

New York Yacht Club v Lehodey

2017 NY Slip Op 31995(U)

September 13, 2017

Supreme Court, New York County

Docket Number: 150632/16

Judge: Charles E. Ramos

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
NEW YORK YACHT CLUB,

Plaintiffs,

- against -

Index No. 150632/16

JOHN LEHODEY, SOFITEL NEW YORK HOTEL,
ACCOR NORTH AMERICA INC., ACCOR BUSINESS
AND LEISURE NORTH AMERICA INC., KSSNY,
INC., and NORMANDIE, LLC,

Defendants.

-----X

Hon. C.E. Ramos, J.S.C.

In motion sequence 001, defendants John Lehodey (Lehodey), Sofitel New York Hotel (Sofitel), Accor Business and Leisure North America Inc. (Accor Business), and Normandie, LLC (Normandie) move to dismiss plaintiff New York Yacht Club's (NYYC) complaint (Complaint) pursuant to CPLR 3211(a)(1), (5), and (7).

In motion sequence 002, defendants KSSNY, Inc. (KSSNY) moves to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5), and (7).

In motion sequence 003, defendant Accor North America Inc. (Accor) moves to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5), and (7).

Defendants' motions to dismiss are herein consolidated for disposition, and are granted in their entirety for the reasons set forth below.

Background

The following factual allegations are set forth in the Complaint, and for the purposes of this motion are accepted as true.

NYYC is a not for profit corporation organized under the laws of the State of New York, with its principal place of business as 37 West 44th Street ("Club Premises") (Complaint, ¶ 1). Since 1899, NYYC has constructed, owned, and operated the Club Premises (Complaint, ¶ 16).

The Club Premises is situated immediately to the east of the Sofitel, which is located at 43-45 West 44th Street ("Hotel Premises"). The Sofitel is located within 100 feet of the Club Premises (Complaint, ¶ 17).

Since October 5, 2001, Sofitel has managed and operated the Hotel Premises.

The Club Premises is approximately 85 feet in height, and the Sofitel is approximately 300 feet in height (Complaint, ¶ 17). Prior to 1998, NYYC established multiple chimneys, flues, and vent stacks at the Club Premises, including a plumbing vent which is now less than two feet away from the Sofitel (Complaint, ¶ 17).

In September 1985, NYYC entered into a "Zoning Lot and Development Agreement" with a corresponding "Declaration and Consent" ("ZLDA"), with non-party West 44th Street Associates

("Associates"), wherein NYYC sold its air rights and merged its zoning lot with that of Associates, thereby allowing Associates to build on the Hotel Premises (Complaint, ¶ 21).

Paragraph 7 of the ZLDA requires the parties to provide advance written notice to the other party of any filing with the Department of Buildings ("DOB") that would affect the other party's rights (Simoni Aff., Ex. C).

Paragraph 8 of the ZLDA provides, in relevant part:

The parties hereto acknowledge and agree that this [ZLDA] and the Declaration are intended solely to create the Combined Zoning Lot, to make available to Associates the Excess Zoning Rights, to regulate the rights and obligations of the parties hereto and to impose the restrictions upon the Yacht Club, and that, except as herein specifically set forth, each party hereto retains full ownership and control over its land (Feder Aff., Ex. 7, ¶ 8).

Paragraph 5 provides, in relevant part, that:

The parties hereto agree that construction plans and specifications for, and applications for Certificates of Occupancy...shall be so filed with the Department of Buildings of the City of New York as to obtain separate "new building" and "alteration" numbers (Feder Aff., Ex. 7, ¶ 5).

In February 1997, Normandie acquired the Sofitel, including the air rights previously sold by NYYC (Complaint, ¶ 22).

In March 1998, Lehodey and Normandie commenced a "New Building" job application ("Application"), job application No. 101738960, with the DOB for the demolition of the existing building on the Hotel Premises and for the Sofitel's construction (Complaint, ¶ 23).

On September 24, 1998, the DOB approved the Application (Feder Aff., Ex. 5).

Lehodey is the sole managing member of Normandie, and maintains active investments in Accor Business' hotel management businesses (Complaint, ¶ 5). Lehodey is also affiliated with the Sofitel and Accor, has served as president of Accor Business, and is the sole member of Normandie (Complaint, ¶¶ 6, 15).

