Board of Mgrs. of the 235 E. 22nd St. Condominium v Wing Fat Property., Inc.
2018 NY Slip Op 31603(U)
March 1, 2018
Supreme Court, New York County
Docket Number: 157477/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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BOARD OF MANAGERS OF THE 235 E. 22nd ST. CONDOMINIUM,

Plaintiff,

-against-

WING FAT PROPERTY., INC.

Defendant.

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Index No. 157477/2016
Motion Seq: 001

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion by defendant for leave to amend its answer is granted in part and the cross-motion by plaintiff for leave to amend the complaint is granted in part. The branches of the motion and cross-motion relating to discovery issues were resolved via a stipulation (*see* NYSCEF Doc. No. 51).

Background

Plaintiff is the Board for a condominium. The front entrance to plaintiff's building is on East 22nd Street and the rear entrance is through a courtyard on East 23rd Street. That courtyard is a lot where a building, which had an address of 242 East 23rd Street, used to stand; that building was demolished in 1933. Plaintiff purchased that lot in about 1984 and turned that lot into a courtyard and rear entrance to its building. Plaintiff also built a ramp in that courtyard, presumably so wheeled items could access the back door to its building. When plaintiff purchased that lot, the deed also included, as relevant here, "to the center of the party wall" on the west side of the lot, which also constitutes the east wall of 240 East 23rd Street, the address of defendant's building.

That wall – the east wall of defendant's building and the west wall of the plaintiff's courtyard, is the basis of this lawsuit. Plaintiff commenced the instant action seeking damages arising from defendant's allegedly improper construction and repair of the wall. Plaintiff alleges that because of defendant's actions and inactions, that wall needs to be repaired including the mortar and sealant around the chimneys. Plaintiff alleges that there are multiple violations issued to defendant by the New York City Department of Buildings ("DOB").

The Instant Motion & Cross-Motion

In plaintiff's original complaint, plaintiff alleged that the wall was a *party* wall.

Defendant moves to amend its answer; the proposed amended answer is based upon plaintiff's allegations that the wall is a *party* wall. Defendant claims that plaintiff's predecessor (the owner of the demolished 242 Building) failed to properly protect the structural integrity of the building during demolition and left defendant's property exposed to the elements. Defendant insists that since taking over the premises, plaintiff has built a decorative stucco exterior on the party wall and an access ramp right next to the party wall. Defendant claims that this ramp pitches towards the party wall and has caused water damage because waterproofing and base flashing were not installed with the ramp. Defendant alleges that it was not aware of the damages arising from the decorative stucco exterior until recently, when plaintiff removed the stucco in order to conduct repairs. Defendant moves for leave to amend its answer to add counterclaims for negligence and a declaratory judgment that plaintiff is jointly responsible with defendant to repair the party wall. Defendant also seeks to add an affirmative defense based on the applicable statute of limitations.

Plaintiff cross-moves for leave to amend its complaint and for discovery issues– these discovery issues were resolved in the stipulation cited above (NYSCEF Doc. No. 51).

In its cross-motion, plaintiff has changed its theory of the case. In the proposed amended complaint, plaintiff no longer claims that the wall is a *party* wall. The proposed amended complaint seeks to add facts alleging the wall ceased functioning as a party wall in the 1980s, removes its claim for damage to a party wall, and adds a claim for injunctive relief demanding that defendant fix the wall. Now, plaintiff claims that only defendant uses the wall for structural support, that plaintiff only uses the wall as a decorative part of its courtyard and, therefore, the wall is no longer a *party* wall. Plaintiff insists that defendant must fix the side of its building because it might collapse onto plaintiff's property.

Discussion

Because the discovery issues were resolved, the only remaining issues for this Court to decide are the branches of the motion and cross-motion that seek leave to amend the pleadings. As plaintiff's proposed amended complaint changes the theory of the case, and would necessarily change the proposed amended answer, plaintiff's cross-motion must be addressed first.

"Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise, although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-55, 797 NYS2d 434 [1st Dept 2005] [internal quotations and citations omitted]). Therefore, the Court must first determine whether there is merit to plaintiff's claim that the wall is not a party wall. For the reasons set forth below, the Court concludes that there is

merit to the amended complaint.

"A common definition of a party wall is a division wall between two adjacent properties belonging to different persons and used for the mutual benefit of both parties, but it is not necessary that the wall should stand partly upon each of the adjoining lots; it may stand wholly upon one lot" (*145 West 10 Realty LLC v Whelan*, 107 AD3d 461, 462, 968 NYS2d 432 [1st Dept 2013] [internal quotations and citations omitted]).

