SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice PART 12

Index Number : 156217/2012
MUSHLAM, INC.
vs
STATE OF NEW YORK
Sequence Number : 001
AMEND PLEADINGS

INDEX NO. 156217/12
MOTION DATE
MOTION SEQ. NO. 001

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/21/13

BJ
BARBARA JAFFE 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 : IAS PART 12

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SYDNEY SOL GROUP LTD. f/k/a MUSHLAM INC.,

Plaintiff,

- against -

THE STATE OF NEW YORK, THE NEW YORK CITY LOFT BOARD, ERIC T. SCHNEIDERMAN, an Attorney General of the State of New York, MARIE NAZOR, and PETER MICKLE (being tenants in occupancy of the building owned by plaintiff at 544 West 27th Street, County of New York, in the City of the State of New York),

Defendants.

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Index No. 156217/12

Mot. seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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Brandon S. Gribben, Esq.
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For defendants:
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Plaintiff moves for an order granting it leave to amend its complaint, summons, and affidavit of service, and to consolidate this action with *Mushlam, Inc. v Nazor, et al.*, Index No. 100207/08. Defendants Nazor and Mickle oppose, and cross-move for an order dismissing plaintiff's amended complaint for failure to state a cause of action, lack of personal jurisdiction, failure to include necessary parties as defendants, and for sanctions. Plaintiff opposes.

I. BACKGROUND

In 2008, plaintiff landlord commenced an action under Index No.100207/08 seeking to eject defendant tenants from the fourth floor of 544 West 27th Street in Manhattan. (NYSCEF 20). By decision and order dated December 31, 2009, the justice previously presiding in this part granted plaintiff summary judgment. (NYSDEF 62 [Index No. 100207/08]).

In 2010, Article 7-C of the Multiple Dwelling Law, also known as the Loft Law, was amended to provide *inter alia*, that a former commercial-use building which includes three or more families living independently from one another for 12 consecutive months between January 1, 2008 and December 31, 2009 may qualify as an "interim multiple dwelling" (IMD) and thereby be subject to the Loft Board's jurisdiction and protection. And, pursuant to an additional amendment, where two or more families reside independently in a building located within the area north of West 24th Street, south of 27th Street, west of Tenth Avenue, and east of Eleventh Avenue, IMD status may also be conferred. (Multiple Dwelling Law § 281[5]).

By decision and order dated December 13, 2010, the justice granted defendants leave to amend their answer to add as an affirmative defense that the premises are protected by the additional amendment conferring IMD status for a building within which two or more families independently reside within the stated boundaries and pertinent period. He also granted defendants leave to reargue the December 2009 decision, and upon reargument, granted their motion for an order vacating it given the additional amendment. (NYSCEF 21, 48).

On or about September 10, 2012, plaintiff commenced the instant action seeking a declaration that the additional amendment to the Loft Law is unconstitutional, along with an injunction enjoining defendants from demanding or requiring that it comply with it. (NYSCEF

8).

B. Service upon defendants

On September 24, 2012, plaintiff served pleadings on a woman identifying herself as Marie Nazor. In his affidavit of service, the process server correctly describes Nazor's race, hair color, approximate height, age, and weight, and refers to her gender accordingly, except for ultimately describing it erroneously as male. (NYSCEF 23).

The same day, plaintiff affixed pleadings to Mickle's door after fruitlessly waiting five minutes for a response. Two previous failed attempts to serve Mickle were made on September 19 and September 20. The process server does not state in his affidavit whether he also mailed a copy of the pleadings to Mickle (NYSCEF 32), and Mickle denies any direct encounter with a process server, receiving the pleadings in the mail, and that the pleadings were affixed to the door of his unit. (NYSCEF 31). On or about October 15, defendants answered the complaint, asserting, among other affirmative defenses, that service was defective. (NYSCEF 3).

On October 23, 2012, plaintiff again affixed the pleadings to Mickle's door after again fruitlessly waiting five minutes for a response and after two previously failed attempts on October 19 and October 22. He also mailed a copy of the pleadings to Mickle's address. (NYSCEF 4). Mickle acknowledges receiving a complaint by certified mail in October. (NYSCEF 31).

II. DEFENDANTS' CROSS-MOTION TO DISMISS

B. Personal jurisdiction

Defendants allege that the mistaken reference to Nazor's gender in the affidavit of service, as well as the process server's failure to mail a copy of the pleadings to Mickle,

constitute fatal defects in service, and that as a result, personal jurisdiction over them has not been obtained. (NYSCEF 31, 35, 46). Plaintiff concedes the error in the Nazor affidavit, but denies that it constitutes a jurisdictional defect, and maintains that in any event, defendants do not dispute that Nazor was actually served. Plaintiff also observes that Mickle, while disputing the September 24 service, alleges no facts rebutting the October 23 service. (NYSCEF 36, 45).

