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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ARTHUR BATSIDIS,

Plaintiff,

-against-

WALLACK MANAGEMENT COMPANY, INC. and 225 EAST 57th STREET OWNERS, INC.,

Defendants.

INDEX NO. 603606/2007

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by plaintiff for leave to amend the complaint.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits (Memo) | 2 |
| Reply Affidavits — Exhibits (Memo) | 3 |

Cross-Motion: ☐ Yes ☒ No

This motion arises from a case in which a cooperative apartment shareholder was stopped by the cooperative's management from performing renovations in his apartment. Plaintiff, the shareholder, and defendants, the cooperative and its management company, entered into an alteration agreement permitting certain renovations to the plaintiff's apartment. Plaintiff alleges that work commenced on the renovations in July, 2007, and that defendants halted the renovations on October 2, 2007.

On October 30, 2007, plaintiff commenced this action alleging four causes of action and seeking relief for each, as follows: 1) breach of contract, seeking $24,000 in damages for money spent in performance of the contract; 2) injunctive relief compelling defendants to allow plaintiff to complete the renovation project; 3) money damages for discriminatory conduct against the plaintiff, who is an immigrant; and 4) preliminary injunctive relief restraining the

defendants from destroying certain tapes that allegedly contained evidence of the discrimination. Notably, plaintiff did not seek money damages for rendering the subject apartment uninhabitable.

On November 15, 2007, upon a motion to resolve the issues of injunctive relief, the parties entered a stipulation, which stipulation was so-ordered by Justice Stallman. The stipulation provided, among other things, that the plaintiff will abide by certain conditions and that the defendants will not prevent the plaintiff from completing the renovations if those conditions are met. The stipulation also stated that plaintiff could serve an amended complaint until December 16, 2007.

Plaintiff fulfilled all conditions of the stipulation, but defendants refused to allow plaintiff to continue the renovations until he paid certain monies pursuant to a cost-shifting provision in the alteration agreement. Plaintiff moved to compel compliance with the stipulation, which went up to the Appellate Division, First Department. The First Department determined that the contractual provision was valid. However, by failing to include the payment of those monies in the so-ordered stipulation resolving the motion, defendants had essentially waived payment of those monies as a pre-condition to continuing the renovations. Plaintiff could proceed with the renovation and defendants would have to enforce plaintiff's compliance with the cost-shifting provision via another method.

Plaintiff now seeks to amend the complaint, pursuant to CPLR 3025(b), to allege a cause of action for monetary damages for the uninhabitability of the subject apartment due to defendants' failure to comply with the so-ordered stipulation.

Defendants oppose the motion, contending that two sections of the subject alteration agreement prevent the plaintiff from seeking the damages demanded in the proposed amended complaint. The first of these sections states: "4. The Shareholder releases the Corporation, the Corporation's agents and employees from . . . (b) any liability for claims the Shareholder

may now or hereafter have against the Corporation or Managing Agent for interruption, suspension or delays of the performance of the work . . . ." The second section, numbered 18 of the alteration agreement, provides for plaintiff to indemnify the defendants for damages to person or property caused by the work discussed in the alteration agreement or by plaintiff's failure to comply with the alteration agreement. The defendants contend further that the so-ordered stipulation itself prohibits the instant motion, as the stipulation provides that "plaintiff shall be permitted to serve but shall not be required to serve an amended complaint by 12/16/07" (Stipulation dtd 11/15/07 at 3). The defendants also oppose the motion on grounds that the amendment should be barred by the doctrine of laches, equitable estoppel, and because the plaintiff has unclean hands.

In a reply affidavit, the plaintiff argues that defendants cannot cite the alteration agreement to protect themselves from violating the so-ordered stipulation. Plaintiff also states that upholding sections 4 and 18 of the alteration agreement would be against public policy, because it would preclude liability for gross negligence and intentional torts.

Motion to Amend - Standards

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just . . . ." The law in New York is well settled that such leave shall be freely granted absent prejudice or surprise resulting from the delay (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept. 2003], citing *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should, of course, be freely given."]). The First Department has "consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted . . . " (*Ancrum*, 301 AD2d at 475). "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Thompson v Cooper*, 24

AD3d 203, 205 [1st Dept. 2005], citing *Ancrum*, 301 AD2d at 475, and *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [2001]). This essentially means that, upon a motion to amend or supplement a pleading, we must treat any opposition similarly to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7).

Discussion

The Court first notes that both plaintiff and defendants erroneously qualify the instant motion as a motion for leave to amend the complaint. The motion actually seeks to supplement the complaint with a new cause of action based upon a subsequent related transaction or occurrence. The limitation on amending the complaint contained in the subject stipulation is therefore irrelevant.

The Court disagrees with plaintiff's contention that, pursuant to the First Department's holding, the subject section 4 is inapplicable because defendants did not include in the stipulation language regarding that section 4. The First Department made clear that their ruling only went as far as eliminating the payment of fees as a precondition to continuing the renovation. The alteration agreement contract otherwise stands.

