Eisbrouch v Two E. End Ave. Apt. Corp.
2016 NY Slip Op 31709(U)
September 12, 2016
Supreme Court, New York County
Docket Number: 153197/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN PART 11

Justice

DAVID and EILEEN EISBROUCH,

INDEX NO. :153197/13

Plaintiffs,

MOTION DATE 9-9-16

- v -

MOTION SEQ. NO.: 001

TWO EAST END AVENUE APARTMENT CORPORATION and TUVIA FELDMAN,

Defendants.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [ ] Yes [x] No

Plaintiffs move pursuant to CPLR 3025(b), to amend their complaint to add an additional claim against defendant Two East End Avenue Apartment Corporation ("East End") for an award of attorneys' fees and costs pursuant to the proprietary lease and Real Property Law § 234. East End opposes the motion as does defendant Tuvia Feldman ("Feldman").

This is an action for damages sustained to plaintiffs' cooperative apartment on January 7, 2012, after the antique lamps owned by Feldman, plaintiffs' upstairs neighbor, allegedly malfunctioned causing a fire to start in Feldman's apartment. It is alleged that there were no working smoke detectors in the Feldman apartment, and that when the firefighters arrived, the fire service function on the building's elevator was not functioning, requiring firefighters to walk up eight floors to Feldman's apartment.

The original complaint alleges, *inter alia*, that East End breached paragraphs 4(a) and 4(b) of the subject proprietary lease, respectively, by failing "with reasonable dispatch after receipt of said damage [caused by fire] to repair or replace the walls, floors and ceilings and wiring, and by failing to abate plaintiff's rent after December 1, 2012, even though plaintiffs' apartment was uninhabitable until February 2013. In the wherefore clause of the original

complaint, plaintiffs includes as damages "reasonable attorneys' fees."

Discovery is complete and note of issue has been filed. Plaintiff now moves to amend the complaint to include allegations that plaintiffs are entitled to recover attorneys' fee pursuant to RPL § 234[1] based on paragraph 28 of the proprietary lease which, provides, *inter alia*, that if the Lessee is in default under the lease, and the Lessor is required to incur any expenses, including attorneys' fees, the Lessee shall pay such expenses.

East End opposes the motion, arguing that as note of issue has been filed it will be prejudiced by the delay in adding the claim or, in the alternative, requests further discovery including an opportunity to depose plaintiffs as to any breach of the proprietary lease, as well as the retainer agreement and the amount of attorneys' fees expended. East End argues that plaintiffs did not show that any facts recently came to their attention since the proprietary lease was the focus of the litigation.[2]

Feldman also opposes the motion, asserting that the request to amend is untimely as

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[1]RPL section 234 provides:

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy.

[2]East End also argues that the motion is procedurally deficient because the proposed amended complaint is not signed or verified by plaintiffs and plaintiffs submit no evidence that the retainer agreement between plaintiffs and their counsel was signed. There arguments are without merit, since the amended complaint is a proposed pleading and can be signed and verified in the event the court grants the motion, and a signed retainer agreement is not a prerequisite to recovery of attorneys fees here.

discovery is complete.[3]

In reply, plaintiffs point out that they requested attorneys' fees in the original complaint and that the new allegations merely provide the basis for such request. In addition, plaintiffs assert that they would be willing to provide defendants with copies of their attorney's time ledgers to date, together with their qualifications.

Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). In this context, the courts define prejudice as a "some special right lost in the interim, some change of position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add." Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1st Dept. 1991)(citations omitted). As for the merit of a proposed amendment, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted).

Here, the amendment is of sufficient merit since East End is potentially liable for plaintiffs' reasonable attorneys in accordance with RPL § 234. if plaintiffs establish that East End breached the proprietary lease, See Sperling v. 145 East 15th Street Tenants' Corporation, 174 AD2d 498 (1st Dept 1991)(granting attorneys' fees to proprietary tenant to the extent she prevailed in litigation). In fact, the opposing parties do not argue that the proposed amendment lacks prima facie merit. Instead, they argue that they will be prejudiced by plaintiffs' failure to seek the amendment before the completion of discovery and the filing of the note of issue. This argument is unavailing as the original pleading contained a request for attorneys' fees and alleged that East End breached the proprietary lease so that the opposing parties cannot claim prejudice or surprise resulting from the delay in seeking the amendment.[4]

At oral argument, East End's only specific request for discovery was in connection with damage regarding attorneys' fees and plaintiff consented to this request, which is granted.

In view of the above, it is

ORDERED that the plaintiffs' motion is granted and the proposed amended complaint shall be deemed served upon efiling of this decision and order; and it is further

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[3]Feldman also contains that paragraph 36 of the complaint alleges Feldman should have installed arc-fault circuit-interrupter is a new allegations is without merit as the original complaint contains the same paragraph.

[4]In the amended complaint, plaintiffs allege that East End breached paragraphs 4(a) and 4(b), 2 and 3 of the proprietary lease. The court notes, however, that in the original complaint, plaintiffs assert that East End breached its covenants under paragraphs 4(a) and 4(b). The court further notes that defendants do not argue specific prejudice related to paragraphs 2 and 3, and that the parties do not submit a copy of the lease, nor is the lease an identified efiled document.

ORDERED that within twenty days of efiling this decision and order, plaintiffs shall efile and amended pleading; and it is further

ORDERED that plaintiffs are to provide defendant Two East End Avenue Corporation with a ledger of their attorneys' time and billing records concerning this action within ninety days of the efiling of this decision and order

Dated: September 17, 2016

HON. JOAN A. MADDEN
J.S.C.

Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION