Kai Chui Chan v Lipiner
2017 NY Slip Op 30991(U)
May 10, 2017
Supreme Court, New York County
Docket Number: 650697/2015
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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KAI CHUI CHAN A/K/A JIMMY CHAN,
MASTER TENANT,

Plaintiff,

DECISION/ORDER
Index No. 650697/2015

-against-

MARLENE LIPINER AND THOR 174-176
BOWERY, LLC,

Defendant.

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HON. SALIANN SCARPULLA, J.:

In this action, *inter alia*, for specific performance, plaintiff Kai Chui Chan ("Chan") moves for leave to amend the second amended complaint.

Defendant Marlene Lipiner ("Lipiner") was the owner of the building located at 174-176 Bowery. According to the allegations of the complaint, Lipiner leased the first floor commercial space in the building to 176 Bowery, LLC, pursuant to a lease agreement dated March 2, 2000. However, Chan only formed 176 Bowery, LLC in September 2015, and explains that the entity 176 Bowery, Inc. was mistakenly named 176 Bowery LLC in the lease agreement. 176 Bowery, Inc. paid the rent due under the lease to Lipiner. 176 Bowery, Inc. then dissolved in 2003. According to Chan, he became the master tenant when 176 Bowery, Inc. ceased its corporate activities.

On February 9, 2015, Lipiner sent a letter to 176 Bowery. Inc./176 Bowery, LLC indicating that she had accepted an offer from defendant Thor 174-176 Bowery LLC ("Thor") to purchase the building.

Chan sent Lipiner a letter to exercise the right of first refusal pursuant to Article XXXI of the lease, and offered to buy the building. Pursuant to Article XXXII of the lease, "landlord shall allow

the Master Tenant to sublease to the two existing principals of Master Tenant: Penny Cheung (aka Ping Cheung) or Jimmy Chan (aka Kai C. Chan) within the original purpose of the lease under any legal entity which they own 100% of. All terms and provisions of the lease shall remain in full force and effect as to any sublease." Chan claimed that he became the replacement "master tenant" pursuant to Article XXXIII of the lease, which provided that if certain conditions were satisfied, "landlord agrees to continue to recognize the remaining sub-lessee…as the replacement master tenant under the master lease." Chan sent a check for $510,000 as a down payment, made payable to Lipiner's attorney. Lipiner refused to allow Chan to exercise the right of first refusal, and instead offered to pay him $500,000 to waive the right of first refusal.

In March 2015, Chan commenced this action seeking specific performance of the right of first refusal and his right to purchase the building. He also asserted a claim for breach of contract and served a Notice of Pendency. After reviewing Chan's allegations, Lipiner and Thor closed on the sale of the building on April 15, 2015. Lipiner also paid Thor $1,000,000 in exchange for a release from any further liability, as well as indemnification and defense in this action.

Lipiner then removed the action to federal court, and Chan moved for a temporary restraining order and preliminary injunction to "enjoin[] defendant(s) from further sale. . . of the property and/or any landlord tenant actions by Lipiner or Thor against [Chan] during the action." The parties stipulated, *inter alia*, that Thor would not commence any action or proceeding to evict Chan from the premises during the course of the litigation. The stipulation further provided, "[Chan] shall personally comply with and perform all obligations of tenant under the agreement of lease made as of March 2, 2000 between [Lipiner], as landlord, and 176 Bowery, LLC as tenant, as if [Chan] were the tenant under the lease. For purposes of this stipulation, [Thor] shall be deemed the landlord."

The case was then remanded back to this court.[1] Throughout discovery, Chan maintained that he was the tenant because he became the master tenant once 176 Bowery Inc. dissolved in 2003.

Chan now moves for leave to amend the complaint and join 176 Bowery Inc. and 176 Bowery LLC as plaintiffs. He argues that he and/or 176 Bowery Inc. and/or 176 Bowery, LLC, has been and continues to be the triple net lessee of the premises with a right of first refusal to purchase 176 Bowery pursuant to the March 2, 2000 lease with defendant Lipiner. He alleges that they exercised the right of first refusal in February 2015 and should have been afforded the opportunity to purchase the property. Further, he maintains that he and/or his companies should be afforded a new opportunity to close on the purchase of 176 Bowery because Thor and Lipiner improperly adjusted the purchase price and terms of the sale. Specifically, Lipiner granted Thor $6,440,000 of seller financing, terms as to which Chan/176 Bowery, Inc./176 Bowery LLC were not afforded notice and opportunity to exercise the right of first refusal.