To obtain personal jurisdiction over a defendant, the plaintiff must serve her in a manner authorized by statute. (*See Macchia v Russo*, 67 NY2d 592, 595 [1986]). As relevant here, personal service is accomplished by delivering the pleading to the defendant herself or to a person of suitable age and discretion at her dwelling place, or if such service cannot be made with due diligence, by affixing the pleading to the defendant's dwelling place and mailing a copy of it to her last known residence. (CPLR 308). The latter method, performed in compliance with CPLR 308(4), is known as "nail and mail" service. (*See Farias v Simon*, 73 AD3d 569 [1st Dept 2010]).

An affidavit of service constitutes *prima facie* evidence of the sufficiency of that service. (*Johnson v Deas*, 32 AD3d 253 [1st Dept 2006]). To warrant an evidentiary hearing, the defendant must proffer a sworn non-conclusory denial of service rebutting specific facts set forth in the affidavit of service. (*City of New York v Miller*, 72 AD3d 726, 727 [2d Dept 2010]; *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]).

Here, the process server's description of Nazor is not disputed, and apart from one obvious error, contains repeated and accurate references to Nazor's gender. Moreover, defendants do not offer an affidavit from anyone disputing the facts set forth in the affidavit.

While the September 24 affidavit of service contains no indication of whether plaintiff

mailed a copy of the papers to Mickle's last known address, the process server swore in his October 25 affidavit that the pleadings were both affixed and mailed on October 23. This constitutes *prima facie* evidence of proper service. (*See* CPLR 308[4]). Therefore, Mickle's denial of having encountered a process server and his assertion that the process server failed to affix the pleadings on September 24 are immaterial. Additionally, Mickle concedes having received the complaint by mail in October, and his insistence that the October 23 service does not cure the defect in the September 24 attempt is fatally conclusory (*see Miller*, 72 AD3d at 727 [bare denial of service insufficient to entitle defendant to evidentiary hearing]), and, in any event, incorrect (*see IBJ Schroder Bank & Trust Co. v Zaitz*, 170 AD2d 579 [2d Dept 1991] [re-service "effectively obviated" defendant's jurisdictional defense]; *Helfand v Cohen*, 110 AD2d 751 [2d Dept 1985] [re-service "was entirely appropriate and served to cure the jurisdictional defects of which defendants complained"]; *Heusinger v Russo*, 96 AD2d 883 [2d Dept 1983] [same]).

Defendants have therefore failed to rebut plaintiff's *prima facie* showing that they were properly served.

B. Failure to state a cause of action

Defendants assert that absent determinations as to the number of families residing within plaintiff's building and whether the additional amendment applies to it, a declaration that it is unconstitutional would have no immediate or practical effect on the parties' rights, and thus, plaintiff's action for a declaratory judgment does not present a justiciable controversy. (NYSCEF 35, 46).

Plaintiff contends that defendants have created a justiciable controversy by seeking protection under the additional amendment, and argues that a declaration that the subsection is

unconstitutional would warrant summary judgment in the ejectment action as defendants will be unable to prove that three or more families resided in the building during the pertinent period. (NYSCEF 45).

Pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

The granting of declaratory relief is left to the sound discretion of the supreme court. (*See* CPLR 3001; *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]). However, courts are constitutionally authorized to resolve only legal issues that would have an "immediate practical effect on the conduct of the parties," and are prohibited from rendering advisory opinions. (*New York Pub. Interest Research Group [NYPIRG] v Carey*, 42 NY2d 527, 530 [1977]; *see also Cuomo v Long Is. Light. Co.*, 71 NY2d 349 [1988]).

A justiciable controversy exists when the contingent future event is "contemplated by one of the parties," as a declaratory judgment "will have the immediate and practical effect of influencing their conduct." (*Hussein v State of New York*, 81 AD3d 132, 135-36 [3d Dept 2011], *affd* 19 NY3d 899 [2012]).

A declaratory judgment is premature, the Court of Appeals has admonished:

if the future event is beyond the control of the parties and may never occur . . . Then any

> determination the court may make would be merely advisory since it can have no immediate effect and may never resolve anything. Thus it is settled that the courts will not entertain a declaratory judgment action when any decree that the court might issue will become effective only upon the occurrence of a future event that may or may not come to pass.

(*NYPIRG*, 42 NY2d at 531).

