

Nainan v 715-723 Sixth Ave. Owners Corp.
2022 NY Slip Op 33918(U)
November 16, 2022
Supreme Court, New York County
Docket Number: Index No. 160751/2015
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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DAN NAINAN, ELLE XU-BUSTIN, COLLE BUSTIN,
DOUGLAS HILL, JAMES MORITZ, DIANE SOLOMON,
VICTORIA MEZZICH, DAVID HILLMAN, ZULLY
GONZALEZ, IRWIN THOMAS, SOO KYUNG HWANG,
LONGJUN XIE, ZHILA ISMAILI

INDEX NO. 160751/2015

MOTION DATE N/A

MOTION SEQ. NO. 007

Plaintiffs,

- v -

715-723 SIXTH AVENUE OWNERS CORP., ROOP
METHARAMANI, DAVID CARLOS, JOAN DZIEKANSKI,
MELISSA GREEN, LYDIA BELL, E&M BRONX
ASSOCIATES LLC, 101 WEST OWNER I, LLC, 715-723
SIXTH AVENUE REALTY LLC, SIREN MANAGEMENT
CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 258, 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/for CONSOLIDATE/JOIN FOR TRIAL.

In this action for breach of fiduciary duty and intentional misrepresentation/fraud in connection with the purchase and sale of the interests held by a co-op in a residential building located at 101 West 23rd Street, New York, New York (the building), the remaining plaintiffs in this action, Diane Solomon and Victoria Mezzich (collectively, plaintiffs), now move to remove and consolidate another action entitled *715-723 Sixth Avenue Owners Corp. v Mezzich*, pending in Civil Court of the City of New York, New York County, Index Number LT-306384-22-NY (the civil court action), with the instant action, or in the alternative, that the civil court action be stayed pending the trial in this action.¹ The motion is opposed. For the following reasons, plaintiffs' motion is denied.

BACKGROUND

Plaintiffs own shares in the building and reside in unit 3F. Defendant 101 West 23 Owner I, LLC (owner), is the owner of the property known as 101 West 23rd Street, New York, New York, and the ground lessor of the cooperative pursuant to a ground lease dated November 1, 1999 that is set to expire in 2044. Defendant 715-723 Sixth Avenue Owners Corp. (the cooperative) is the ground lessee under the ground lease. Defendant 715-723 Sixth Avenue

¹ The Court notes that this action is on the trial calendar and scheduled for a settlement conference on December 13, 2022.

Realty LLC (the majority shareholder) is the majority shareholder of the cooperative. Defendants Lydia Bell, David Carlos, Joan Dziekanski, Melissa Green, Roop Metharamani, and Siren Management Corp. are the board members and management company, respectively.

This action stems from the March 30, 2016 purchase of the majority shares of the cooperative by the majority shareholder. Plaintiffs allege that defendants breached their fiduciary duties to plaintiffs, misrepresented facts, and engaged in self-dealing to coerce the plaintiffs and the remaining shareholders into selling their shares to the majority shareholder for less than fair market value. Plaintiffs, who are the sole remaining shareholders who elected not to sell their shares, commenced this action against defendants alleging that the cooperative failed to exercise appropriate business judgment in failing to find a buyer willing to pay more and recommended accepting an offer to purchase their shares for too low a price and without sufficient information. The complaint further alleges that board members acted out of self-interest when they recommended a proposal to sell the cooperative's shares, including that one board member acted as the broker for the transaction, thereby obtaining a benefit from the transaction.

In 2018 the ground rent increased pursuant to the terms of the ground lease. Thereafter the owner and cooperative litigated the issue of the calculation of the ground rent increase, including concerning the neutral's appraisal of which the increase was based. The Appellate Division, First Department, approved the neutral's appraisal (*101 W. 23 Owner I LLC v 715-723 Sixth Ave. Owners Corp.*, 174 AD3d 447 [1st Dept 2019]). According to the cooperative, as a result of the increase in rent due under the ground lease, the cooperative increased the rent or maintenance due by plaintiffs.

On or about May 2, 2022, the cooperative commenced the civil court action by filing and serving upon plaintiffs the nonpayment notice of petition and petition. The petition alleges that plaintiffs failed to pay maintenance increases since January 1, 2018. In their answer in the civil court action, plaintiffs claim that the cooperative conspired with the majority shareholder to improperly implement rent increases in the ground lease, which correspondingly increases the amount alleged to be due and owing by plaintiffs as maintenance payments to the cooperative. In their answer to the petition, plaintiffs do not deny that they are in arrears, but rather suggest that the nonpayment is justified because they are being singled out for disparate treatment by the cooperative.

In support of their motion, plaintiffs first argue that the civil court action and the instant action share common issues of fact and law. Specifically, plaintiffs contend that the cooperative increased the maintenance fee to coerce plaintiffs to sell their shares to the majority shareholder to unjustifiably remove plaintiffs from the premises. Plaintiffs contend that the increase in maintenance is part and parcel with the cooperative's scheme in this action to remove plaintiffs from the premises. Plaintiffs also argue that a recovery in the instant action would constitute a set off in the housing court action. Plaintiffs contend that they would rely on the same documents to defend themselves in the civil court action as they would use to support their claims in the instant action, to wit, the proprietary lease, the by-laws, house rules, and the other documents or agreements exchanged by and between the parties and which otherwise govern their rights and obligations. Plaintiffs also contend that the parties, witnesses, and evidence presented will be the same in both actions. Finally, plaintiffs argue that removal of the civil court action to supreme

court is appropriate because the civil court is not empowered to provide injunctive relief preventing the cooperative from instituting summary proceedings to recover possession of the premises during the pendency of the instant action.

