

Board of Mgrs. of Pascal v Hurvitz
2022 NY Slip Op 31493(U)
May 9, 2022
Supreme Court, New York County
Docket Number: Index No. 161178-2020
Judge: Lynn R. Kotler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

Board of Managers of Pascal, as agent for unit owners

INDEX NO. 161178-2020

- v -

MOT. DATE

Monica Denisse Hurvitz

MOT. SEQ. NO. 002

The following papers were read on this motion to/for consolidate for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is a motion by defendant, Monica Denisse Hurvitz ("Hurvitz"), to consolidate two actions arising from her ownership of a unit in the Pascal Condominium pursuant to CPLR § 602 (a). Hurvitz is the owner of the residential unit 5B in at the Pascal Condominium located at 333 East 109th Street, New York, New York 10029 (the "Building").

In action No. 1 (index no. 155175-2019), filed in the Supreme Court, New York County, on May 22, 2019, Hurvitz sues defendant, the Board of Managers of the Pascal Condominium ("BoM Pascal"). She asserts that the Condominium Bylaws provide that the repair and maintenance of General Common Elements in the Building are the sole obligation of the BoM Pascal. She states that on or about February 2, 2016, and then again on or about August 9, 2017, there were major water leaks in the Building that caused damage to a majority of the units in the Building, including her own. She states that the source of the water leaks was an improperly constructed or damaged exterior wall which is a General Common Element of the Building and thus ought to be repaired by the BoM Pascal. Hurvitz asserts that the BoM Pascal refused to inspect or repair the exterior wall. She also asserts that the BoM Pascal wrongfully filed a common charge lien against her Unit, 5B, for arrears totaling \$10,206.43. Hurvitz disputes the arrears.

Hurvitz asserts eight causes of action. The first and second causes of action are for a declaratory judgment that the BoM Pascal is responsible for the repairs to the Building and injunctive relief forcing the BoM Pascal to make such repairs. The third and fourth causes of action are for a declaratory judgment that Hurvitz does not owe the disputed arrears and thus that the lien should be dismissed, and for injunctive relief forcing the BoM Pascal to explain the arrears and permanently enjoin foreclosure on the lien. The fifth cause of action is for breach of fiduciary duty wherein Hurvitz claims that the BoM Pascal breached its fiduciary duty by failing to repair the Building. The sixth cause of action is for negligence wherein Hurvitz asserts that the BoM Pascal breached its duty to maintain and repair the Common Elements. The seventh cause of action is for breach of contract wherein Hurvitz assert that the BoM

Dated: 5.9.22

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Pascal's failure to make repairs to the outside wall of the building is a breach of its duties as defined by the Condominium By-Laws. Finally, in the eighth cause of action, Hurvitz asserts that the BoM Pascal breached its covenant of good faith and fair dealing by failing to make repairs to the Building.

In action No. 2 (index no. 161178-2020), also filed in the Supreme Court, New York County, on January 19, 2022, the BoM Pascal sues Hurvitz. The BoM Pascal alleges that it has been harassed by Hurvitz for years in an effort by Hurvitz to avoid paying common charge arrears that have been owed since before December 1, 2019, and to avoid the consequences of renting her apartment in violation of the condominium governing documents. BoM Pascal asserts that Hurvitz wanted to rent her unit out to Qai Gordon ("Gordon") and Marvin Lloyd ("Lloyd"). This rental was not permitted by the Bylaws of the condominium since Hurvitz still owed arrears. BoM Pascal alleges that Hurvitz rented the unit to Gordon and Lloyd anyway, despite the fact that she had been advised that it was not permitted, and also gave Gordon and Lloyd credentials to enter the building, another alleged violation of the Condominium governing documents. BoM Pascal also alleges that Hurvitz made slanderous statements, calling the BoM Pascal "racists" and filed false complaints with the Police Department and "appropriate authorities of the city of New York."

BoM Pascal asserted eight causes of action. However, in an order dated August 17, 2021, this Court severed and dismissed causes of action Nos. 4-8. Therefore, only the first three causes of action remain. The first cause of action is for breach of contract wherein BoM Pascal states that Hurvitz breached the contract within the condominium governing documents by renting her apartment to Gordon and Lloyd and by sharing the credentials to enter the building with them. The second cause of action is for injunctive relief to prevent Hurvitz from continuing to rent the building and share building credentials. The third cause of action is for legal costs and fees that BoM Pascal incurred in pursuit of this litigation.

On September 30, 2021, Hurvitz e-filed an answer to action No. 2 with thirteen counterclaims. The first and second counterclaims allege breach of contract based on allegations that the BoM Pascal improperly denied Hurvitz's application to lease her Unit. The third counterclaim alleges breach of contract based on allegations that the BoM Pascal improperly refused to allow her renters to reside in the Unit. The fourth, fifth and sixth counterclaims allege breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty based on allegations that the BoM Pascal overcharged Hurvitz and failed to provide a proper accounting. The seventh counterclaim alleges breach of fiduciary duty for selectively enforcing the Bylaws by allegedly permitting other similarly situated unit owners to lease their units. The eighth counterclaim seeks a declaration that Hurvitz does not owe any common charges to the Condo, and an order of specific performance requiring the Board to issue to Hurvitz a statement of account with a zero balance. The ninth counterclaims seeks a declaration that the BoM Pascal improperly promulgated certain rules and regulations, and deeming the rules and regulations null and void. The tenth, eleventh and twelfth counterclaims allege housing discrimination in violation of the Fair Housing Act (42 § USC 3601 et seq.), the New York City Human Rights Law (Executive Law §§ 296(5), (7)), and the New York City Administrative Code §§ 8-107(5), 107(7), based on allegations that the BoM Pascal's decision to not approve Hurvitz's application to lease the Unit and to not permit her renters to reside in the Unit was based on her renters' race. Finally, the thirteenth counterclaim seeks an injunction enjoining the Board from engaging in the conduct alleged in the Complaint.