"The essential consideration which compels the continuance of a party-wall easement over the wishes of one of the property owners is the necessity of continued support of an existing building and not an isolated property right in the wall as such" (1 NY Jur 2d, Adjoining Landowners § 39).

In support of its cross-motion, plaintiff identifies case law that compels this Court to deny defendant's motion only because defendant's claims are based upon the notion that the wall is still a *party* wall. "[O]nce the wall stopped providing support for the structures on the adjacent lots, its status as a party wall and all attendant easements ceased" (*211 W. 61st St. Condominium, Inc. v New York City Hous. Auth.*, 146 AD3d 484, 485, 45 NYS3d 409 [1st Dept 2017] [dismissing plaintiff's complaint which alleged that defendant was responsible for maintaining portions of the party wall]; *see also 441 E. 57th St., LLC v 447 E. 57th St. Corp.*, 34 AD3d 378, 824 NYS2d 624 [1st Dept 2006] [finding that plaintiff was allowed to demolish a party wall because defendant had not used the party wall to support its building for more than 80 years and defendant's decorative use of the wall for privacy was not a necessity that required a continuance of an easement]). Accordingly, defendant is not permitted leave to amend its complaint to add a cause of action for a declaratory judgment that plaintiff must share responsibility for maintaining

the *party* wall or for negligence based on plaintiff's failure to maintain the *party* wall.

In opposition, defendant characterizes the above quote from *211 W. 61st St* as dicta. The Court disagrees with that reading of the case because finding that the disputed wall was no longer a party wall was dispositive of the claims in that case. This Court cannot embrace defendant's strained reading of clear case law holding that *support* is the key factor when considering whether a wall continues to have status as a party wall. Here, there is no question that only defendant relies on the wall for support. Therefore, the Court must find that this wall is no longer a party wall and plaintiff may amend its complaint– since the proposed amended pleading simply reflects the fact that the wall is not a party wall.

Defendant's reference to *357 East Seventy-Sixth St. Corp. v Knickerbocker Ice Co.* (263 NY 63, 188 NE 158 [1933]) does not compel a different outcome because that case involved a situation where both parties demolished their buildings; defendant took down the entire party wall and plaintiff (who was trying to erect a new building) sought damages against defendant for having to building a new wall (in place of the party wall). Here, defendant has used the wall for support for at least a century while plaintiff no longer uses the wall for support.

Defendant also relies on *5 East 73rd, Inc. v 11 East 73rd St. Corp.* (16 Misc2d 49, 183 NYS2d 605 [Sup Ct, NY County 1959] *affd without opinion* 13 AD2d 764 [1st Dept 1961]) where the Court found that an adjoining landowner who was using a party wall to support his building could not use glass blocks in the portion of the wall which was on the adjoining land. In *5 East 73rd*, both property owners demolished their buildings but left the party wall standing (*id.* at 51). Plaintiff constructed a new building that utilized the party wall for support while defendant's new property did not use the wall for support (*id.*). Plaintiff subsequently installed

glass bricks on portions of the party wall that extended onto defendant's property and plaintiff commenced a declaratory judgment action requesting that the Court declare the wall as plaintiff's property (rather than as a party wall) (*id.* at 51-52).

However, unlike the present circumstances, the defendant in *5 East 73rd* objected and insisted the wall was still a party wall. And the Court placed great weight on the fact that the wall was left standing even though the original adjoining buildings were demolished. The Court noted that the "intentional retention of the wall in its entirety leads to the conclusion that it was the intention of the then adjoining property owners that the wall should continue as a party wall for the common use of both" (*id.* at 56). Here, only one building was demolished, the building that remained used the original party wall for support and there is no clear intention that plaintiff wants the wall to continue as a party wall.

The Court also observes that if the wall is adjudged to be a party wall, then plaintiff will be required to pay for repairs to the wall simply because that wall used to support two buildings before 1933. Plaintiff does not rely on this wall in the same way defendant does. Plaintiff's decorative additions– the stucco– or that it anchored a gate and attached lights to the wall does not change the fact that plaintiff does not use the wall for *support*. As stated above, the concept of a party wall is based upon the notion that two adjacent properties both use a wall for support. In a dense urban environment, it makes sense that the parties would share costs for maintaining a wall upon which neighboring property owners both rely. But where, as here, only one property owner uses the wall to sustain the structural integrity of its building, the owner of the adjacent lot should only have to share in the costs if its actions or inactions contributed to the deterioration of the wall.