In opposition, defendants argue that the civil court action should not be removed because first, that plaintiffs will not suffer imminent harm if the consolidation was denied, and second, that the sole relief sought by plaintiffs in the instant action is for money damages. Defendants next argue that the parties' proprietary lease contains a "no set-off" and no "claims" provision, which precludes plaintiffs from off-setting their obligation to pay maintenance to the Cooperative by consolidating the unrelated claims in this action. Defendants further argue that the two actions do not share common issues of law and fact. Specifically, defendants contend that the claims in the instant action do not turn on the same issues raised in the civil court action.

DISCUSSION

CPLR 602(b) provides, in pertinent part, that "[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." "CPLR 602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact" *Progressive Ins. Co. v Vasquez*, 10 AD3d 518, 519 [1st Dept 2004]). Where common questions of law or fact exist, a motion to consolidate pursuant to CPLR 602(b) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (*Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 [1st Dept 2006]).

It is well established that "[t]he Civil Court is the preferred forum for resolving landlord-tenant issues because it has the unique ability to resolve such issues" (*44-46 West 65th Apartment Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]). In the absence that Civil Court is unable to afford complete relief to the plaintiffs, there is no basis for an application to Supreme Court (*see Cox v J.D. Realty Assocs.*, 217 AD2d 179, 183 [1st Dept 1995]).

Here, plaintiffs fail to demonstrate that the civil court action should be removed and consolidated with the instant action. Initially, the facts and the law in the two actions are fundamentally distinct. This action centers on whether the cooperative's decision to proceed with its endorsement of an agreement by the selling shareholders to sell their interest in their apartments to majority shareholder constituted a breach of a fiduciary duty and fraud, whereas the civil court action is focused on plaintiffs' obligation, and refusal, to pay maintenance. Moreover, the actions that make up the basis for plaintiff's claims herein occurred in 2015, whereas the civil court action centers around the implementation of the increased ground lease rent in 2019. While plaintiffs argue that the facts in both actions are part of a common scheme to remove plaintiffs from the premises, it is not the case that both actions have overlapping issues of law and fact.

Further, if the cases are consolidated, the evidence submitted at trial would include proofs that would otherwise not be at issue in the instant matter, including, among others, evidence concerning payments made by plaintiffs, whether and why certain payments were rejected, payments made by other shareholders, whether the cooperative improperly increased the amount

of the maintenance due or selectively enforced the maintenance and why the maintenance was allowed to accrue over time.

To the extent plaintiffs argue that the two actions should be consolidated because a recovery in the instant actions would constitute a setoff in the other, the proprietary lease contains a no-set off provision prohibiting a counterclaim. Specifically, the proprietary lease states that:

“The Lessee will pay rent to the Lessor upon the terms and at the times herein provided without any deduction on account of any set-off or claim which Lessee may have against the Lessor, . . .”.

(NYSCEF doc. no. 272 at ¶21).

“The courts have generally enforced lease provisions precluding tenants from interposing counterclaims in summary proceedings” (*Titleserv, Inc. v Zenobio*, 210 AD2d 310, 311 [2d Dept 1994]; *Jacobs v Grant*, 89 AD3d 1063, 1064 [2d Dept 2011]). “[I]n the residential context counterclaims will be entertained in summary proceedings notwithstanding the waiver clause, where the counterclaim is inextricably intertwined with the landlord’s entitlement to rent or possession” (*Randall Co. v Alan Lobel Photography, Inc.*, 120 Misc 2d 112, 113 (Civ Ct, New York County 1983)). A “waiver of counterclaim” provision, such as the one here, may not be circumvented by consolidating the summary proceeding with the Supreme Court action (*see 107-48 Queens Blvd. Holding Corp. v ABC Brokerage Inc.*, 238 AD2d 557, 557 [2d Dept 1997] [a waiver of counterclaim provision may not be circumvented by consolidating the summary proceeding with a Supreme Court action”]; *Bon LLC v Fook Luk Realty Inc.*, 128 AD3d 503, 504, 9 [1st Dept 2015]). Additionally, there is no indication—and plaintiffs do not argue—that the counterclaim and cooperative’s entitlement to maintenance are intertwined. Further, while plaintiffs argue in reply that the court should not accept the form proprietary lease submitted by the cooperative, they do not cite to any caselaw suggesting that the form lease not be considered on a motion pursuant to CPLR 602, and in any event, plaintiffs do not contest its accuracy. Accordingly, the Court exercises its discretion to deny plaintiffs’ motion to consolidate the two actions.

In light of the waiver provision, the court further finds that this case is not the circumstance where a resolution in the instant action would resolve the civil court action (*see Morrell & Co. The Wine Emporium v Richalan Realty Corp.*, 93 AD2d 736, 737 [1st Dept 1983]).

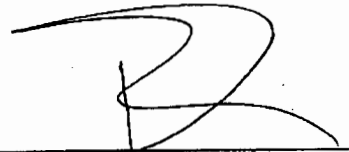
In the alternative, the branch of plaintiffs’ motion seeking a stay of the civil court action pending the resolution of the instant action is denied. While plaintiffs’ request is unopposed, plaintiffs do not cite to any factual basis, statute or caselaw permitting this Court to enjoin the civil court action.

Accordingly, it is hereby

ORDERED that the branches of plaintiffs' motion to remove and consolidate the action entitled 715-723 Sixth Avenue Owners Corp. v Mezzich, pending in Civil Court of the City of New York, New York County, Index Number LT-306384-22-NY, or in the alternative, for a stay in the civil court action pending the resolution of the instant action, are denied; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



11/16/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	