and an elevator bulkhead on the upper portion of the roof, exceed a height restriction contained in the easement agreement. Plaintiff also complains about an HVAC unit installed on the lower portion of the roof which allegedly also exceeded the elevation permitted under the agreement and is noisy; Delshah claims that a 2005 agreement (the "Smog Hog Agreement") expressly allows an HVAC unit on this portion of the roof. Also at issue are two sky lights added to the lower roof top.

In this motion, defendant moves for leave to amend its answer, which it originally filed on January 9, 2019. It claims it wants to add affirmative defenses for 1) the extinguishment of the easement, 2) adverse possession, 3) denial of enforcement of the easement agreement, and 4) unclean hands. Defendant insists that a key issue in this case is the enforceability of the air and light easement contained in the original agreement with defendant's predecessor.

In opposition, plaintiff points out that defendant waited three years to move for leave to amend and the basis for the proposed amendment is from the pleadings and prior motion practice. In other words, plaintiff contends the amendment is delayed and defendant has not proffered a reasonable excuse for this delay. It maintains that defendant's deposition was just completed and that if the amendment were permitted, it would require plaintiff to re-depose several witnesses. Plaintiff maintains that to permit amendment at this stage of the litigation would cause it severe prejudice.

In reply, defendant insists that leave to amend must be freely given and emphasizes that the note of issue has not yet been filed. It argues that delay itself does not compel the Court to

deny the instant motion and that plaintiff will suffer no prejudice. Defendant argues that only two parties have been deposed.

Discussion

"It is well established that leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay. Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position" (*Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011] [internal quotations and citations omitted]).

The Court denies the motion. As plaintiff points out, counsel for defendant's affirmation in support acknowledges that the basis for the proposed amendment is both the pleadings and prior motion practice (NYSCEF Doc. No. 233, ¶ 6). It also asserts, with respect to one of the new affirmative defenses, that "The issue is not new and is based on the contention and facts set forth in the Counterclaim" (NYSCEF Doc. No. 237 at 9). In other words, defendant has known all of the facts that allegedly support these new affirmative defenses for some time. Moreover, the Court observes that defendant previously moved for leave to amend its third-party complaint in July 2020 (*see* NYSCEF Doc. No. 129).

Missing from defendant's motion papers is a sufficient reason for why it waited so long, and waited until after plaintiff took its deposition, to seek leave to amend to add affirmative defenses it could have alleged when it first answered three years ago. All of the proposed affirmative defenses relate to the central issue in the case—the easement. This is not a situation where discovery revealed something new to allege. Although this Court acknowledges that leave to amend should be freely given, this Court will not be an accomplice to such gamesmanship.

This action has already had seven motions, including the instant motion. Defendant has had more than enough time to assert these affirmative defenses and, for whatever reason, chose not to do so.

Now, only after paper discovery is completed and two depositions have been held does defendant seek to amend and essentially restart the discovery process in a case that is nearly four years old. This action will never complete discovery at this rate, which prejudices plaintiff because the whole point of this case is that plaintiff is purportedly suffering an infringement of its light and air – every time the owners look out the window, they see what they think is a breach of their agreement to preserve their views and their light. And the longer the case drags on, the more they suffer and the more they spend on attorneys. On the other hand, the defendant has everything to gain by dragging the case on; it has already enjoyed the additions to the roofs for six years. If defendant wins this case, it will not have to change anything.

Everything defendant wants to add could have been added long ago and certainly this motion should have been made before the defendant's deposition, not a month after. Besides, the proposed amendment all concerns issues that go to plaintiff's prima facie case. If plaintiff loses this case, it will require the Court to decline to enforce the easement. In other words, the affirmative defenses are too late and unnecessary. This Court must exercise its discretion to move this case along and help facilitate as prompt a resolution as possible.

Accordingly, it is hereby

ORDERED that the motion by defendant for leave to amend its answer is denied.

Remote Conference: April 21, 2022 at 9:30 a.m. (NYSCEF Doc. No. 247).

2/9/2022
DATE

ARLENE BLUTH, J.S.C.

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