Lee v Scott
2018 NY Slip Op 31029(U)
May 29, 2018
Supreme Court, New York County
Docket Number: 158477/2014 E
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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PATRICIA LEE and MARC LESTER, individually and derivatively on behalf of LE TOULOUSE CONDOMINIUM

Plaintiffs,

Index No.: 158477/2014 E

-against-

Mot. Seq. No. 011

MICHAEL SCOTT, M.J. SCOTT LIMITED PARTNERSHIP, M.J. SCOTT LLC, JOHN PAIGE, LAW OFFICES OF JOHN M. PAIGE, STEFAN BENN, BENNCO PROPERTIES, INC., LGB FAMILY LLC, CHARLES W. WEISS and CHARLES W. WEISS, P.C., and BOARD OF MANAGERS OF LE TOULOUSE CONDOMINIUM,

Defendants.

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MELISSA A. CRANE, J.S.C.:

Plaintiffs, Patricia Lee and Marc Lester, individually and derivatively on behalf of the Le Toulouse Condominium, move pursuant to CPLR 3212, for summary judgment against defendants Stefan Benn and the LGB Family LLC (collectively as the "Benn Defendants"), and defendants Charles W. Weiss and Charles W. Weiss P.C. (collectively as the "Weiss Defendants"). On October 27, 2017, this court heard oral argument on plaintiff's summary judgment motion. The court, on the record, granted the injunctive portion of plaintiff's motion and comply with the Department of Building's order, but reserved decision on the issue of who has rights to the roof. This decision now addresses the issue of roof rights.

Background

In September 1996, sponsor Bennco Properties, Inc. ("Bennco") converted a five-story garage into a mixed-use condominium building ("the Condominium"), pursuant to the Offering Plan. Stefan Benn ("Benn") was the principal of Bennco. Le Toulouse Condominium is located at 79-81 East 2nd Street, New York, New York. Charles W. Weiss, attorney for the Sponsor,

filed the Declaration of Condominium and By-Laws (the "Declaration") in December 1996. Article Fourth of the Declaration provided for five total units – four residential units and one commercial unit (Sussmane Aff, Exh. 4, Art. Fourth). The Declaration zoned Unit C-1 for commercial and residential use, and restricted the four remaining units, Units R-1 to R-4, to single family residential use only (*id.*). Each residential unit occupies one floor of the second through fifth floors of the Condominium.

In February 2004, Bennco transferred ownership of residential Unit R-3 and Unit R-4 to Stefan Benn. In December 2012, Benn transferred ownership of Units R-3 and R-4 to the LGB Family LLC ("LGB"), with Benn as its sole Managing Member. Defendant Charles Weiss, individually, and through Charles W. Weiss, P.C. acted as the building's attorney from 2007-2012. Weiss helped to draft the 1996 Offering Plan. Plaintiffs Patricia Lee ("Lee") and Marc Lester ("Lester") purchased the one commercial unit ("Unit C-1") in September 2011 from defendant Michael Scott ("Scott"). Lee currently serves as the President of the Board of Managers of the Condominium.

The dispute between the parties concerns the right to use and build on the Condominium's roof. Plaintiffs allege that the Benn Defendants do not own the Condominium's roof, and that the Declaration and By-Laws do not grant any rights to construct any material structure on the roof. Plaintiffs argue, instead, that the no unit owner can access the roof for any reason other than for repair and maintenance with Board permission (Lee Aff, sworn to on July 2, 2017, ¶ 8). Plaintiffs also argue that the roof is commercial space, and therefore, only plaintiffs have access and use of the roof (*id.* at ¶ 9). Defendants Benn allege, *inter alia*, that the March 2010 Third Amendment and the December 2012 Third Amendment read together, grant Unit R-4 extended roof rights, including the right to build a Penthouse apartment, swimming

pool, and lawn (Benn Aff, sworn to on August 22, 2017, ¶ 7-8). In addition, defendants Benn contend that the Declaration always provided that the roof deck is a limited common area for the exclusive use of Unit R-4's owner (*id*).

Under the Declaration and By-Laws, the roof contains General Common Elements, including a caretaker's room and bathroom, the former freight elevator tower, and stairwell bulkhead, and a Limited Common Element roof deck (Sussmanne Aff, Exh. 4, Art. Fourth). The Offering Plan lists the stairwells, lobby, and a portion of the roof deck (stairway bulkhead and 46 square feet of roof space) as "shared residential common elements." Schedule C, under the Declaration, lists Unit R-4's limited common elements as "Balcony, 96 sq. ft." and Roof Deck "3,084 Sq. Ft." (Sussmanne Aff, Exh. 4, Sch C). However, Schedule C, attached to the 2010 Declaration, lists Unit R-4's limited common elements as "Balcony, 96 sq. ft." and Roof Deck "1,852 Sq. Ft" (Benn Aff, sworn to August 21, 2017, Exh J, Sch C). The footnotes to Schedule A, in the Offering Plan provide that the 'RD' notation (for "Roof Deck") allocates exclusive use of the roof deck to unit R-4 (Weiss Aff, Exh. C, p. 12-13). The Offering Plan, Schedule D, also includes architectural drawings for the building where its "Legend" indicates the roof is a residential element and shares the same tax lot identification number (1005) as unit R-4 (Weiss Aff, Exh. C, p. 204). However, the House Rules delineated in Article IX Subsection 5(j) provides "roof-top areas of the Building shall not be used by any Residential Unit Owners, occupants, guests, servants, employees, agents or invitees, at any time for any purpose, exception with the consent of the Board of Managers for repair or maintenance purposes only."

