Schoen v Board of Mgrs. of 255 Hudson Condominium
2022 NY Slip Op 33982(U)
November 21, 2022
Supreme Court, New York County
Docket Number: Index No. 653725/2020
Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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LAURIE G. SCHOEN, AS TRUSTEE OF THE LAURIE G. SCHOEN 2005 REVOCABLE TRUST

Plaintiff,

- v -

THE BOARD OF MANAGERS OF 255 HUDSON CONDOMINIUM,

Defendant.

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INDEX NO. 653725/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

This is a declaratory judgment action seeking a ruling that plaintiff is entitled to maintain and use, on an exclusive basis, an addition made to the backyard of her condominium unit consistent with the terms of Declaration of the condominium and without paying the additional license fees or common charges which defendant Board of Managers of the condominium has tried to impose on her.

Defendant concedes that a prior owner of the unit enclosed an awning over the backyard patio, but argues that it was done without proper Board or New York City Department of Buildings (DOB) approval, and it cites a non-waiver clause in the Declaration to argue that it may refuse to approve or ratify at any time. Defendant has counterclaimed for injunctive relief and a judgment declaring that it is entitled to reject both the original and the updated renovations and to direct their disassembly.

Plaintiff now moves to dismiss defendant's counterclaims on the ground that they are time-barred. Defendant opposes.

FACTUAL BACKGROUND

Plaintiff is the trustee of a trust, for her benefit, which owns condominium unit #TH2 at 255 Hudson Street in Manhattan. (NYSCEF 1). According to drawings attached to the Declaration, the unit is one of three multi-story units at street level with a backyard, making them different from the 61 other units in the building. (NYSCEF 26).

Plaintiff alleges in the complaint that, pursuant to the Declaration and the building's By-Laws, the condominium's common elements are divided into two separate items, General Common Elements which benefit all owners, and Limited Common Elements consisting of terraces and backyards appurtenant to certain units. As relevant here, the three "TH" units have a backyard and terrace areas appurtenant to each unit which are Limited Common Elements facing the rear of the building, for the exclusive use and benefit of each of the three owners, and lacking general accessibility by anyone else in the building. Section 6.6.2 of the By-Laws provides that owners may only install or remove roof surfaces or other structures in the backyard of the TH units with the prior approval of defendant. (NYSCEF 1).

According to the complaint, plaintiff's unit had 1466 square feet of backyard space which included a terrace with an open kitchen area covered by a canvas awning. In April 2013, the unit's prior owner submitted plans to the building's managing agent seeking to perform renovations and construction work in the backyard area. The proposed work sought to refurbish the existing awning to include wood and glass panels (presumably enclosing it), and the replacement of wood decking and outdoor kitchen cabinetry. It is alleged that the managing agent approved the work. (NYSCEF 1).

Plaintiff acquired the unit in 2017, and in 2018 she sought to perform additional work in the backyard, including replacing existing mechanical units; installing new flooring in the enclosed

patio area; installing a new outdoor kitchen backsplash; replacing exterior lighting; and installing new wood planters. She alleges that she submitted her plans for approval. at which point defendant notified her that the 2013 work was illegal, undertaken without defendant's approval, and in violation of the NYC Building Code. (NYSCEF 1).

Plaintiff alleges that she entered into an Alteration Agreement with defendant to provide for certain conditions under which she could perform the work, and that she performed as required, including obtaining DOB approval. Then, when the work was nearly complete, she contends that defendant demanded that she sign a License Agreement, giving her the shorter of 120 months or the date of sale of the unit to use her backyard as constructed, requiring her to pay a monthly license fee of $2500 per month, and demanding that she pay increased common charges of $870 per month. Plaintiff claims that, in retaliation for her refusal to consent to these additional terms, defendant refused to grant access to her backyard in 2020 for what she characterizes as routine maintenance. (NYSCEF 1).

In response, defendant claims that paragraph 35 of the Condominium Rules, which are attached to the By-Laws, prohibits the erection of "any structure on any Terrace, Balcony or Backyard," and that any approval given to the prior unit owner is irrelevant as the By-Laws contain a general non-waiver provision. Defendant also alleges that the prior owner's structure was constructed without obtaining proper DOB approval, and that the structure reduces the condominium's overall "Floor Area Ratio," effectively reducing the size of the air rights the condominium association would be able to sell to a neighboring developer. Finally, defendant alleges that plaintiff knew or should have known when she purchased the unit that the structure was not part of the Limited Common Elements appurtenant to her unit. (NYSCEF 10).

Based on these allegations, defendant asserts two counterclaims, seeking injunctive and declaratory relief for the alleged violation of the By-Laws, Declaration and Rules by the 2013 erection of the structure, and it seeks an order requiring plaintiff to remove it and return the backyard to its original state. (*Id.*)

Plaintiff now moves, pursuant to CPLR 3211 (a)(5), for an order dismissing defendant's counterclaims as time-barred under Real Property Actions and Proceedings Law (RPAPL) § 2001, which provides a special statute of limitations relating to the erection of structures that allegedly infringe or impede upon easements, setbacks and property lines.

LEGAL CONCLUSIONS

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). We accept the facts alleged in the [pleading] as true, accord [the movant] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

RPAPL §2001, entitled "Action to enforce certain covenants restricting use of land or for damages for breach to be brought within two years" provides, in relevant part, as follows:

> 1. This section applies to actions to enforce a covenant or agreement restricting the use of land or to recover damages for breach thereof, including an action predicated on infringement of an easement or other interest created by the covenant or agreement, to the extent that the restriction relates to structures that may be erected on the premises and limits such structures with respect to set-back or side-lines, the area that may be built upon, the location, independent character or number of structures, height, or general purpose for which they shall be designed or typically suited.
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> 2. An action to enforce the covenant or agreement by compelling the removal or alteration of a structure, or to recover damages for breach of the

covenant or agreement, or to recover damages for infringement of an easement or other interest in the premises so restricted, cannot be maintained unless it is commenced (a) before the expiration of two years from the completion of the structure concerned, or (b) before September one, nineteen hundred sixty-five, whichever shall be later.

3. a. For the purposes of this section, where the breach of the restriction upon which the action is predicated consists of a replacement, enlargement or alteration of a previously existing structure which did not constitute or involve a violation of the restriction, or where a previously existing structure constituted a violation for which action is barred as provided in this section and a replacement, enlargement or alteration is made constituting or creating a different or more extensive violation, the completion of the replacement, enlargement or alteration shall be deemed the completion of the structure.

b. The date of issuance of a certificate of occupancy or, if no such certificate shall have been issued, the date of the actual occupancy of the structure or of the structure as replaced, enlarged or altered, shall be deemed the date of completion of the structure.

4. The application of this section is not affected by any disability or lack of knowledge on the part of any person, and is not affected by the fact that the person against whom the action might have been brought within the period herein provided was during that time a non-resident or absent from the state.

5. If an action governed by this section is not commenced within the time herein provided it shall be conclusively presumed that the right of action for the relief for which that action might have been brought has been released.

6. Nothing in this section shall be construed in any manner to limit any other statute or rule of law or equity by reason of which, at a date previous to the expiration of the period provided in this section, the restriction is or may be deemed extinguished or held unenforceable, or unenforceable by judgment compelling the removal or alteration of a structure.

Plaintiff relies on the two-year statute of limitations as a defense to the counterclaims, as the counterclaims were filed seven years after the prior owner renovated and enclosed the awning space. However, in the first instance, it is unclear whether RPAPL 2001 applies to condominiums. The parties cite no caselaw on point, and the only case involving condominiums relates to two separate condominium associations with separate parcels of land, in which one claimed easement

rights over the other. (*444 E. 86th Owners Corp. v 435 E. 85th St. Tenants Corp.*, 32 Misc 3d 1232[A], 2011 WL 3557030 [Sup Ct, New York County 2011], *affd* 93 AD3d 588 [1st Dept 2012]).

Plaintiff also fails to establish that the renovations constituted a ""replacement, enlargement or alteration" within the meaning of section 3(a) of the statute, absent any supporting authority.

Defendant argues that RPAPL § 2001 is inapplicable since plaintiff and the prior owner interfered with the rights of other condominium owners to use common areas, but does not explain its reasoning, nor does it appear relevant since the area at issue is a limited common area to which no one but plaintiff or plaintiff and the other TH unit owners have access. While defendant also argues that the non-waiver clause precludes the statute of limitations defense, it cites no authority for it.

Finally, plaintiff moves to dismiss defendant's second counterclaim, for a declaratory judgment, on the ground that it duplicates the first counterclaim for injunctive relief. However, since injunctive relief is relief granted during the pendency of an action, whereas a declaratory judgment is issued at the conclusion of an action, they are not duplicative.

Accordingly, it is hereby:

ORDERED, that plaintiff's motion to dismiss defendant's counterclaims is denied.

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11/21/2022
DATE

DAVID B. COHEN, 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