The proposed third amended complaint includes a specific performance cause of action, and new causes of action (1) seeking a judgment declaring that 176 Bowery, LLC/176 Bowery, Inc./Chan is the triple net tenant of the premises, possessing the right of first refusal; (2) seeking a judgment declaring that they timely exercised the right of first refusal; (3) seeking a judgment declaring that they are entitled to complete the purchase of the premises at the same price and on the same terms and conditions as Thor did; and (4) for tortious interference with contract against Thor. Chan maintains that there would be no prejudice resulting from the amendments.

Chan alleges that many of the allegations in the proposed third amended complaint merely flesh out the facts as set forth in the previous complaint, and provide more detail. Certain other

[1] Chan filed a second amended complaint to correctly name Thor as the buyer.

facts set forth in the proposed third amended complaint were unknown, or could not be confirmed, until Chan deposed Lipiner and Thor. For example, it was discovered that 176 Bowery Inc. was misnamed 176 Bowery LLC in the March 2000 lease due to a scrivener's error made by Lipiner's attorney at that time, Charles Luk. Further, according to Charles Luk, the intent behind Article XXXIII of the March 2000 lease was to state that Chan would become the replacement master tenant under the lease if 176 Bowery Inc. went out of business.

In opposition, defendants argue that the motion to amend and join new parties must be denied because (1) plaintiffs are judicially estopped from asserting that anyone other than the existing plaintiff is the tenant; (2) the new theories are thoroughly inconsistent with the factual position plaintiff has asserted over the past year; (3) such amendment would be futile, because the present owner is a bona purchaser for value as against anyone other than the existing plaintiff; and (4) defendants would be prejudiced by the amendment.

Discussion

"Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies and Associates, Inc. v. New York City Health & Hospitals Corp.*, 59 N.Y.2d 755, 757 (1983). Prejudice is defined as "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add." *Murray v. City of New York*, 51 A.D.3d 502, 503 (1st Dept. 2008); *Barbour v. Hospital for Special Surgery*, 169 A.D.2d 385, 386 (1st Dept. 1991).

Here, although this motion is being made far into the litigation process, no such prejudice has been demonstrated. *See Jacobson v. McNeil Consumer & Specialty Pharmaceuticals*, 68 A.D.3d 652, 653 (1st Dep't 2009). The proposed amendments to the complaint more fully detail the subject matter of the action, and the circumstances and occurrences leading up to the sale of the

premises. The proposed amended complaint no longer includes a breach of contract cause of action, retains the specific performance cause of action, and adds causes of action for declaratory judgment and tortious interference with contract. The facts and allegations set forth in the declaratory judgment and specific performance causes of action have the same general basis in fact in the previous complaint; they are simply more detailed.

The claim for tortious interference with contract, which Chan claims only became apparent when the communications between Thor and Lipiner were revealed during discovery, also causes no prejudice to defendants because it is based on the same facts and alleged conduct that were known to them and set forth in the previous complaint. Leave to amend a complaint to add an additional theory of liability is generally granted when the defendants were placed on notice of such theory by the allegations in the initial complaint, such that the defendants cannot establish that they will be prejudiced by the amended complaint. *Jacobson v. McNeil Consumer & Specialty Pharmaceuticals*, 68 A.D.3d 652, 653 (1st Dep't 2009).

However, the branch of plaintiff's motion seeking joinder of 176 Bowery, LLC and 176 Bowery, Inc. as plaintiffs is denied. First, 176 Bowery, LLC was not in existence at the time the lease agreement was executed, and was only formed in 2015 as part of this litigation. It has no entitlement to relief in this action. Discovery has revealed that the name "176 Bowery, LLC" as set forth in the lease agreement was a misnomer, and the real party to the lease agreement at that time was 176 Bowery, Inc. However, 176 Bowery, Inc. dissolved in 2003 and was only revived in 2016 as part of this litigation. Chan has consistently alleged throughout this action, and pointed to documentary evidence to support his allegation, that upon 176 Bowery, Inc.'s dissolution, he became the master tenant under the lease who was owed the right of first refusal. As such, there is no basis upon which to join 176 Bowery, Inc. as plaintiff.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Kai Chui Chan a/k/a Jimmy Chan, Master Tenant's motion to amend is granted solely to the extent that plaintiff is granted leave to amend his second amended complaint consistent with this decision and order; and it is further

ORDERED that the third amended complaint shall be served within 20 days of the date of this order.

This constitutes the decision and order of the court.

Dated: May 10, 2017
New York, New York

J.S.C.
HON. SALIANN SCARPULLA