Size v Board of Mgrs. of 65 N. Moore Condominium
2016 NY Slip Op 30162(U)
January 22, 2016
Supreme Court, New York County
Docket Number: 652403/2010
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19
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DAVID SIZE,

Plaintiff,

-against-

BOARD OF MANAGERS OF 65 NORTH MOORE CONDOMINIUM, ARTHUR SKELSKIE, JAMES DANIELS and TRIBECA ENTERPRISES LLC., and TRIBECA FILM CENTER, INC.,

Defendants.
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DECISION/ORDER

Index No.: 652403/2010

Mot. Seq. 002

KELLY O'NEILL LEVY, J.:

Defendant Tribeca Film Center, Inc. ("Tribeca") moves for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Amended Complaint with respect to the third cause of action. Tribeca argues that there is no privity of contract, that plaintiff has failed to state a cause of action, and that the documents submitted resolve all factual issues as a matter of law. Plaintiff David Size opposes the application. The motion is granted for the reasons set forth below.

Background

Plaintiff has owned a basement commercial unit ("Unit B") at 65 North Moore Street, New York, NY ("the Condominium"), a mixed-use building landmarked by the New York City Landmarks Preservation Commission, since approximately November 2006. Since July 1996, Tribeca has owned a single commercial condominium unit located on the ground floor level ("Unit G") of the building. The Condominium was established in or about 1987 upon filing of the Declaration and By-Laws with the New York State Attorney General's Office. In or about February 1989, the Condominium's Declaration was amended, and the unit boundaries of Unit G

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and Unit B were modified so that a common area entrance foyer at the southeast corner of the ground floor was created which is a common element for the exclusive use of Units B and G.

The Condominium's Certificate of Occupancy provides that the basement unit may only be used for storage. The plaintiff alleges that he entered into a contract of sale of Unit B with a third party in February 2009. The contract was contingent upon the Condominium waiving its right of first refusal and obtaining a change in the certificate of occupancy to allow the buyer use of Unit B as a showroom. The Board of Managers ("Board") declined to exercise its right of first refusal. Plaintiff, through his engineer, made an application to the Landmarks Preservation Commission and the Department of Buildings ("DOB") to amend the building's Certificate of Occupancy to allow Unit B to be used as a showroom. In or about June 2009, the Landmarks Commission approved the application and thereafter, the DOB granted plaintiff the right to obtain a DOB work permit to construct a secondary means of egress from Unit B to the ground floor of the Condominium. The Board subsequently informed plaintiff that he was in default because the application was not made in the name of the Board.

Plaintiff filed a complaint against numerous entities on December 29, 2010. As against the Board, plaintiff claimed breach of the Condominium's By-Laws and Declaration and sought a declaratory judgment compelling it to execute all necessary documents and fully cooperate with plaintiff with respect to the application and permit to change the permissible and legal use of Unit B. Also named in the action was Tribeca Enterprises LLC against which plaintiff sought a declaratory judgment compelling it to execute all necessary documents and fully cooperate with plaintiff in his plan to construct a secondary egress. Plaintiff also sued certain individuals for tortious interference with contractual relations.

By amended complaint filed March 9, 2011, Tribeca was added as a defendant and plaintiff asserted a cause of action against it for declaratory judgment compelling it to execute all necessary documents with respect to construction of a staircase leading from Unit B to the ground floor common area located at the southeast corner of the Condominium.[1]

The Instant Motion

Tribeca moves for summary judgment on the third cause of action for declaratory judgment, the sole cause of action asserted against it, alleging that no genuine issue of material fact exists. Tribeca asserts that as a unit owner, it is subject to the Condominium Declaration and By-Laws and has no contractual or common law duty for it to perform the acts demanded by plaintiff. It further argues that plaintiff has failed to state a claim on which relief can be granted in that the only allegation against Tribeca in the amended complaint is that Tribeca owns Unit G with no mention of whether the defendant possesses any rights pursuant to the terms of the Declaration. Plaintiff asserts that he does indeed have a relationship with Tribeca in that they share an entrance foyer. Plaintiff also states that he is permitted construct a second means of egress from Unit B to a foyer/limited common element area in the southeast corner of the Condominium pursuant to the terms of the Declaration and that Tribeca has taken proactive steps to prevent the construction.