On June 15, 2004, the New York City Department of Buildings ("DOB") issued a building permit ("June 2004 Permit") to Benn (as owner of Unit R-4) for alterations to the roof. Plaintiffs Lee and Lester assert that Benn commissioned two sets of plans. Plaintiff argues that

Benn fraudulently submitted fake 2004 plans to the Department of Buildings ("DOB") to obtain a Permit that only encompassed a renovation of the caretaker's bedroom, bathroom, and former freight elevator tower (Sussmane Reply Memo, p.13). However, Benn then used that Permit to build a residential unit without permits, approvals, or amendments, and in violation of the NYC Zoning Resolutions (*id.*). Today, as a result of planning and alterations that Benn commenced in 2004, the rooftop structure currently includes multiple bedrooms, bathrooms, living spaces and a pool (the "Penthouse"). It appears Benn has controlled the use of the Penthouse apartment after the completion of the buildout.

The Third Amendment to the Declaration of Condominium of Le Toulouse Condominium dated March 15, 2010 ("March 2010 Third Amendment") attempted to resolve the Offering Plan's different characterizations of unit R-4's roof rights and incorporate the roof's square footage into Unit R-4. However, the Condominium never filed the March 2010 Third Amendment with the New York City Department of Finance Office of the Register ("Register").

In December 2012, the Condominium filed a version of The Third Amendment, dated December 7, 2012, with the Register ("December 2012 Third Amendment"). Unlike the March 2010 Third Amendment, that the five current owners signed, only Stefan Benn signed the December 2012 Amendment. As of December 7, 2012, only three of the five original signers (60%) of the March 2010 Third Amendment still owned units in the Condominium. Article XII of the Offering Plan entitled "Amendments" provides, "[an] amendment shall be approved by eighty percent (80%) of the Unit Owners in number and common interest." Article XII further provides "said amendment shall be set forth in a duly recorded amendment to the Declaration.... no amendment affecting any Commercial Unit, or the rights of the Commercial Unit Owner, may be made without the consent of the affected Commercial Unit Owner.

Discussion

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; Dauman Displays v Masturzo, 168 AD2d 204, 205 [1st Dept 1990], lv dismissed 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Plaintiffs allege that the Offering Plan and Declaration do not establish that Unit R-4 has exclusive possessory rights to the roof, and that defendants Benn were not entitled to construct a rooftop structure on a Condominium common element. Plaintiffs note the documentation (regarding their purchase of Unit C-1) proffered by the defendants, including the Offering Plan, and the state-filed condominium amendments, do not disclose the Penthouse's existence, and that they could not have known of defendants' claims to the Condominium's rooftop as the March 2010 Third Amendment never was filed with the Register. Plaintiffs also contend that defendant Benn misled the Unit Owners into signing the 2010 Amendment by withholding information from them.

Specifically, plaintiffs allege that the 2010 Draft Amendment included many false statements of fact that hid the true nature of the alterations to the roof and resulting violations from the Condominium, and induced the owners of Units C-1, R-1, and R-2 to execute the document (Sussmane Reply Memo, p.13). Plaintiffs likewise maintain that Benn falsely represented to the Condominium the roof alterations were performed with proper approvals under New York State law, but that the addition exceeded the scope of the June 2004 Permit when defendants Benn built a luxury Penthouse apartment instead of the permitted caretaker's room. Plaintiffs allege Benn has unjustly reaped over $500,000 in rental income from the illegal Penthouse apartment.

Defendants Benn however argue that the unit owners' signatures on the March 2010 Third Amendment unanimously granted the limited common element of the roof deck to be incorporated into unit R-4, and that notwithstanding defendants' failure to file the March 2010 Third Amendment, the identical language appears in both the 2010 and 2012 versions of the Third Amendment. Defendants further allege that the Third Amendments clarified the extended roof top rights owned by unit R-1 (encompassing over 3000 square feet of common elements owned by all unit owners) and defendants therefore were free to build a Penthouse apartment there. Defendants further allege that they obtained the appropriate permits from the Department of Buildings and that their renovations were performed within the scope of the DOB permit.

Based on the foregoing, there are disputed material issues of fact that the court cannot determine without a trial. The parties dispute the scope of defendants' claim of rooftop rights as delineated by the Offering Plan, the By-Laws, the House Rules and the validity of the March 2010 Third Amendment and the December 2012 Third Amendment defendant Benn filed. Issues of fact exist as to whether Benn fraudulently induced the unit owners into surrendering rooftop

rights to defendants based on defendants' alleged misrepresentations, and if any consideration was given to the unit owners for the surrender. Notwithstanding the foregoing, issues of fact exist as to whether defendants were permitted to build a Penthouse apartment (assuming the validity of the Third Amendments), and if so, whether defendant Benn built the Penthouse within the parameters of the DOB permit (*see, cf., 82 Retail, LLC v Eighty-Two Condominium,* 158 AD3d 429 [2018]). For these reasons, the court denies the motion for summary judgment. Accordingly, it is hereby

ORDERED that the court denies plaintiff's motion for summary judgment.

Dated: May 29, 2018

ENTER:

HON. MELISSA A. CRANE, J.S.C.

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J.S.C.