Water Runoff From Ramp

The Court observes that defendant's counterclaim for negligence in the proposed amended answer is not entirely based on the notion that the wall in question is a party wall. Defendant also insists that the party wall was damaged by a ramp, constructed by plaintiff, that is pitched towards the wall and does not have adequate waterproofing or flashing (*see* NYSCEF Doc. No. 18 at 9-10 [proposed amended answer]). Defendant alleges that water runoff from this ramp has caused the party wall to deteriorate and that plaintiff's decorative stucco covering on the wall concealed the deteriorating brick along the bottom of the party wall. Defendant claims that the dilapidated condition of the wall was not discovered until engineers conducted surveys in the last two years.

In opposition, plaintiff claims that any allegations with respect to the ramp are time-barred by the applicable statute of limitations since the ramp was installed more than 20 years ago.

Here, the Court grants defendant's motion for leave to amend to include a proposed counterclaim for negligence only to the extent that it relates to the water runoff from the ramp. While plaintiff correctly points out that there is a three-year statute of limitations for negligence that causes property damage, plaintiff failed to sufficiently rebut defendant's claim that it only recently discovered the damage. The critical point is when the *damage* from the water runoff occurred, not when the ramp was installed. Damage to a wall from water is unlikely to occur instantly– it usually takes years to degrade the structural integrity of a wall. And here, defendant claims it only recently (within the last two years) discovered that the wall was damaged.

Discovery may reveal that defendant knew about the issues with the wall and support

plaintiff's argument that this counterclaim is time-barred. It is unclear from the papers, for example, what caused defendant to have engineers look at the wall. Alternatively, discovery may also show that the water runoff was a continuing wrong (*see Congregation B'nai Jehuda v Hiyee Realty Corp.*, 35 AD3d 311, 313, 827 NYS2d 42 [1st Dept 2006] [noting that a defendant's negligence in failing to repair a drainage system constituted a continuing wrong that gave rise to a new cause of action for each injury]). But on a motion for leave to amend, which must be freely given, the Court does not require defendant to conclusively prove its counterclaim. That is the purpose of discovery.

Statute of Limitations Affirmative Defense

Defendant also seeks leave to amend to add an affirmative defense for statute of limitations. Defendant claims that plaintiff will suffer no prejudice through this amendment and stresses that plaintiff has cross-moved to amend its complaint. Defendant emphasizes that plaintiff's cross-motion supports its own claim to add this affirmative defense because it could assert a statute of limitations defense for the first time when answering an amended complaint. Defendant concludes that there is no basis to prevent it from adding an affirmative defense under these circumstances.

Plaintiff claims that the Court should deny defendant's request to add this affirmative defense because it would cause undue prejudice as plaintiff has already engaged in discovery and motion practice.

Here, the Court finds that defendant is entitled to assert the additional affirmative defense because plaintiff will not suffer prejudice or surprise. Discovery in this case is nowhere close to

being completed– in fact, the parties agreed to engage in substantial paper discovery during oral argument on the instant motion (*see* NYSCEF Doc. No. 51). In any event, because the Court has granted plaintiff's instant cross-motion for leave to amend, defendant could have added an affirmative defense relating to the statute limitations in its answer to the amended complaint (*see Mendrzycki v Cricchio*, 58 AD3d 171, 174-75, 868 NYS2d 107 [2d Dept 2008] [holding that because an amended complaint supercedes the original complaint, a defendant could raise a statute of limitations defense for the first time in an answer to an amended complaint]).

Summary

Because there is no dispute that the wall only provides support for defendant's building, the Court finds that the wall is no longer a party wall and, therefore, defendant may not add counterclaims based on the theory that plaintiff must contribute to the repairs of a party wall. However, defendant may allege that plaintiff's purported negligence with respect to the ramp (the absence of waterproofing or flashing) has caused damaged to the wall. Of course, discovery may reveal that defendant knew about the water runoff and damage long ago– but at this preliminary stage of the case, defendant is permitted to allege that counterclaim.

Accordingly, it is hereby

ORDERED that the motion by defendant for leave to amend its answer is granted only to the extent that defendant may assert a counterclaim for negligence relating to water runoff and assert an affirmative defense based on the statute of limitations and denied as to the remaining branches of the motion that were premised on plaintiff's now-abandoned allegations of a party wall and it is further

ORDERED that the cross-motion by plaintiff for leave to amend is granted only to the

extent that plaintiff may amend its complaint in the form annexed to its motion and is denied as to the remaining branches of the cross-motion.

Nothing in this decision and order shall be construed to limit defendant's answer to the amended complaint is ways other than specifically set forth above.

Plaintiff shall e-file the proposed amended complaint as a separate document on NYSCEF and defendant may file an answer to that amended complaint in accordance with this decision pursuant to the CPLR. The parties are directed to appear for the already-scheduled conference on June 12, 2018 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: March 1, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH