Yusin v Saddle Lakes Home Owners Assoc., Inc.
2016 NY Slip Op 32200(U)
September 15, 2016
Supreme Court, Suffolk County
Docket Number: 05860/2013
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Wendy Yusin,

Plaintiff,

-against-

Saddle Lakes Home Owners Association, Inc. and Board of Managers of The Saddle Lakes Home Owners Association,

Defendants.

Clerk of the Court

Index No.: 05860/2013

Motion Sequence No.: 003; MG
Motion Date: 10/2/15
Submitted: 1/6/16

Motion Sequence No.: 004; XMOT.D
Motion Date: 12/3/15
Submitted: 1/6/16

Attorney for Plaintiff:

Ciarelli & Dempsey, P.C.
737 Roanoke Avenue
Riverhead, NY 11901

Attorney for Defendants:

Cohen, Warren, Meyer & Gitter, PC
80 Maple Avenue, P.O. Box 768
Smithtown, NY 11787

Upon the following papers numbered 1 to 40 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 14; Notice of Cross Motion and supporting papers, 15 - 29; Answering Affidavits and supporting papers, 30 - 37; Replying Affidavits and supporting papers, 38 - 40; it is

ORDERED that the branch of the motion by defendants to strike plaintiff's jury demand is granted; and it is further

ORDERED that the branch of the motion by defendants for summary judgment in their favor dismissing plaintiff's first cause of action is granted; and it is further

ORDERED that the branch of the motion by defendants for summary judgment on their first counterclaim requiring plaintiff to comply with the community's age restriction is denied at this time without prejudice; and it is further

ORDERED that the cross motion by plaintiff to dismiss defendants' affirmative defenses is denied as to defendant's first and fourth affirmative defenses, but granted as to defendants' third affirmative defense; and it is further

ORDERED that the branch of plaintiff's cross motion to dismiss defendants' counterclaims is denied.

Plaintiff Wendy Yusin commenced this action to enjoin defendants Saddle Lakes Home Owners Association and Board of Managers of the Saddle Lakes Home Owners Association (collectively "Saddle Lakes") from enforcing the Riverhead Town zoning law and the Home Owner Association's by-laws with regard to the over 55 age requirement for residents of the Saddle Lake retirement community. Plaintiff's complaint alleges discrimination based upon Saddle Lake's enforcement of Riverhead Town zoning laws, irreparable injury in a diminution of the value of the property, unreasonable interference with property, violation of Executive Law § § 297 (a) and 296 (5) (a) (2), selective enforcement, and unequal treatment based upon past complaints of discrimination. The complaint seeks an injunction and monetary damages. Saddle Lakes answered and asserted four affirmative defenses and three counterclaims, including an injunction directing plaintiff to vacate the premises until eviction. Discovery has been completed, a note of issue has been filed and plaintiff has filed a jury demand.

The facts are not in dispute. Saddle Lakes Home Owners Association is a not-for-profit corporation formed to own and operate recreational facilities and common areas within the Saddle Lakes retirement community in Riverhead, New York. It provides services to owners of condominium homes within the community, such as landscaping, snow removal, and exterior maintenance of the homes. Plaintiff originally purchased the property when she was 38 years old as a joint tenant with right to survivorship with her mother, who was 55 years old. Plaintiff's mother passed away in October of 2011. Plaintiff became the sole owner of 8 Lakeview Court, Riverhead, New York, which is situated within the Saddle Lakes community and is subject to by-laws of the Home Owners Association. The Town of Riverhead has promulgated, under its zoning authority, a residence retirement community district ("RC") which restricts occupancy of units, residences and communities within the district to persons 55 years of age or older. In accordance with the zoning law, defendants restrict occupancy within Saddle Lakes to individuals 55 years of age or older. Plaintiff admits she is under 55 years of age. On February 1, 2012, defendants demanded plaintiff have someone over 55 move in with her or vacate the premises.

Defendants now move to strike plaintiff's jury demand, contending that by joining claims for both legal and equitable relief plaintiff has waived her right to demand a jury trial. Defendants also seek dismissal of plaintiff's first cause of action maintaining that the Riverhead Town Code classification restricting the occupancy of retirement communities, including Saddle Lakes, is valid.

Defendants also seek summary judgment on their first counterclaim requiring plaintiff to comply with the community's age restriction. In support of the motion, defendants submit, among other things, the affidavits of Riverhead Town Attorney Robert F. Kozakiewicz and Justine Tocci, Esq.; the declaration of covenants, restrictions, easements, charges and liens for Saddle Lakes; the by-laws of Saddle Lake; portions of plaintiff's deposition testimony; the Town of Riverhead RC zoning restrictions; the condominium offering plan; the pleadings; and the note of issue with jury demand.