In March 2000, Normandie sold and assigned one or more interests in the Sofitel and the Hotel Premises to an entity known as Hotel Leasing (NY) Trust (Hotel Leasing) (Complaint, ¶ 40).

On October 5, 2001, Lehodey, while construction of the Sofitel was ongoing, obtained a temporary certificate of occupancy ("TCO") (Complaint, ¶ 34). Pursuant to the TCO, the construction of the Sofitel was deemed substantially complete on October 5, 2001 (Feder Aff., Ex. 6).

In January 2007, Hotel Leasing sold and assigned its interest in the Sofitel and the Hotel Premises to West 44th Street Owner Co. (Complaint, ¶ 41).

Subsequently, in November 2014, West 44th Street Owner Co. sold and assigned its interest in the Sofitel and the Hotel Premises to KSSNY, the Sofitel's current owner (Complaint, ¶ 42).

On May 13, 2004, the DOB issued a permanent certificate of occupancy ("CO"), which indicates that construction of the Sofitel was complete on December 2, 2003 (Feder Aff., Ex. 3).

On April 14, 2016, NYYC commenced this action, asserting claims for continuous trespass, negligence, fraud, intentional misrepresentation, fraudulent concealment, negligent misrepresentation, nuisance, and violations of New York City Building Code of 1968 ("Code") §§ 27-859 and 27-860 and RPAPL 871. NYCC alleges that Lehodey and Normandie knowingly failed to disclose the existence of the chimneys and flues on the Club Premises in the Application (Complaint, ¶ 33). NYYC also alleges that defendants failed to provide NYYC with notice and plans for extending the chimneys and flues of the Club Premises in accordance with Code §§ 27-859, 27-860, 27-917, and 27-157 (Complaint, ¶ 26).

At oral argument on October 13, 2016, this Court stayed the pending motions to dismiss, and referred the matter to the DOB to determine whether the Sofitel's construction violated certain Codes.

On March 29, 2017, Benjamin Hillengas ("Hillengas"), Assistant General Counsel of the DOB, notified NYYC's counsel via written correspondence, that the DOB did not intend to issue violations, due to the lapse in time since Sofitel received its 2004 Certificate of Occupancy ("DOB Letter") (NYSCEF Doc. No.

80). In the DOB Letter, Hillengas provided that it was "not a final determination, nor will the Department render a final determination" (NYSCEF Doc. No. 80).

On April 28, 2017, NYYC submitted an agency appeal of the determination in the DOB Letter to the New York City Board of Standards and Appeals (BSA) (Simoni Supp. Aff., Ex. C). The general counsel for the BSA rejected the appeal, maintaining that the DOB Letter was not a "final determination" (Simoni Supp. Aff., Ex. D)

Discussion

Defendants move to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5), and (7), arguing that NYYC's claims are barred by the applicable three and six-year statute of limitations. In addition, defendants argue that NYCC fails to allege a physical encroachment on the Club Premises, justifiable reliance, or the existence of a special relationship between the parties.

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted if the movant presents documentary evidence that resolves all factual issues and will "definitively dispose of the claim" (*Fortis Financial Services, LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002]).

On a motion to dismiss pursuant to CPLR 3211(a)(5), the moving party must establish, prima facie, that the time to commence an action has expired. The burden then shifts to the

plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable (*Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499, 499-501 [1st Dept 2013]).

In New York, causes of action for negligence, trespass, private nuisance, violation of property rights and Code provisions, such as Code § 27-860, are all governed by a three-year statute of limitations (*Barklee 94 LLC v Oliver*, 124 AD3d 459, 460 [1st Dept 2015]; *Mindel v Phoenix Owners Corp.*, 17 AD3d 227 [1st Dept 2005]; *Kent v 534 E. 11th Street*, 80 AD3d 106 [1st Dept 2010]).

Generally, "a cause of action accrues, triggering the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief" (*West Chelsea Bldg. LLC v Guttman*, 139 AD3d 39, 42 [1st Dept 2016]). A cause of action under Code § 27-860 accrues when the allegedly improper construction work that triggers a duty under the statute is complete (*Mindel v Phoenix Owners Corp.*, 17 AD3d 227, 228 [1st Dept 200]).

Defendants argue that pursuant to the CO and TCO, construction of the Sofitel was complete as early as October 5, 2001 and by December 2, 2003 the latest, and, as a result, the

construction of the Sofitel and NYYC's lack of extended chimneys was apparent no later than 2004 (Feder Aff., Ex. 3 & 6).

