

Sebco Dev., Inc v Building Mgt. Assoc., Inc.

2023 NY Slip Op 34642(U)

September 28, 2023

Supreme Court, Bronx County

Docket Number: Index No. 805674/2023E

Judge: Fidel E. Gomez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X
SEBCO DEVELOPMENT, INC; ET AL.,

Plaintiffs,

Index No. **805674/2023E**

- against -

Hon. **FIDEL E. GOMEZ**
Justice

BUILDING MANAGEMENT ASSOCIATES, INC.,
Defendant.


-----X

The following papers numbered 1 to 6, Read on this Motion noticed of 8/25/23, and duly submitted as no. 1 and 2 on the Motion Calendar of 8/25/23.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause – Exhibits and Affidavits Annexed	1, 3	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits	6	
Pleadings - Exhibit		
Stipulation(s) - Referee’s Report - Minutes		
Filed Papers- Order of Reference		
Memorandum of Law	2, 4, 5	

Plaintiff’s cross motion (Seq. 1) and motion (Seq. 2) is decided in accordance with the Decision and Order annexed hereto.

Dated: 9/28/23

Hon. 
FIDEL E. GOMEZ, JSC

- 1. CHECK ONE CASE DISPOSED NON-FINAL DISPOSITION
- 2. MOTION/CROSS-MOTION IS GRANTED (MOTION) DENIED (MOTION)
 GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE. SETTLE ORDER FIDUCIARY APPOINTMENT
 SUBMIT ORDER REFEREE APPOINTMENT
 DO NOT POST NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X
**SEBCO DEVELOPMENT, INC; 178TH STREET
HOUSING DEVELOPMENT FUND COMPANY,
INC., 479 COURTLANDT AVENUE HOUSING
DEVELOPMENT FUND CORPORATION;
CROTONA PARTNERS L.P.; ERMA CAVA
HOUSING DEVELOPMENT FUND COMPANY,
INC.; E.C. HOUSING DEVELOPMENT COMPANY,
INC.; FILOMENA GARDENS HOUSING
DEVELOPMENT FUND COMPANY, INC.; FOX
STREET HOUSING DEVELOPMENT FUND
CORPORATION; HUNTS POINT HOUSING
DEVELOPMENT FUND CORPORATION; PIO/VIP
L.P.; ROSINA ASSOCIATES L.P.; SEBCO
HOUSING DEVELOPMENT FUND COMPANY,
INC.; TIFFANY GARDENS, L.P., TIMPSON
HOUSING DEVELOPMENT FUND CORPORATION;
WILLIS AVENUE ASSOCIATES, L.P.,**

Plaintiff,

-against-

DECISION AND ORDER

Index No. 805674/2023E

BUILDING MANAGEMENT ASSOCIATES, INC.,

Defendant.

-----X

Plaintiff's cross-motion (Seq. 1) for a preliminary injunction is denied without prejudice.¹

Plaintiff's motion (Seq. 2) for an Order, *inter alia*, amending the caption is denied.

BACKGROUND

Plaintiffs commenced the instant action on April 10, 2023. The complaint seeks damages and injunctive relief arising from Plaintiff's allegation that, in February 2023, Plaintiff SEBCO

¹By Notice of Withdrawal of Motion, dated September 12, 2023, defendant withdrew its motion to dismiss the original complaint (Seq. 1).

Development, Inc. (SEBCO) replaced Defendant Building Management Associations, Inc. (BMA) as manager of 14 government subsidized low-income housing projects. On June 6, 2023, BMA moved to dismiss the complaint pursuant to CPLR § 3211 on the ground that it has a defense founded upon documentary evidence, that certain of the plaintiffs lacked legal capacity to sue, and that the complaint failed to join necessary parties and failed to state a cause of action. The motion was made returnable on August 11, 2023, and the notice of motion contained a demand pursuant to CPLR § 2214(b) that “answering papers and notice of cross-motion, if any, be served at lease seven days before the return date of this motion.” On July 24, 2023, the parties stipulated to extend plaintiffs time to oppose the motion to August 17, 2023, and to adjourn the return date of the motion to September 13, 2023. While the stipulation prepared by plaintiffs’ counsel stated that plaintiffs would file their opposition by August 17, so as to provide BMA with three weeks to prepare a reply, it made no reference to the time to file a cross-motion.