Plaintiff cross-moves for partial summary judgment dismissing the first, third, and fourth affirmative defenses and the three counterclaims, contending that defendants have failed to comply with 42 USC § 3607 (b) (2) of the Fair Housing Act in failing to conduct verifications of age surveys of its residents, and discrimination pursuant to Executive Law § 296. In support of the cross motion, plaintiff submits the pleadings; a stipulation between the parties; a prior decision of the court; the deposition transcripts of Carl Klein, and Douglas Weigher; the by-laws; the deed; the Town of Riverhead RC zoning requirements; and various correspondence.

CPLR 4101(1) provides for a jury trial in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only." However, "the deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial" (***Hebranko v Bioline Labs.***, 149 AD2d 567, 567, 540 NYS2d 264 [2d Dept 1989]; *see* ***Anesthesia Assoc. of Mt. Kisco, LLP v Northern Westchester Hosp. Ctr.***, 59 AD3d 481, 873 NYS2d 202 [2d Dept 2009]; ***Tiffany at Westbury Condominium v Marelli Dev. Corp.***, 34 AD3d 791, 826 NYS2d 623 [2d Dept 2006]). A party's entitlement to a jury trial is determined by the allegations set forth in the complaint, not by the prayer for relief (*see* ***Magill v Dutchess Bank & Trust Co.***, 150 AD2d 531, 541 NYS2d 437 [2d Dept 1989]; ***Hebranko v Bioline Labs.***, 149 AD2d 567, 540 NYS2d 264). Thus, a prayer for equitable relief will not be considered a waiver of the right to a jury if a sum of money would provide complete relief to the plaintiff under the facts alleged in the complaint (*see* ***Anesthesia Assoc. of Mt. Kisco, LLP v Northern Westchester Hosp. Ctr.***, 59 AD3d 481, 873 NYS2d 202; ***Hebranko v Bioline Labs.***, 149 AD2d 567, 540 NYS2d 264; ***Murphy v American Home Prods. Corp.***, 136 AD2d 229, 527 NYS2d 1 [1st Dept 1988]). Further, once the right to a jury trial has been lost by the intentional joinder of equitable and legal claims in a pleading, "any subsequent dismissal, settlement or withdrawal of the equitable claim[s] will not revive the right to trial by jury" (***Zimmer-Masiello, Inc. v Zimmer, Inc.***, 164 AD2d 845, 846-847, 559 NYS2d 888 [1st Dept 1990]; *see* ***Haber v Cohen***, 74 AD3d 1282, 903 NYS2d 242 [2d Dept 2010]; ***Whipple v Trail Props.***, 261 AD2d 470, 690 NYS2d 321 [2d Dept 1999]).

Plaintiff's complaint seeks an injunction, money damages for the diminution of value of her property, money damages for the deprivation of the reasonable use of her property, money damages for a violation of Executive Law § 296, and money damages for selective enforcement. Plaintiff concedes in reply that "she has never contended that her complaint seeks no equitable relief." An action for an injunction is equitable in nature (*see* ***Finger Lakes Health Sys, Agency v St. Joseph's Hosp.***, 81 AD2d 403, 442 NYS2d 219 [3d Dept 1981]). A declaratory judgment action "can be legal or equitable in nature, and to determine whether a party is entitled to a jury trial, 'it is necessary to examine which of the traditional actions would most likely have been used to present the instant

claim had the declaratory judgment action not been created'" (***State Farm Mut. Auto. Ins. Co. v Sparacio***, 25 AD3d 777, 778-779, 809 NYS2d 151 [2d Dept 2006]).

Here, plaintiff waived her right to demand a trial by jury by joining actions for equitable relief, in which she alleges no adequate remedy at law, with actions to recover damages for defendants' alleged deprivation of the use and occupancy of her home (*see* ***Zimmer-Masiello, Inc. v Zimmer, Inc.***, 164 AD2d 845, 559 NYS2d 888; ***Cohn v Adler***, 139 AD2d 481, 526 NYS2d 843; *see also* ***Anesthesia Assoc. of Mt. Kisco, LLP v Northern Westchester Hosp. Ctr.***, 59 AD3d 481, 873 NYS2d 202). Plaintiff also waived her right to a jury trial by asserting a claim for injunctive relief based on the same transaction and occurrences that formed the legal claim against defendants (*see* ***Willis Re Inc. v Hudson***, 29 AD3d 489, 816 NYS2d 43 [1st Dept 2006]; ***Chim Chul Yi v Marcy Realty Co.***, 291 AD2d 368, 736 NYS2d 883 [2d Dept 2002]). Accordingly, the motion by defendants for an order striking the demand for a jury trial is granted.