Discussion

A party moving for summary judgment pursuant to CPLR § 3212 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). If the moving party meets this burden, the burden shifts to the non-

[1] The court notes that per stipulation dated April 24, 2011, the action was discontinued as against Arthur Skelskie, James Daniels, and Tribeca Enterprises LLC.

moving party to either demonstrate with admissible evidence the existence of a factual issue requiring a trial, or offer an adequate excuse for its failure to do so. *See Marden v. Maurice Villency, Inc.*, 29 A.D.3d 402, 402-03 (1st Dep't 2006); *Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714, 717 (1986). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). Conclusions, allegations, and speculative statements are insufficient to defeat a summary judgment motion. *See Marden*, 29 A.D.3d at 403, *Plantamura v. Penske Truck Leasing, Inc.*, 246 A.D.2d 347, 348 (1st Dep't 1998).

Tribeca argues that actions with respect to the use of the common area at the southeast corner of the ground floor are dictated and governed by the Declaration and By-Laws. It further argues that there is no privity of contract with the plaintiff and that there are no facts in dispute with respect to the documentary evidence submitted.

Plaintiff argues in opposition that Tribeca and plaintiff have exclusive use of the entrance foyer, thereby creating a "relationship" between them. Plaintiff further argues that even if there is no privity of contract, Tribeca has taken proactive steps to restrict the plaintiff's right to construct a second means of egress and that it incorrectly maintains that its consent must be obtained before plaintiff can construct a second means of egress from the basement to the entrance foyer. Plaintiff contends that Tribeca's position is contradicted by the sixth amendment to the offering plan, which explicitly permits the plaintiff to construct the second exit through the foyer without Tribeca's consent. Plaintiff also claims that dismissal would be premature because discovery is incomplete and relevant facts are still within the exclusive knowledge of Tribeca. Lastly, plaintiff argues that Tribeca opposes construction of the egress because it would interfere with its business operations and would be aesthetically displeasing. In support of his position,

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Plaintiff presents the court with various letters. The first letter, dated June 9, 2010 and unsigned, is from an engineer and disputes the findings of an engineering report obtained by the Board relating to the scope and cost of the work required to construct a second egress. This letter does not relate to Tribeca. The second letter, dated August 27, 2008, is from Plaintiff's prior counsel informing Tribeca that he has the right to construct the second means of egress and requests assurances that Tribeca will not attempt to impede Plaintiff's rights. The third letter, which is unsigned and undated, is a proposed agreement between Tribeca and the proposed purchaser of Unit B relating to the anticipated construction project.

Tribeca in response argues that it has no right or authority pursuant to the terms of the Declaration or the By-Laws to execute any documents relating to the alteration or construction of a stair leading from Unit B to the common area space on the ground floor. Tribeca claims that in 2008, the plaintiff sought permission from Tribeca to construct a stairway in Tribeca's unit, which Tribeca declined to give. In 2010, plaintiff again requested that Tribeca allow him to construct a stairwell in Tribeca's unit. Tribeca stated that it would consider the request under certain conditions. It is undisputed that no agreement was ever reached. Tribeca argues that it never had any input or ever took any action with respect to the Unit owner constructing a stairway leading to the foyer/limited common element area.

The Condominium By-Laws provide that that no unit owner shall make any structural addition, alteration or improvement in or to a unit, without the prior written consent of the Board. In addition, the By-Laws state that any application to any governmental authority having or asserting jurisdiction for a permit to make an addition, alteration or improvement in or to any unit shall be executed by the Board of Managers only.

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Tribeca argues that the letters Plaintiff submits to the court were misquoted and intended to mislead the court to believe that Tribeca was taking action relating to the foyer/limited common element area when in fact the letters relate to Tribeca's unit. Tribeca seeks sanctions of $10,000 for Plaintiff's conduct.

Analysis

In *Pekelnaya v. Allyn*, 25 A.D.3d 111, 120 (1st Dep't 2005), the First Department noted that the common elements of a condominium are solely under the control of the board of managers. Further N.Y. RPL § 339-k of the NY Code Article 9-B ("Condominium Act") states that

> No unit owner shall do any work which would jeopardize the soundness or safety of the property, reduce the value thereof or impair any easement or hereditament, **nor may any unit owner add any material structure** or excavate any additional basement or cellar, without in every such case the consent of all the unit owners affected being first obtained.