Plaintiffs filed their opposition papers on August 17, 2023. Three weeks later, on September 8, 2023, plaintiffs filed a cross-motion returnable on September 14, 2023 (the return date of the motion to dismiss). Notably, plaintiffs did not provide BMA or the Court with advance notice before filing the cross-motion as required by Commercial Division Rule 24(c).² Plaintiffs did not request a telephone conference with the Court as required by that same rule. Nor did they obtain a court-approved briefing schedule as required by Rule 24(f).

* * * * *

1. Plaintiffs’ cross-motion

As noted above, plaintiffs’ cross-motion was filed without advance notice to BMA and to the Court, without a pre-motion conference, and without a court-approved briefing schedule, in violation of Commercial Division Rule 24 and this Court’s Part Rules.

Commercial Division Rule 24 provides, in relevant part, that

(c) Prior to the making or filing of a motion, counsel for the moving party shall advise the Court in writing (no more than two

²The Rules of the Commercial Division, 22 NYCRR 202.70, are incorporated by reference in the Part 32 - Commercial Division Rules, subject to minor modifications not relevant here.

pages) on notice to opposing counsel outlining the issue(s) in dispute and requesting a telephone conference. If a cross-motion is contemplated, a similar motion notice letter shall be forwarded to the court and counsel. Such correspondence shall not be considered by the court in reaching its decision on the merits of the motion. . .

(f) If the matter cannot be resolved, the parties shall set a briefing schedule for the motion which shall be approved by the court. Except for good cause shown, the failure to comply with the briefing schedule may result in the submission of the motion unopposed or the dismissal of the motion, as may be appropriate.

Part 32 - Commercial Division Rules, Section VI, states:

The procedure prescribed by Commercial Division Rule 24 must be followed before any qualifying motion is made, including those promulgated by Rules 14 and 24.

(emphasis in original).

Accordingly, pursuant to Commercial Division Rule 24 and this Court's Part Rules, before filing the cross-motion, plaintiffs were required to provide BMA and the Court with advance written notice of the motion, request a pre-motion telephone conference with the Court, and obtain a court-approved briefing schedule,³ which plaintiffs failed to do.

In addition, as Defendant correctly asserts, the cross-motion is untimely pursuant to CPLR §§ 2214 and 2215. CPLR § 2214 states:

(b) Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time.

³The cross-motion does not fall into any categories of motions exempted from these requirements under Rule 24(b).

CPLR § 2215 states, in relevant part:

At least three days prior to the time at which the motion is noticed to be heard, or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers . . .

Here, BMA's notice of motion was served on plaintiffs via e-filing on June 9, 2023. It was made returnable on August 11, 2023, which is more than sixteen days after the date the motion was served. The notice of motion included a demand that opposing papers and any cross-motion be served at least seven days before the return date. Therefore, pursuant to CPLR §§ 2214 and 2215, plaintiffs were required to file any cross-motion at least seven days before the return date of the motion. By stipulation of the parties, the motion was adjourned to September 14, 2023. Plaintiffs were therefore required to file any cross-motion on or before September 7, 2023. However, they filed and served their cross-motion on September 8, 2023, one day after this deadline, without providing any explanation for their lateness.

2. Plaintiffs' motion to amend caption and docket amended complaint

Since defendant has not yet answered the complaint and the period for responding to the complaint has not yet expired,⁴ plaintiffs are entitled to amend the caption and complaint without leave of court.⁵ Significantly, CPLR § 3025(a) provides that a party may amend its pleading once without leave of court within 20 days after its service, *or at any time before the period for responding to it expires*, or within 20 days after service of a pleading responding to it. Inasmuch as the First Amended Complaint was e-filed as an exhibit to the instant motion, it is hereby


ORDERED that defendant may serve a response to the First Amended Complaint within 20 days hereof.

⁴Defendant's motion to dismiss the original complaint, pursuant to CPLR § 3211, extended defendant's time to serve an answer responsive to the original complaint. (CPLR § 3211[f]).

⁵Indeed, plaintiffs assert same in their Memorandum of Law in support of the motion.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
September²⁸, 2023

Hon. 
FIDEL E. GOMEZ, J.S.C.