Therefore, according to defendants, the statute of limitations for the negligence, continuous trespass, nuisance, Code § 27-860, and RPAPL 871 claims expired by 2007, at the latest. Defendants further argue that, pursuant to *W. Chelsea Bldg. LLC v Guttman*, the TCO, filed in October 2001, and the CO, filed in May 2004, are prima facie proof that NYYC's Code § 27-860 claim accrued (*W. Chelsea Bldg. LLC v Guttman* 139 AD3d 39, 42 [1st Dept 2016]).

KSSNY argues that even if NYYC's action was timely under the applicable statute of limitations, NYYC has failed to establish that KSSNY, as a succeeding owner, owes a statutory duty under Code § 27-860 to extend the chimneys.

In opposition, NYYC argues that defendants have a specific ongoing affirmative duty under Code § 27-860 and Mechanical Code 801.1.1 to provide written notification to neighboring buildings with chimneys and flues within 100 feet at least 45 days prior to construction, and thereafter, to extend NYYC's chimneys to comply with the Code. As a result, defendants' continued use of the Hotel Premises is an ongoing violation of the law, which compromises the health and safety of the inhabitants and guests of the Sofitel and the NYYC. As to its negligence claim, NYYC argues that defendants owe an ongoing duty to take reasonable

precautions to avoid injury to NYYC.

In response to KSSNY's argument, NYYC maintains that Administrative Code 28.201.1 and 202 specifically provides that ongoing "use" in violation of current or prior codes is a violation of the code itself.

The Court finds that NYYC's claims alleging negligence, continuous trespass, nuisance, violation of Code § 27-860, and violation of RPAPL 871 are barred by the applicable statute of limitations. Defendants have established, prima facie, that the time to commence an action has expired. NYYC has failed to establish that the statute of limitations was tolled or otherwise inapplicable.

Here, it is undisputed that the TCO indicates that, as of October 5, 2001, the Sofitel was 300 feet tall, which is over 215 feet taller than the NYYC (Feder Aff., Ex. 6). Likewise, the CO establishes that construction was fully complete on December 2, 2003, thereby triggering the statute of limitations.

The TCO and CO both constitute documentary evidence, which establishes that all of NYYC's claims accrued when construction was deemed substantially complete (*West Chelsea Bldg. LLC v Guttman*, 2014 WL 4146804 [2014], *affd* Mar. 31, 2016, 139 AD3d 39). Even if the Court ignored the date the CO was issued, it is undisputed that construction of the Sofitel was deemed fully complete no later than 2004, and NYYC's claims would still be

time-barred.

Defendants have sufficiently established that NYYC's claims for negligence and violation of Code § 27-860 are barred by the statute of limitations, as they accrued no later than 2007, approximately nine years prior to the commencement of this action (CPLR 214; *Kent v 534 E. 11th St.*, 80 AD3d 106, 112 [1st Dept 2010]; *Mindel*, 17 AD3d at 228).

Additionally, NYYC's nuisance cause of action is time-barred under the applicable statute of limitations, as NYYC commenced this action more than three years after the completion of construction of the Sofitel on December 2, 2003, the date of the purported wrong (CPLR 214[4]).

NYYC is correct that injuries to property caused by a continuing nuisance involving a "continuous wrong" can give rise to successive causes of action which accrue each time the wrong is committed (*Town of Oyster Bay v Lizza Industries, Inc.*, 22 NY3d 1024 [2013]). However, the "continuous wrong" doctrine should only be "predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*Henry v Bank of America*, 147 AD3d 599, 601 [1st Dept 2017]) (internal quotations omitted).

Here, the purported tortious conduct was the discrete act of failing to extend the NYYC's chimneys, which occurred on or before December 2, 2003, when construction was fully complete

(*Oyster Bay*, 22 NY3d at 1032). NYYC has failed to establish that the nuisance cause of action was connected to multiple tortious acts, thereby constituting successive causes of action (*Id.*).

Likewise, NYYC's first cause of action for continuous trespass fails for the same reasons set forth above, as NYYC has failed to establish that the alleged trespass here was ongoing (CPLR 214[4]; *Bloomingtons, Inc. v New York City Tr. Auth.*, 52 AD3d 120 [1st Dept 2008]; *Lauersen v Antonopolous*, 119 AD3d 404 [1st Dept 2014]).

