133 Essex St. Condominium v Evanford, LLC
2012 NY Slip Op 33382(U)
March 1, 2012
Supreme Court, New York County
Docket Number: 112906/07E
Judge: Judith J. Gische

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDITH J. GISCHE, J.S.C.

PRESENT: _____ PART 10
Justice

Index Number : 112906/2007
133 ESSEX STREET CONDOMINIUM
vs.
EVANFORD, LLC
SEQUENCE NUMBER : 009
DISMISS ACTION

INDEX NO. 112906/07E

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

status conf 5/10/12
no1 5/11/12

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S): _____

Dated: MAR 01 2012

_____, J.S.C.
JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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133 Essex Street Condominium,
Plaintiffs,
-against-

Evanford, LLC, Calabrese Investors, LLC
Black Label Residential, LLC,
31 Rockaway Avenue, LLC and
John Doe No. 1 through Jane Doe No. 25
the names being fictitious etc.,
Defendants.

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DECISION/ORDER
Index No.: 112906/07E
Seq. No.: 009, 010, 011

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Motion Seq No. 9	
Black and Rockaway n/m 3211 w/ MS affid, MS affirm, exhs	1
Condo opp w/AJ affirm, exhs	2
Black and Rockaway reply w/MS affirm	3
Motion Seq No. 10	
Evanford n/m renewal w/RS affid, exhs	4
Condo opp w/AJ affirm, exhs	5
Calabrese reply w/LAD affirm	6
Motion Seq No. 10	
Condo n/m w/AJ affirm, exhs	7
Evanford opp w/RR affirm, exhs	8
Black and Rockaway opp w/MS affid	9
Other (for all motions):	
Steno minutes 1/12/2012	10

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by the Board of Managers of 133 Essex Street Condominium ("board") for a permanent injunction and compensatory damages against the

defendants. There are presently three motions before the court. Motion sequence number 9 by Black Label Residential, LLC ("Black") and 31 Rockaway Avene, LLC ("Rockaway") is for the pre-answer dismissal of the claims against asserted by the board in its 3rd Amended Complaint filed June 30, 2011 ("complaint"). Motion sequence number 10 is by Evanford, LLC ("Evanford") to renew its prior motion for summary judgment, decided by the court on March 31, 2011 ("prior order"). Motion sequence number 11 is by the Board for an order vacating the stay on discovery from Black and Rockaway. The motions are consolidated for disposition in this decision/order because they arise from the same set of facts and involve the court's prior order.

The reader is presumed familiar with all prior decisions and orders of the court in this case.

Arguments

In its March 31, 2011 order, the court granted the Board permission to serve a 3rd amended complaint asserting claims against defendants Black and Rockaway on the basis that one or both of these entities are the new owners of the building. In that same order, the court denied Evanford's motion for summary judgment.

Now that the 3rd amended complaint has been served by the Board, Rockaway and Black seek the pre-answer dismissal of all the claims against them based on documentary evidence (CPLR 3211 [a] [1]) and because the complaint fails to state a cause of action against them (CPLR 3211 [a] [7]). Evanford has vacated the commercial premises and there is a new tenant occupying the ground floor stores. Evanford contends that this is a new fact entitling it to renewal of its prior motion for summary judgment and, upon renewal, the claims against it should be severed and dismissed. Evanford contends

that since it is no longer in possession of the commercial units, there is no injunctive relief to be had against it. Evanford also claims there is no basis to hold it liable for the damages allegedly suffered by the condominium while Evanford was the lessee, but even if there is, the board has not come forward with any proof of what its damages are and, therefore, there is no need for a hearing on damages. The Board's motion is for discovery from Black and Rockaway, whether or not these entities remain in the case or as non-parties.

In connection with the motion to dismiss the 3rd amended complaint, the court must afford the pleading a liberal construction, take the allegations therein as true, and provide the plaintiff with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept. 1997]).

The 3rd amended complaint contains 19 claims. Most are alleged against all the defendants. Some, however, are alleged against only certain defendants. The claims are best summarized as being for injunctive relief on the one hand and money damages on the other. There is also one tort action, pleaded against Black only, for aiding, abetting and conspiring with the sponsor to file a false, erroneous and misleading amendment to the condominium declaration.

The claims against Black and 31 Rockaway are based upon the following facts:

Calabrese (the sponsor) had a mortgage on the two commercial units through Chinatrust Bank and Chinatrust brought a foreclosure action against the sponsor. In June 2009, while the foreclosure action was pending, Chinatrust assigned its interests to Black. The assignment of the mortgage was recorded in September 2009. The Evanford lease was included in the assignment. Later, Calabrese and Black entered into an agreement

that resulted in a Judgment of Foreclosure on consent (Black Label, LLC v. Calabrese Investors, LLC et al, Supreme Court, N.Y. Co., Index No. 111127-08). Black bought the commercial units at the foreclosure sale in August 2010 for the price of $50,000.

Prior to that, however, the sponsor executed a quit claim in favor of Rockaway. The Board believes Rockaway and/or Black are alter egos, successors in interest and/or affiliates of one another and/or the sponsor. It is also claimed that Black conspired with the sponsor to file a false amended condominium declaration with the City. The amendment to the condominium documents is, according to the Board, ultra vires because no vote by the residential unit owners was held and, therefore, the changes to the general common elements, such as moving a janitor's closet and reconfiguring an exit are null and void. The Board contends the general common elements must be restored to their original configuration and use.

Black and Rockaway argue that they have documentary evidence proving there was a referee's deed conveying title to two commercial units to Black and, therefore, the Board has no claim against Rockaway since it is not currently an "owner" of the units. The documents they provide include the judgment of foreclosure and auction sale and the referee's deed. The referee's deed, dated November 22, 2010, identifies Black as the successful bidder at auction and the grantee. Although Black and Rockaway admit that Rockaway "held" the commercial units for some time on behalf of Black, according to Black and Rockaway this was only as a convenience to "further secure Black's foreclosure judgment." The issue of who Black and Rockaway are is also the subject matter of the Board's motion for discovery from these entities.

Black and Rockaway argue that the Board has failed to state a cause of action against them because the facts in the 3rd amended complaint all pertain to actions taken

by the sponsor and Evanford, well before Black took title of the building on November 22, 2010. Thus, Black contends there was no cognizable legal relationship between the Board and Black (or Rockaway) before that date and neither of them have any legal responsibility for why and how the condominium declaration was amended in May 2010 by the sponsor. Black and Rockaway state that the sponsor had the right to amend the condominium declaration to affect the size and percentage of the commercial units and, therefore, the commercial units are properly configured. With respect to the 18th cause of action against Black for "conspiracy," Black and Rockaway argue that this claim should be dismissed because no specific wrongful acts are alleged which might constitute an actionable, independent underlying tort.

The Board argues that until the general common elements are restored, whoever the "owner" is remains answerable to the Board for damages. Thus, the Board contends the sponsor, Black and Rockaway each bear liability for damages and, as the current owner Black and/or Rockaway bears the added responsibility of returning the commercial units to their original configuration by, among other things, restoring the janitor closet to the residential owners. The Board stands by its claim, that Black and/or Rockaway are alter egos of one another and/or of the sponsor, based upon the deposition testimony by the sponsor's principal Lorenzo DeLuca, Esq. DeLuca testified at his EBT that Martin Shaw, Esq. prepared the amended declaration. Attorney Shaw is also Black and Rockaway's attorney in this action. According to DeLuca he received $15,000 from Rockaway as consideration for a quit claim deed.

Evanford argues it should be permitted to renew its prior motion for summary judgment because it can no longer control what happens at the premises and, therefore, is not subject to any order for a permanent injunction. Evanford claims further that the

Board suffered no damages.

Discussion

In order to prevail on a CPLR 3211(a)(1) motion, the documents relied on must definitively dispose of plaintiff's claim (Blonder & Co., Inc. v. Citibank, N.A., 28 A.D.3d 180 [1st Dept 2006]). Thus, factual allegations that are "flatly contradicted" by documentary evidence are not presumed to be true or accorded every favorable inference (Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 [1st Dept 1999] aff'd 94 NY2D 659 [2000]). Otherwise, the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff's favor (Gorelik v. Mount Sinai Hosp. Center, 19 A.D.3d 319 [1st Dept 2005]). Moreover, the motion must be denied if from the pleading's four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Gorelik v. Mount Sinai Hosp. Center, 19 A.D.3d at 319).