Hurvitz argues that the matter should be consolidated because there are common questions of law and fact. She argues that both actions No. 1 and 2 concern the issue of alleged unpaid common charges and that both actions set forth claims relating to the alleged breach of one parties' obligation to the other, all of which relate to Hurvitz's use and ownership of the Subject Unit. Hurvitz also argues that not granting the application for consolidation could result in inconsistent rulings on identical or similar issues which arise in both actions and that neither party would suffer any prejudice by granting the application.

The BoM Pascal opposes the motion. It argues that these actions arise from totally different facts that occurred years apart, and that the actions present different issues, claims, witnesses, evidence and standards of liability. It also states that combining the two actions would not result in inconsistent rulings because there is only one common issue to both actions and once it is litigated and determined in one action, that determination will be binding on the other action. The BoM Pascal asserts that if consolidation were warranted, Hurvitz would have made this motion earlier in the litigation, and that the motion is an attempt to muddy action No. 2 by associating it with the far messier and long-inactive action No. 1.

Pursuant to CPLR § 602 (a), when actions involve common questions of law or fact, the court can, upon motion, order the actions consolidated (CPLR § 602 [a]). A motion to consolidate is addressed to the sound discretion of the trial court (*Gov't Employees Ins. Co. v. Uniroyal Goodrich Tire Co.*, 242 AD2d 765 [3d Dept 1997]). Consolidation can only be ordered where there is a common question of law or fact between the two actions involved (*Gibbons v. Groat*, 22 AD2d 996 [3d Dept 1964]; *Keenan v. American Bridge Division- United States Steel Corp.*, 31 AD2d 637 [2d Dept 1968]). Consolidation should be denied where "common questions of law or fact are lacking, where the actions involve dissimilar issues or disparate legal theories, or where a joint trial would substantially prejudice an opposing party or pose a risk of confusing the jury or rendering the litigation unwieldy." (*Cromwell v. CRP 482 Riverdale Avenue, LLC*, 163 AD3d 626 [2d Dept 2018]).

The motion is denied for the reasons that follow. While the parties are identical in both actions, the only common issue between the two actions is the issue of Hurvitz's alleged unpaid common charges. Action No. 1 deals primarily with the facts surrounding two alleged water leaks caused by an improperly constructed or repaired outside wall of the Building. The contractual claims, claims for breach of fiduciary duty, negligence claims, and claims for breach of the covenant of good faith arise from the alleged February 2, 2016, and August 9, 2017 water leaks. Only the third and fourth causes of action deal with the unpaid common charges and those causes of action attempt to dismiss the common charge lien against Hurvitz and compel the BoM Pascal to explain the arrearage. In comparison, action No. 2 deals with breach of contract. That action focuses on Hurvitz's alleged violation of the Condominium governing documents when she rented her apartment despite the alleged arrearage and when she provided those renters with credentials to the building. Action No. 2's relationship to the unpaid common charges is peripheral. The question of whether the arrears exist is pertinent, but most of the factual inquiry surrounds the rental of the unit. Hurvitz attempts to make the unpaid common charges a larger issue in action No. 2 by asserting in her counterclaims that the BoM Pascal failed to provide her with accounting of these charges and by seeking a declaration that Hurvitz does not owe any common charges to the Condo. Yet even these counterclaims only make up five out of the thirteen alleged counterclaims.

Here, consolidation of the actions would be inappropriate because the actions are lacking common questions of law and fact, because they are based in dissimilar legal theories and because consolidation may render the litigation unwieldy. In a 2nd Department case, *County of Westchester v. White Plains Ave., LLC*, the defendants moved to consolidate two actions (*County of Westchester v. White Plains Ave., LLC*, 105 AD3d 690 [2d Dept 2013]). In that case, the court decided that, although there were some common questions of fact between the two cases, that consolidation would be inappropriate because the second action involved additional allegations that were irrelevant to the first action (*Id.*). The court also decided that "the applicable legal principles in the respective actions are so dissimilar, and the trial may prove so unwieldy, that consolidation of the actions would result in jury confusion and prejudice the right to a fair trial" (*Id.*). Similarly, here, action No. 1 involves additional allegations that are irrelevant to action No. 2. Although there is one common issue between the two actions, the actions are based mostly around separate factually inquiries.

Additionally, the actions involve different legal claims and standards of liability. Action No. 1 revolves around contract and tort claims based on alleged water leaks. In action No. 2, the remaining causes of action assert breach of contract and equitable claims based around the unauthorized lease of a unit of the condominium. The counterclaims in action No. 2 are breach of contract and discrimination claims based on the BoM Pascal's denial of Hurvitz's lease. CPLR § 602 is meant to simplify litigation

by consolidating similar actions, not to further complicate it (*See Harby Associates, Inc. v. Seaboyer*, 82 AD2d 992 [3d Dept 1981]). Here, consolidation would muddy the issues, create an action that is based in totally separate factual inquiries and legal theories, and would likely result in an unwieldy trial and jury confusion. Finally, the court agrees with the BoM Pascal that combining the two actions would not result in inconsistent rulings because there is only one common issue to both actions and once it is litigated and determined in one action, that determination will be binding on the other action. For these reasons, consolidation is inappropriate. Therefore, the motion must be denied in its entirety.

In accordance herewith, it is hereby

ORDERED that defendant's motion to consolidate the actions for all purposes is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

5-9-22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.