Even if NYYC's claims for continuous trespass and violation of RPAPL 871 were timely, dismissal would still be warranted because NYYC fails to allege a physical entry of the Club Premises. NYYC's assertion that it had a property right in no structure being erected within 100 feet of its chimney is unpersuasive and not supported by any case law. NYYC's claim under RPAPL 871 similarly fails to establish an encroachment by defendants on the Club Premises.

NYYC is correct that an owner of real property is entitled to utilize its air space (*McMillan Inc. CF Lex Associates*, 56 NY2d 386 [1982]). However, NYYC has failed to establish that the construction of the Sofitel deprived NYYC of that right.

Furthermore, it must be determined whether NYYC's fraud, intentional misrepresentation, fraudulent concealment and negligent misrepresentation claims are barred by the applicable

statute of limitations.

Claims for fraud, intentional misrepresentation, and fraudulent concealment must be commenced within six years from the date the fraud accrued or two years from when a plaintiff discovered a fraud (CPLR 213[8]; *CIFG Assur. N. Am. Inc. v Credit Suisse Sec. [USA] LLC*, 128 AD3d 607, 608 [1st Dept 2015]).

Defendants argue that NYYC's fraud claims began to accrue in March 1998, when Lehodey and Normandie filed plans with the DOB that failed to disclose the existence of chimneys and flues on the Club Premises, and therefore, expired in March 2004.

This action was commenced approximately twelve years after the construction of the Sofitel was deemed fully complete, therefore, it must be determined whether NYYC could have discovered the purported fraud more than two years prior to the commencement of this action (CPLR 213[8]; *CIFG Assur. N. Am., Inc. v Credit Suisse Sec. (USA) LLC*, 128 AD3d 607 [1st Dept 2015]). It is undisputed that the Application, which is the subject of NYYC's fraud claims, was submitted to the DOB in March 1998 (Complaint, ¶ 23).

As defendants correctly stated, NYYC, with reasonable diligence, could have discovered the alleged fraud by May 13, 2004, at the latest, when the DOB issued the CO (Feder Aff., Ex. 3). By this time, it was apparent that the Sofitel's construction was fully complete and that NYYC's chimneys had not been

extended. Moreover, the Application, just like any other DOB filing, was made available to the public upon reasonable investigation.

NYYC fails to establish that they could not have discovered the foundation for its claims prior to January 2014. NYYC was put on notice of the alleged fraudulent statements in the DOB Filings as early as March 1998, but absolutely by May 13, 2004, regardless of whether Lehodey and Normandie failed to fulfill its obligation to notify NYYC of the Application. Defendants make a prima facie showing that NYYC was on inquiry notice of its fraud claims by December 2, 2003, at the absolute latest, when construction was fully complete (CPLR 213[8]; *Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685, 689 [1st Dept 2016]). Accordingly, NYYC's third cause of action for fraud and fourth cause of action for negligent misrepresentation are time-barred under the applicable statute of limitations (CPLR 213[8]; *14 Bruckner LLC v 14 Bruckner Blvd. Realty Corp.*, 78 AD3d 431 [1st Dept 2010]).

Lastly, even if NYYC's claims under Code § 27-860 were not time-barred, they could not stand as to Accor, Accor Business, or KSSNY. Defendants have sufficiently established that the Code places the burden of compliance on the owner (*Bondoc v Zervoudis*, 270 AD2d 105 [1st Dept 2000]).

Given their limited involvement in construction and

planning, Accor and Accor Business "virtually ha[d] no authority to make the structural alterations plaintiffs call for" (Id., at 106).

Likewise, since KSSNY did not become the owner of Sofitel until November 2014, it too lacked authority to mandate the alterations under the Code during the Sofitel's construction. Accordingly, liability cannot attach as to Accor, Accor Business, Sofitel, or KSSNY under Code §§ 27-860 and 27-859. NYYC has failed to establish that KSSNY, a succeeding owner who was not involved in construction, can be held liable for a purported violation of Code § 27-860.

The Court will not evaluate the remainder of defendants' arguments in light of the untimeliness of NYYC's claim.

Accordingly, it is

ORDERED that Defendants' motions to dismiss are granted in their entirety, and the clerk is directed to enter judgment accordingly.

Dated: September 13, 2017

ENTER:



J.S.C.

CHARLES E. RAMOS