The permanent injunction causes of action

A deed is documentary evidence of ownership (Fleming v. Kamden Properties, LLC, 41 A.D.3d 781 [2nd Dept 2007]). The deed provided by Black and Rockaway shows that the referee conveyed title of the commercial units to Black. Therefore, Black has conclusively established that it, not Rockaway, is the current owner of record of the building. As will be seen, this only affects the injunctive causes of action, but not the claim for damages, as they relate to Rockaway.

The Board claims that the sponsor injured and/or destroyed the general common elements and the Board seeks to have the common elements restored to their original configuration. The issue of whether the sponsor reduced the area of the general

common elements or took other actions injurious to the rights of the residential owners remains to be decided. Since the sponsor no longer owns the commercial units and Black is their new owner of record, if Black allows its tenant to continue using certain areas which the Board claims do not belong the commercial units, then plaintiff has a claim not only against Black for a permanent injunction (i.e. restoration, etc), but also for damages.

At this stage, the court does not have to evaluate whether the Board has a good claim against the new owner, only whether the facts support the claim stated. Nor is it important whether the new owner had any involvement in moving the janitor closet or taking other actions destructive to the rights of the residential owners. Accepting the Board's claims as true, that the general common elements were injured, destroyed, etc., and those areas have not restored, the Board has stated a claim against Black for injunctive relief. Therefore, the motion to dismiss the injunctive relief claims set forth against Black in the 4th, 5th, 7th, 8th, 13th, 14th, 15th and 17th is denied.

Black's motion, however, to dismiss the 1st and 6th causes of action is granted. The 1st cause of action is for injunctive relief against "the Construction and Operation that is not in compliance with any of the Governing Documents, and which interferes with the quiet enjoyment and peaceful possession of the Premises by the Residential Unit owners." Although that claim is asserted against "all defendants," the underpinnings of this claim was that Evanford was doing unauthorized work in the commercial unit and that such work was with the knowledge and consent of the sponsor. There are no new allegations that Black and its tenant are engaged in any such activities. The 6th cause of action is also alleged against all the defendants, but the relief sought pertains to Evanford and the sponsor. Since no facts support this claim

against Black, it is severed and dismissed as to Black as well.

Having decided that there is conclusive documentary proof (referee's deed) that Black is the current owner, not Rockaway, the claims for injunctive relief against Rockaway must be dismissed. Rockaway cannot be required to make changes to the commercial units absent control. There are no facts to show that Rockaway is currently an owner. Therefore, Rockaway's motion for the dismissal of the 1st, 4th, 5th, 6th, 7th, 8th, 13th, 14th, 15th and 17th causes of action – each for injunctive relief– are granted

Damages

DeLuca testified at his EBT that he gave Rockaway a quit claim deed to the commercial units for an agreed to price of $15,000. He also testified he did not know what the relationship between the two companies is, if any, or whether they are affiliates. Black and Rockaway state in their motion that Rockaway "held" the property for Black, but the circumstances surrounding that arrangement, or what this means, is unclear. Therefore, the deed does not conclusively establish that Rockaway did not have some ownership interest in the premises -- albeit for a limited time -- before Black took title. The Board may have a claim against Rockaway for damages that accrued during the period Rockaway was involved with the units, even though the Board has no claim against Rockaway for injunctive relief (see decision, supra). Therefore, Rockaway's motion to dismiss the 11th and 16th causes of action against it for damages is denied.

Black's motion for the dismissal of the 11th, 16th and 19th causes of action against it for money damages is also denied because the Board contends it suffered money damages as a result of the configuration, alteration etc., of the general common elements. At this stage, those facts must be accepted as true and the issue of whether

the Board can prove its claims does not enter into the court's calculus (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]).

Conspiracy

The Board's 18th cause of action is asserted only against Black. In relevant part, the Board contends that "Black Label, aided, abetted, and conspired with Calabrese, to cause Calabrese to file ... an amended Declaration with respect to the Condominium, including various revised architectural drawings and maps . . ." However, neither Black Label nor Calabrese sought nor obtained the necessary consent of all of the unit owners before amending the declaration filing it in May 2010. The amended declaration is, therefore "erroneous, misleading, fraudulent, violative of law . . .violative of the governing documents and ultra vires..." The relief sought by the Board is a declaration that the 1st amendment to the condominium declaration is null and void.

The Board also factually asserts that Black has been involved with the sponsor and the building since June 2009 when Chinatrust assigned its interest to Black and Black became the holder of the note. Black foreclosed on the mortgage in March 2010. The amendment to the condominium was made in May 2010 and in August 2010, Black bought the commercial units from the sponsor, becoming the owner of record of the units when the referee's deed was conveyed in November 2010.

CPLR 3016 requires that where a cause of action is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." It is well settled law that New York does not recognize an independent civil tort of conspiracy (Hoeffner v. Orrick, Harrington et al., 85AD3d 457 [1st Dept 2011]). Therefore, to the extent that the Board claims Black (and others) conspired to commit a fraud or some other tort, the Board fails to state a cause of action (Hoeffner v. Orrick, Harrington et al., supra).

Assuming that the Board's claim is that Black helped the sponsor commit a fraud, then plaintiff must plead specific facts tending to show the material elements of a fraud cause of action are present. Those elements are: 1) a material misrepresentation of a fact, 2) knowledge of its falsity, 3) an intent to induce reliance, 4) justifiable reliance by the plaintiff and 5) damages (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553 [2009]). Where, as here, liability for fraud is extended beyond the principal actors to those who, although not participants in the fraudulent scheme, are said to have encouraged and, therefore, aided and abetted it, the complaint must allege further that the aider/abettor "knew of or intended to aid ... in the fraud" (National Westminster Bank USA v. Weksel, 124 A.D.2d 144, 147 [1st Dept 1987] *lv den.* 70 NY2d 604 [1987]).

The Board's 18th cause of action does not satisfy any of these pleading requirements. There is no factual claim, for example, that Black encouraged the sponsor to amend the declaration, or even if it did encourage the sponsor, that Black encouraged the sponsor to file a fraudulent document or that Black knew that the proposed amended declaration had to be, but was not, voted on by the shareholders. Having met its burden of showing the Board has not stated a cause of action for aiding and abetting a conspiracy to commit a fraud, Black's motion for the dismissal of the 18th cause of action against it is granted and that claim is severed and dismissed.

Evanford's motion

Evanford seeks renewal of its prior motion for summary judgment. The sponsor joins in the motion, but it is opposed by the board. A motion to renew is based upon the discovery of material facts which existed at the time the prior motion was made but were not then known to the party and for that reason not disclosed to the court (Foley v. Roche, 68 A.D.2d 558, 567 [1st Dept 1979]). An event that takes place after the prior

order is made is not considered newly discovered evidence that would support a motion to renew (Donnelly v. Donnell, 114 A.D.2d 671 [3rd Dept 1985]). However, even where the requirements for renewal are not met, such relief may still be properly granted so as not to "defeat substantive fairness" (Metcalfe v City of New York, 223 AD2d 410, 411 [1st Dept. 1996]).

The underlying motion was brought by Evanford in October 2010. The court's prior order is dated March 31, 2011. In April 2011, after the court's prior order, Evanford vacated the premises. Evanford argues since it is no longer occupying or using the premises, and has no control over them, it cannot perform any of the restorative actions sought by the Board and that any injunction against it would be meaningless.

Despite arguments by the Board, that Evanford knew or should have expected it would be vacating and surrendering the commercial premises to the new owner when it brought the underlying motion, the facts Evanford raise did not exist until after the court made its decision. In any event, and for reasons that will become clear, Evanford is allowed to renew its prior motion for summary judgment because it should no longer be in this case.

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " [Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

Evanford has established that it vacated the commercial premises and they were renovated and re-leased to a new tenant. The Board's claims against Evanford are for injunctive relief, such as not making noise, not using a lobby entrance and not using general common elements for their customers. When pressed at oral argument (see transcript

1/12/12), the Board agreed that the injunctive relief sought in the 3rd amended complaint no longer applies to Evanford if they, in fact, have no interest in or not affiliates of the new owner and/or tenant. Robert Shamlian, a member of Evanford, LLC made that factual representation in his sworn affidavit. The Board has not raised an issue of fact that Evanford is an affiliate or related entity of either of those companies. Therefore, Evanford's motion for summary judgment on all but the 11th cause of action which is discussed separately below.

The 11th cause of action, asserted against Evanford (and the other defendants) is for $2 million in damages. The damages are to compensate the residential unit owners for: 1) material changes to the general common elements, 2) being deprived of their right to unfettered use of such areas and 3) the diminished safety, security and quiet enjoyment of their property. Evanford seeks dismissal of this cause of action on the basis that, despite discovery, and four (4) years into this action, the Board has failed to produce any evidence of what their damages are, let alone why they are estimated at $2 million. In opposition to Evanford's motion, the Board states that it would like the opportunity to prove its damages at trial.

The party seeking summary judgment must satisfy its initial burden of making a prima facie showing of entitlement to judgment as a matter of law before the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Here, Evanford has failed to establish that the Board has suffered no monetary damages. Although, at trial, the Board will have to prove its damages, on this motion the burden is on Evanford. In any event, in opposition to Evanford's motion the Board has raised material facts about whether the general common elements were, in fact,

eroded and/or destroyed by the defendants' actions. If, indeed, the general common elements were reconfigured, altered or destroyed, there may be a monetary value attached to those alterations. Consequently, Evanford's motion for summary judgment on the 11th cause of action against it in the 3rd amended complaint is denied.

Discovery

Following service of the second amended complaint, Black and Rockaway answered. The plaintiff then served each of them with a Notice of Discovery and Inspection. Most of the demands for discovery pertain to the assertions and defenses alleged in the answer. Neither Black nor Rockaway has, however, answered the third amended complaint. Therefore, the demands previously served are not only superceded by service of the 3rd amended complaint, many of the demands exceed the scope of the claims remaining in the (now) streamlined complaint.

The court will, therefore, extend Black and Rockaway's time to answer, as provided for in CPLR 3211 (f). Once they have answered, plaintiff may serve new discovery demands limited to the following:

- as to Rockaway: the issue of damages, as pleaded in the 16th cause of action and then only for the period of time leading up to the conveyance of the referee's deed in November 2010.

- as to Black: the issue of injunctive relief and damages, as pleaded in the 4th, 5th, 7th, 8th, 11th 13th, 14th, 15th and 17th causes of action (injunctive relief) and in the 16th and 19th causes of action (money damages).

Black and Rockaway may also serve discovery demands that are similarly tailored.

Other items

Although Black and Rockaway has raised arguments that the Board has no right to commence or maintain this action against them, this argument was first raised in their January 5, 2012 opposition to the Board's motion for discovery – well after Black and Rockaway's November 22, 2011 reply in further support of their motion to dismiss. A party should not be allowed to raise additional legal arguments in supplemental submissions. In fact, this department discourages that practice (Garced v. Clinton Arms Associates, 58 A.D.3d 506 [1st Dept. 2009]) and further submissions should be rejected by the court if a party is attempting to raise new theories of law not previously advanced (Ostrov v. Rozbruch, 91 AD3d 147 [1st Dept 2012]). Consequently, the issue of whether the Board has a right to commence or maintain this action is not before the court or resolved in this decision/order.

Recapitulation

The motion by Evanford for renewal of its underlying motion for summary judgment is granted and upon renewal, Evanford is granted summary judgment severing and dismissing all but the 11th cause of action in the amended complaint.

The motion by Black and Rockaway is granted in part and denied in part as follows:

- Black's motion for the dismissal of the 1st, 6th and 18th causes of action against it is granted. However Black's motion for the dismissal of the 4th, 5th, 7th, 8th, 11th 13th, 14th, 15th, 16th, 17th and 19th causes of action is denied.

- Rockaway's motion to dismiss the 1st, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 13th, 14th, 15th and 17th causes of action against it is granted and those claims are severed and dismissed. Rockaway's motion to dismiss the 11th and 16th causes of action against Rockaway is, hower denied.

Black and Rockaway shall answer the complaint in the manner provided under CPLR 3211 [f].

The motion by the Board for discovery is granted in the manner and to the extent provided.

This case is scheduled for a status conference on **May 10, 2012** in Part 10 at 9:30 a.m. The date by which to file the note of issue is extended to **May 11, 2012**. Plaintiff may only file its note of issue if all discovery is complete and in compliance with the Part 10 rules.

Conclusion

It is hereby

ORDERED that this case is scheduled for a status conference on **May 10, 2012** in Part 10 at 9:30 a.m. The date by which to file the note of issue is extended to **May 11, 2012**; and it is further

ORDERED that any relief not expressly address has nonetheless been considered by the court and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 1, 2012

So Ordered:

Hon. Judith J. Gische, JSC