Turning to defendants' motion for summary judgment, it is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, *citing* ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Defendants have established their prima facie entitlement to summary judgment in their favor dismissing the first cause of action in the complaint. Plaintiff alleges that the Town of Riverhead's Residence RC District zoning classification which mandates that any one-family dwelling unit located within a Residence RC District be occupied by persons over the age of 55 years, violates Executive Law Section 296 (5) (a) and the Federal Fair Housing Act. Initially, it is noted that the Town of Riverhead is not a defendant herein. Moreover, providing for land use suitable for the elderly has been viewed as a nondiscriminatory exercise of the power to provide for the general welfare of all people, especially when the validity of that zoning classification has been fairly debated, "[the town board's] legislative judgment must be allowed to control" (***Maldini v Ambro***, 36 NY2d 481, 369 NYS2d 385 [1975]). Here, plaintiff concedes that the Town "has the authority and jurisdiction to establish zoning districts for age restricted housing communities as a valid exercise of zoning authority." Defendants have established that they did not create the age restriction, but rather comply with the provisions of the zoning district established by the nonparty Town. As plaintiff does not challenge the Town of Riverhead's zoning classification, the first cause of action for an injunction enjoining defendants from enforcing the Town zoning ordinance restricting occupancy in one-family dwelling units in the Residence RC District to persons age 55

and older is dismissed.

Turning to the branch of defendants' motion for summary judgment on the first counterclaim, defendants have established their prima facie entitlement to summary judgment for an order directing plaintiff to vacate the premises known as 8 Lakeview Court, Riverhead, New York. Defendants have established, and plaintiff does not contest, that the Town of Riverhead's Residence RC District for retirement communities, which restricts occupancy of units, residences, and communities within the retirement community district to persons 55 years of age or older (*see* Code of the Town of Riverhead § 303-44 (A)) is a valid zoning classification (***Maldini v Ambro***, 36 NY2d 481, 369 NYS2d 385). Defendants have also established that the developer's offering plan for the Saddle Lakes Condominium advised plaintiff at the time of purchase, under the heading "Special Risks" that:

> This Condominium is being developed pursuant to the Residence RC District (Retirement Community) Zoning classification of the Town of Riverhead and the Declaration of Covenants and Restrictions recorded in the Suffolk County Clerk's Office in Liber 11954, Page 211 and, therefore, occupancy of the Units shall be limited to the following persons: (I) at least one person who is fifty-five (55) years of age or over; (ii) a spouse greater than nineteen (19) years of age; (iii) children and/or grandchildren residing with their parents or grandparents where one (1) of said parents or grandparents, with whom the children or grandparents are residing, is fifty-five (55) years of age or older, provided that said children or grandchildren are over the age of nineteen (19) years; and (iv) adults under fifty-five (55) years of age may be admitted as permanent residents if it is established that the presence of such person is essential for the physical care or economic support of eligible older persons.

Plaintiff was also advised in the Condominium I Offering Plan under the heading "Introduction" that:

> There is no restriction upon ownership of a Home. Occupancy of a Home, however, may only be for residential purposes in accordance with the Residents RC District (Retirement Community) Zoning classification of the Town of Riverhead and the Declaration of Covenants and Restrictions recorded in the Suffolk County Clerk's Office in Liber 11954, Page 211 and, therefore, occupancy of the Units shall be limited to the following persons: (I) at least one person who is fifty-five (55) years of age or over; (ii) a spouse greater than nineteen (19) years of age; (iii) children and/or grandchildren residing with their parents or grandparents where one (1) of said parents or grandparents, with whom the children or grandparents are residing, is fifty-five (55) years of age or older, provided that said children or

> grandchildren are over the age of nineteen (19) years; and (iv) adults under fifty-five (55) years of age may be admitted as permanent residents if it is established that the presence of such person is essential for the physical care or economic support of eligible older persons.

It is not disputed that plaintiff is under 55 years of age, and was aware of, and agreed to the age restrictions in the Condominium Offering Plan. In her purchase agreement plaintiff specifically agreed to be bound by the Condominium Offering Plan. Moreover, she testified that when she signed the purchase agreement she was aware of the age restriction requirement contained in the Condominium Offering Plan.