Defendants have failed to show any prejudice to overcome the rule that leave to amend or supplement a pleading should be freely given. They have not shown that depositions have already been held or that any discovery documents have been destroyed, nor shown any other prejudice beyond the passage of time, which is insufficient in this case. In fact, if plaintiff were to allege the subject cause of action in a separate complaint, the statute of limitations would not have run. The doctrine of laches does not apply for the same reason.

Defendants' arguments regarding equitable estoppel is similarly unconvincing. Equitable estoppel applies when the relief sought is in some way grounded in the fraud or other deceitful conduct of the party seeking relief, and the party asserting the estoppel defense shows "(1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party

estopped; and (3) a prejudicial change in his position" (*BWA Corp. v Alltrans Exp. U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept. 1985]). The concept behind equitable estoppel is that, as a result of the fraud, it would be unfair or inequitable to grant the relief sought. As stated above, there has been no prejudicial change in position. More significantly, there is no evidence that plaintiff acted deceitfully in carrying out the conditions of the so-ordered stipulation, or in any other way, and it is therefore impossible for defendants to meet the first or second element of the estoppel defense. Defendants' contention that estoppel can be based on non-deceptive careless conduct is wrong, and the only case cited to support their contention does not stand for it in any way.

Defendants' unclean hands argument fails because of the reasons cited by plaintiff in its reply papers. In addition to the lack of deceptive conduct on the part of plaintiff, the defense of unclean hands is necessarily inapplicable, as the subject cause of action is for damages, rather than equitable relief. "[T]he doctrine of unclean hands is an equitable defense that is unavailable where, as here, the [subject cause of] action is exclusively for damages" (*Greco v Christofferson*, 70 AD3d 769, 771 [2d Dept. 2010]).

Moving to the defendants' argument based upon the provisions of the alteration agreement, plaintiff is correct in noting that section 18 is irrelevant, as it deals exclusively with issues pertaining to the indemnity of third parties for damage caused by the plaintiff's renovations.

The remaining question is whether section 4 of the alteration agreement prohibits the additional cause of action in the proposed amended complaint. As section 4, by its terms, expressly disallows causes of action for damages to plaintiff based upon any suspension or delay of the renovation work caused by the defendants, the issue to be resolved is whether the provision should be invalidated as against public policy.

Courts will not lightly set aside parties' freedom to contract by invalidating a contractual

provision, so the standard is quite high. There are several different reasons the subject provision could conceivably be invalidated, including unconscionability, but plaintiff only argues public policy, and so only public policy will be considered. "Contracts are illegal at common law, as against public policy, when they are such as to injuriously affect or subvert the public interests" (*Kirshenbaum v General Outdoor Advertising Co.*, 258 NY 489, 494 [1932]). Generally speaking, this means that a contractual provision will be invalidated as against public policy when it has an adverse effect on the interests of third parties or the public at large. For example, a contract affects the interests of a third party when a contract, by its provisions, indemnifies a party against punitive damages (*Public Mut. Ins. Co. v Goldfarb*, 53 NY2d 392 [1981]). Punitive damages protect individuals from others' harmful conduct, and a contractual provision that protects the tortfeasor from punitive damages will destroy the purpose of the punitive damages, and eliminate a protection of the third party against the tortfeasor's conduct. A more indirect adverse effect is a contract to allow a party to reap the rewards of corruption (*McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465 [1960]).

The First Department previously examined this very same alteration agreement. The First Department upheld a cost-shifting provision, and, in doing so, noted the alteration agreement is based upon the form alteration agreement promulgated by Real Estate Board of New York in conjunction with the Association of the Bar of the City of New York. As there was a similar cost-shifting provision in the form alteration agreement, and there were significant policy reasons to shift all costs to the cooperative shareholder seeking to renovate, the First Department held that the cost-shifting provision was reasonable, was supported by public policy concerns, and should not be invalidated.

The Court has examined the form alteration agreement, and there is no parallel there to the provision prohibiting the plaintiff from seeking damages for the cooperative corporation and management company delaying or suspending renovation work. In fact, the form alteration

agreement states that the cooperative corporation will have the right to suspend the renovation work for breach of the alteration agreement; the form agreement does not provide that the cooperative corporation could halt the renovations for any reason whatsoever.

However, there are still sound reasons to uphold the provision. Where the shareholder's renovations create conditions that could potentially harm other shareholders' persons or their property, the cooperative corporation has a fiduciary duty to protect the other shareholders from the renovations. The subject provision allows the cooperative corporation to fulfill that duty without fear of exposing itself to a costly damages award, while still allowing the shareholder recourse in equity.

In contrast, the Court finds plaintiff's argument that the subject provision violates public policy to be unconvincing. The subject contractual provision affects no rights other than those of the plaintiff. No third-party rights are adversely affected by the subject provision. As such, the Court cannot set aside the subject contractual provision, and the proposed complaint as supplemented therefore fails to state a cause of action.

It is therefore,

ORDERED that the plaintiff's motion for leave to amend the complaint is denied; and it is further,

ORDERED that the parties shall appear in this Part (80 Centre Street, Room320) for a status conference on December 8, 2010, at 2:30 P.M.

This constitutes the Decision and Order of the Court.

**Enter:**

**Dated: October 21, 2010**

**Paul Wooten J.S.C.**

**Check one:** ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

**Check if appropriate:** ☐ **DO NOT POST**