In *NYPIRG*, the Court declined to determine the constitutionality of a voting proposition given the possibility that voters would not approve it, observing that a declaratory judgment "would be merely of abstract interest and moot." (*Id.*). Similarly, in *Saratoga County Chamber of Commerce Inc. v Pataki*, the plaintiffs sought a declaratory judgment that the Governor lacked authority to enter into a land-trust agreement with the Mohawk Tribe to develop a casino. The agreement had already been approved by the United States Secretary of the Interior, although the Governor had not yet indicated whether he would sign it. The court thus found that the plaintiff's action was not justiciable as the alleged wrong sought to be enjoined was "wholly speculative and abstract." (275 AD2d 145, 158 [3d Dept 2000]).

By contrast, in *Hussein*, the court declined to dismiss the plaintiffs' action seeking a declaration that various school districts' funding of education failed to meet minimum constitutional standards. Rather, it found compelling the data included in the complaint detailing the lack of adequate funding, as well as factors indicating that the districts would remain underfunded absent judicial intervention. A declaratory judgment, the court reasoned, "will have an immediate and practical effect on the rights and actions of the parties." (81 AD3d 132, 137). Similarly, in *Prodell v State of New York*, the court held justiciable an action seeking a declaratory judgment that legislation providing for a tax assessment reduction was unconstitutional. A lower court had already applied the provision against plaintiffs, resulting in

what the court felt was a "substantial likelihood" that the assessment would be reduced. (211 AD2d 966, 968 [3d Dept 1995]).

Here, absent any finding as to whether there existed three separate residences in the building during the pertinent period, there is no need to determine whether the additional amendment applies to plaintiff's building, for a determination that three separate residences existed in the building will qualify plaintiff's building as an IMD without resort to the additional amendment.

Moreover, "it is an abuse of discretion for a court to entertain an action for declaratory judgment when there is pending between the parties an action that will fully dispose of the controversy." (*Morgenthau*, 59 NY2d 143, 155). Here, the issue may be resolved in the course of the ejectment action. (*See id.* [pendency of criminal actions warranted dismissal of declaratory judgment action]).

Therefore, without a finding that only two families resided in plaintiff's building during the pertinent period and within the pertinent boundaries, a declaration that the additional amendment is unconstitutional will have no immediate and practical impact on the parties, and a declaratory judgment will not dispose of the ejectment action as defendants would still be able to rely on the protection of the Loft Law as it exists without the additional amendment. As in *NYPIRG* and *Saratoga County Chamber of Commerce*, what plaintiff seeks to enjoin "may not come to pass." (*See also Emipre 33rd LLC v Forward Ass'n Inc.*, 87 AD3d 447, 448 [1st Dept 2011] [declaratory judgment improper when future event plaintiff anticipated was decision made by third-party that may never come to pass]; *ABN Amro Bank, N. V. v MBIA Inc.*, 81 AD3d 237 [1st Dept 2011], *affd on other grounds* 17 NY3d 208 [plaintiffs sought judgment declaring that if

other parties defaulted on their securities, they could look to defendants to satisfy their insurance claims; in essence, plaintiffs improperly sought advisory opinion premised on future events not in defendants' control and thus speculative]; *Claire v O'Driscoll*, 30 AD3d 1119, 1121 [1st Dept 2006] [supreme court should not have ruled on rate of interest if a party commenced and prevailed in action]; *Bolt Assocs. v Diamonds-In-The-Roth, Inc.*, 119 AD2d 524 [1st Dept 1986] [plaintiffs sought judgment to determine whether revenues received from tenants would be subject to certain classification once premises converted to cooperative; as conversion had not yet occurred and may never occur, conversion itself and potential revenues were hypothetical and there was no justiciable controversy]).

For these reasons, plaintiff fails to state a cause of action for a declaratory judgment.

III. DEFENDANTS' MOTION FOR SANCTIONS

As the action is not frivolous, sanctions are inappropriate. (*See* 22 NYCRR 130-1.1[c]).

IV. CONCLUSION

Given this result, I need not address plaintiff's motion.

Accordingly, it is hereby

ORDERED, that plaintiff SYDNEY SOL GROUP LTD. f/k/a/ MUSHLAM INC.'s motion to amend its summons and affidavit of service and to consolidate this action with Index no. 100207/08 is denied as moot; it is further

ORDERED, that the cross-motion to dismiss is granted and the eighth cause of action of the first amended complaint is dismissed as against defendants MARIE NAZOR and PETER MICKLE; and as no other defendants remain in this action, the complaint is dismissed; and it is further

further

ORDERED, that defendants' motion for sanctions against plaintiff is denied.

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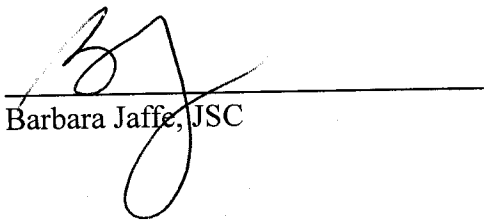

Barbara Jaffe, JSC

DATED: October 21, 2013
New York, New York