In opposition, plaintiff contends that defendants "are not in compliance with the provisions of the age restriction exemption contained in the Housing for Older Persons Act of 1995 and in New York Executive Law Section 296 (5) (a)." The exemption, however, relates to the familial status discrimination exemption contained in the Fair Housing Act. Executive Law Section 296 (5) (a) provides:

> [I]t shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:
>
> (1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.
>
> The provisions of this paragraph (a) shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner resides in one of such housing accommodations, (2) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex or (3) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner resides in such housing accommodation or (4) solely with respect to age and familial status to the restriction of the sale, rental or lease of housing accommodations exclusively to persons sixty-two years of age or

> older and the spouse of any such person, or for housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607 (b) (2) (c) of the federal Fair Housing Act of 1988, as amended, shall apply.

The Fair Housing Act, also known as Title VIII of the Civil Rights Act of 1968, codified in 42 USC § 3601, prohibits discrimination in the sale or rental of dwellings on the basis of race, color, religion, national origin, sex, familial status and handicap. The Fair Housing Act, by its very terms, excludes age discrimination. In 1988, Congress amended the Fair Housing Act (FHA) and prohibited housing discrimination on account of familial status (*see* Fair Housing Amendments Act of 1988 [FHAA], Pub.L. No. 100–430, 102 Stat. 1619). As amended by the FHAA, the FHA broadly prohibits discrimination against families with children in connection with the sale and rental of housing (*see* 42 USC §§ 3604(a)-(e), 3605, 3606, 3617, 3631.1). "[F]amilial status" means one or more individuals (who have not attained the age of 18) being domiciled with a parent or other person having legal custody of such individual or individuals; or the designee of such parent or other person having such custody, with written permission of such parent or other person (42 USC § 3602 [k]). The protections against familial status discrimination also apply to "any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years." Contrary to plaintiff's position, familial status does not apply to plaintiff.

In 1995, Congress passed the Housing for Older Persons Act (HOPA) (*see* 42 USC § 3607 [b] [2] [c]), which revised the 55 or older familial exemption to the FHA. Under the FHA, as amended by the FHAA and HOPA, housing qualifies for the 55 or older familial exemption when it is "intended and operated for occupancy by persons 55 years of age or older" and three requirements are satisfied:

> (i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
>
> (ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
> (iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall —
>
> (I) provide for verification by reliable surveys and affidavits; and
>
> (II) include examples of the type(s) of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be

admissible in administrative and judicial proceedings for the purposes of such verification.

The Housing of Older Persons Act applies as an exception to the familial status discrimination provisions of the FHAA in housing for older persons, it does not apply to plaintiff's claims (***Balvage v Ryderwood Improvement and Service Ass'n, Inc.***, 642 F3d 765 [9th Cir 2011]). Therefore, the Fair Housing Act, the Fair Housing Amendments Act, and the Housing for Older Person Act, are not applicable here and plaintiff has not established a federal discrimination law defense to defendant's first counterclaim.

With regard to plaintiff's state discrimination claim alleged under Executive Law § 296, defendants, a home owners association and its board of managers, do not own, lease, sub-lease, assign or act as a managing agent of the property and, therefore, Executive Law § 296 does not apply. Additionally, defendants, in their first counterclaim, do not dispute plaintiff's right to sell, lease or rent the property to any individual 55 years of age or older or her right to own the property. Plaintiff has not demonstrated that the federal law, which specifically excludes age discrimination, applies. Plaintiff has also not demonstrated that the state law, with regard to discrimination in the sale, rental or lease of housing accommodations, applies to the occupancy provisions of a municipally created over 55 years of age retirement community (***Greens at Half Hollow Home Owners Ass'n, Inc. v Greens Golf Club, LLC***, 131 AD3d 1108, 17 NYS3d 158 [2d Dept 2015]; ***Campbell v Barraud***, 58 AD2d 570, 394 NYS2d 909 [2d Dept 1977]). Accordingly, plaintiff has not raised a triable issue of fact regarding defendants' first counterclaim.

However, "[a] mandatory injunction is an extraordinary remedy to which a suitor has no absolute right but which may be granted or withheld by a court of equity in the exercise of its discretion. Even where the facts which would justify the grant of an extraordinary remedy are established, the court still must decide whether, in the exercise of sound discretion, it should grant the remedy, and if granted, the terms and conditions which should be annexed to it" (***Lexington & Fortieth Corp. v Callaghan***, 281 NY 526, 531, 24 NE2d 316 [1939]). A court determining an application for mandatory injunctive relief is required to consider both the benefit to the applicant and the harm to the opposing party that would follow the granting of such a remedy (*see* ***Broser v Schubach***, 85 AD3d 957, 925 NYS2d 875 [2d Dept 2011]; ***Marsh v Hogan***, 81 AD3d 1241, 919 NYS2d 536 [3d Dept 2011]; ***Town of Fishkill v Turner***, 60 AD3d 932, 876 NYS2d 92 [2d Dept 2009]; ***Nat Holding Corp. v Banks***, 22 AD3d 471, 802 NYS2d 214 [2d Dept 2005], *lv denied* 6 NY3d 715, 823 NYS2d 356 [2006]; ***Sunrise Plaza Assoc. v International Summit Equities Corp.***, 288 AD2d 300, 733 NYS2d 443 [2d Dept 2001], *lv denied* 97 NY2d 612, 742 NYS2d 604 [2002]; ***Medvin v Grauer***, 46 AD2d 912, 363 NYS2d 330 [2d Dept 1974]). Given plaintiff's current age, the parties' agreement that defendants would not take any action to terminate plaintiff's occupancy from her residence "during the pendency of this action," the likelihood of a stay pending appeal of the trial of this action and money damages in the form of continued fines in the amount of $50.00 per week, the demand for a mandatory injunction is denied at this time without prejudice, pending the bench trial of this action.

The cross motion by plaintiff seeks to strike the defendants' first, third and fourth affirmative defenses, and defendants' first, second and third counterclaims. A plaintiff may move at any time to dismiss an affirmative defense on the ground that it "is not stated or has no merit" (CPLR 3211 [b]; *see* ***Greco v Christoffersen***, 70 AD3d 769, 771, 896 NYS2d 363 [2d Dept 2010]). A plaintiff moving for dismissal of an affirmative defense bears the burden of demonstrating that such defense is without merit as a matter of law (***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2012]). Upon such a motion, the defendant "is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (***Amerada Hess Corp. v Town of Southold***, 39 AD3d 442, 442, 833 NYS2d 232 [2d Dept 2007]).

Here, plaintiff failed to meet her burden with proof demonstrating the first and fourth affirmative defenses asserted by defendants are without merit as a matter of law (*see* ***Ramanathan v Aharon***, 109 AD3d 529, 970 NYS2d 574 [2d Dept 2013]; ***Lucas v J & W Realty & Constr. Mgt., Inc.***, 97 AD3d 642, 949 NYS2d 391 [2d Dept 2012]; ***Family-Friendly Media, Inc. v Recorder Tel. Network***, 74 AD3d 738, 903 NYS2d 80 [2d Dept 2010]). Defendants' first affirmative defense relies on documentary evidence and plaintiff testified that she was aware of the age restrictions set forth in the Condominium Offering Plan and the defense, therefore, is relevant. That portion of plaintiff's motion which seeks to strike the first affirmative defense of documentary evidence based upon age exemption status as defendants' have failed to comply with the criteria contained in 42 USC § 3607 (b) (2) of the Fair Housing Act in failing to conduct verification of age surveys of its residents is denied. Both Carl Klein and Douglas Weigler testified that "to [their] knowledge" no census or records of ages of owners have been taken or prepared. Michael Cohen, Esq., however, avers that defendants undertook a survey in July of 2011 of residents who were in non-compliance with the age restriction "in an effort to cure any violation." As such factual issues preclude the dismissal of the defense.

Defendants' fourth affirmative defense alleges waiver. Given plaintiff's admission that she did not act on the known age restriction since 2001, when she purchased the property, a waiver defense is relevant.

Defendants' third affirmative defense alleges that the Town of Riverhead is a necessary party. "A court may always consider whether there has been a failure to join a necessary party" (***City of New York v Long Is. Airports Limousine Serv. Corp.***, 48 NY2d 469, 475, 423 NYS2d 651, 654 [1979]; *see* ***Censi v Cove Landings, Inc.***, 65 AD3d 1066, 885 NYS2d 359 [2d Dept 2009]). CPLR 1001 defines necessary parties as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR 1001 [a]). "When a person who should be joined under [CPLR 1001 (a)] has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned" (CPLR 1001 [b]). As plaintiff now admits that the Town of Riverhead age restriction zoning ordinance is valid, the Town is not a necessary party. Accordingly, plaintiff's motion to dismiss the defendants' affirmative defenses is denied as to the first and fourth affirmative defenses, and granted as to the third affirmative defense.

Defendants' counterclaims demand vacature of the subject premises, a money judgment in an amount equal to fines levied by the home owner's association, and attorney fees. That branch of plaintiff motion for dismissal of defendants' counterclaims is denied. The first counterclaim is discussed above. Defendant's second and third counterclaims demand fines and attorney fees, the documentary evidence submitted support both claims and establish that dismissal of these counterclaims is not warranted. Accordingly, plaintiff has not established a prima facie entitlement to their dismissal.

Dated: 9/15/2016

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**