The requirements of this statute are addressed by the First Department in *Board of Managers of Europa Condominium v. Orenstein*, 281 A.D.2d 354 (1st Dep't 2001) wherein the court held that

> While "affected" is not defined in the Condominium Act (Real Property Law art 9-B [§ 339-e]), its import can be gathered from an examination of section 339-i (2), which provides: "The common interest appurtenant to each unit ... shall have a permanent character and shall not be altered without the consent of all unit owners affected ... The common interest shall not be separated from the unit to which it appertains. Nothing contained in this article shall prohibit the division of any unit and common interest appurtenant thereto in a non-residential unit in the manner permitted by the declaration and bylaws." It is apparent that the requirement to obtain the consent of "affected" unit owners before proceeding to "excavate any additional basement or cellar" (§ 339-k) denotes the owners of units "appurtenant" to the common interest--the land (§ 339-e [3] [a])-- which is sought to be altered (§ 339-i [2]).

See also Fabio v. Omnipoint Communications, Inc., 2008 WL 7908050 (Sup. Ct., Westchester County, Jan. 28, 2008).

In *Odell v 704 Broadway Condominium*, 284 A.D.2d 52, 59 (1st Dep't 2001), the court determined that another unit owner should be joined as a necessary party where only the board's president consented to plaintiff's proposed alterations. In *Odell*, the court held although condominium owner (plaintiff) was entitled to rely on the apparent authority of the president of his condominium's board of managers to approve construction of balcony on his unit, *id.* at 57, the president's approval did not dispense with the statutory requirement that the unit owner planning to "add any material structure" to the unit obtain consent of another unit owner affected by the proposed alteration. *Id.* at 57-59.

Similarly, here the plaintiff is attempting to construct a second means of egress from Unit B to a foyer/limited common element area in the southeast corner of the Condominium. The plaintiff is required to get permission from the Board of Managers. But because the second egress is a material structure within the meaning of RPL § 339-k and because the construction of the egress would affect the common elements of the Condominium, it would also affect Tribeca. Therefore Tribeca's consent is required before any work can proceed on the egress and without Tribeca's consent, the plaintiff cannot proceed despite having obtained the necessary approval from the Landmarks Commission and Department of Buildings.

Although the parties dispute where the second means of egress was contemplated, even if the court accepts Plaintiff's argument that he only seeks to build the staircase as part of the common area as provided for in the offering plan and declaration, such construction would necessarily affect Tribeca. Although Plaintiff states that Tribeca impeded his right, he gives no details and the attached letters do not support this argument.

Here Tribeca has established its prima facie case that it is entitled to judgment dismissing the claim against it and plaintiff has failed to provide any evidence that Tribeca has unreasonably

withheld its consent with regard to building a stairwell leading to the common element area or that there exists any other triable issue of fact as its cause of action against Tribeca. *See generally Alvord & Swift v. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82 (1978); *Westchester County Corr. Officers Benevolent Ass'n, Inc. v. County of Westchester*, 99 A.D.3d 998, 999 (2d Dep't 2012). Plaintiff's hope that discovery might lead to evidence sufficient to raise a triable issue of fact as to Tribeca is unavailing. *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 (1st Dep't 2000) ("A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence"); *see also DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480, 482 (1st Dep't 2015).

Accordingly, it is ORDERED that Tribeca's motion for summary judgment is granted and the complaint is dismissed as to Tribeca Film Center, Inc. only, and defendant's request for sanctions pursuant to 22 NYCRR 130-1.1 is denied in the court's discretion; and it is further

ORDERED that the action is continued as against the remaining defendants;[2] and it is further

ORDERED that the caption be amended to reflect the dismissal of Tribeca Film Center, Inc. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Tribeca Film Center, Inc. shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the

[2] As noted above, the action was discontinued as against Arthur Skelskie, James Daniels, and Tribeca Enterprises LLC per stipulation dated April 24, 2011 (filed electronically on May 6, 2011).

Trial Support Office (60 Centre Street, Room 148), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that counsel for plaintiff and the remaining defendants shall appear for status conference on March 2, 2016 at 9:30 a.m. in Part 19 (111 Centre Street, Room 1164B).

This constitutes the Decision and Order of the court.

Dated: January 22, 2016

ENTER:

Hon. Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY