SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 31

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360 EAST 72nd STREET OWNERS INCORPORATED,

Index No. 603850/02

Plaintiff,

DECISION AND ORDER

-against-

MITCHELL RUTTER AND
BALLANCA SMIGEL RUTTER,

Defendants.

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SHERRY KLEIN HEITLER, J.:

Plaintiff, 360 East 72nd Street Incorporated (the coop), moves for partial summary judgment on the issue of a permanent injunction enjoining defendants, Mitchell and Ballanca Smigel Rutter (the Rutters), their children and guests, from ball playing on the terrace of their combined duplex apartment (C1804, C1904, and C1905), located at 360 East 72nd Street in Manhattan (the apartment). Defendants cross-move for leave to amend their answer to add counterclaims.

The gravamen of the dispute between these parties concerns the terrace/roof appurtenant to apartment C1804. The Rutters hold the shares and the proprietary leases to two additional apartments, C1904 and C1905, which have been renovated to form one duplex apartment. The complaint alleges that the Rutters made alterations to the terrace/roof, adjacent to C1804 (including the installation of a basketball hoop), that were not sanctioned by the coop board. Plaintiff states that the Rutters' children use this area to play games, including basketball, that disturb neighboring owners, and create a risk of injury to persons or property. The first cause of action in the complaint seeks a permanent injunction enjoining ball playing, and restraining the Rutters from maintaining structures or equipment that violate the New York City Building Code (the Code), Section 27-334.

The cooperative's motion for partial summary judgment is based upon, inter alia the Code, section 27-334, the undisputed facts, and the letter and deposition testimony of Robert A. Livian (Livian), Deputy Commissioner of Technical Affairs of the New York City Department of Buildings.

The New York City Building Code Section 27-334 states:

> **Protective guards.** Buildings that are more than twenty-two feet in height and have roofs that are flatter than twenty degrees to the horizontal shall be provided with a parapet not less than three feet six inches high, or be provided with a three foot six inch railing or fence, or a combination of a parapet and railing or fence which together are not less than three feet six inches high. Railings or fences may be located inward from the face of the exterior wall a distance not exceeding six feet, and shall be of a type that will prevent children from crawling through or over them. Where roofs are used for recreational purposes, wire fencing at least ten feet high shall be constructed. Where ball games are played on roofs the wire fencing shall be extended to provide an overhead closure. Except on buildings of II-D or II-E construction, railings or fences shall be of non-combustible material. Railings shall be constructed as required in section 27-558 of article three of subchapter nine of this chapter.

The following facts are not in dispute. Defendants admit that the existing fencing on the roof/terrace is under 10 feet in height. The proprietary lease requires board approval for structural changes to the terrace/roof. The board has not approved the Rutters' request for permission to install a 10- foot fence.

Livian, responded to a request by the Rutters for an interpretation of section 27-334. Specifically, the Rutters sought a ruling stating that section 27-334 did not apply to private terraces, that the terrace was not a roof, and that the Code did not apply to ball playing on a private terrace. However, Livian unequivocally stated, in both his written response to the Rutters' inquiry and at his deposition, that section 27-334 does apply to the terrace. Specifically, when asked "Are terraces, such as the terrace that's the subject of this litigation, subject to Section 27-334 of the Code?", he

answered "Yes, a terrace of substantial dimension would be subject to safety requirements of the Code." Q: When you say "of the Code", are you referring to Section 27-334? Answer: "Yes". (See, Plaintiff's Notice of Motion, Exhibit I, Pages 16-17.)

Based upon the forgoing, the cooperative has established that the current fence on the Rutters' terrace does not conform to the Code requirements with respect to ball playing on a roof. Therefore, the plaintiff has made out its prima facie case for partial summary judgment for a permanent injunction prohibiting ball playing on the Rutters' terrace. In fact, during the pendency of this case, the Rutters have agreed not to use the terrace for ball playing. The burden shifts to defendants to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial (*see Winegrad v New York University Medical Center,* 64 NY2d 851 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]).

Defendants' response is multi-faceted. The Rutters allege that it was the replacement of the of the surface of the terrace by the cooperative that caused the noise to travel to the apartment immediately below the terrace. The Rutters further state that prior to the replacement of the surface, there was a layer of poured concrete underneath, which effectively insulated the apartment below from noise. That concrete was not replaced during the resurfacing. Defendants also state that the cooperative board knew that they had a basketball hoop on the terrace, and that there is no evidence that basketball or any other ball playing on the terrace has resulted in injury or constitutes an unsafe condition. Defendants allege that the cooperative board's decision not to allow them to replace the existing fence with a 10-foot fence was made in bad faith.

Even assuming, arguendo, that the Rutters' allegations are true, they still do not negate the fact that the present fence does not comply with the Code. The Rutters' argue, without any authority

cited, that the opinion of the Department of Buildings, which they elected to obtain, is in error. Defendants maintain that the terrace is not a roof as defined in the Code. However, it is well settled that an agency's construction of a statute or regulation that it is charged with enforcing will be upheld provided that it is neither irrational or unreasonable (*Matter of Lower Manhattan Loft Tenants v New York City Loft Board,* 104 AD2d 223 [1st Dept 1984], *affd* 66 NY2d 298 [1985]). The use of the roof/terrace for recreational purposes clearly makes it subject to the regulations of the Building Code that seek to protect the safety of those using the roof, and individuals on the street. Therefore, summary judgment is granted to plaintiff on its cause of action seeking a permanent injunction against ball playing on the roof, on the basis that, under the existing circumstances, the lack of 10- foot fencing is a violation of the Code. Defendants' allegations of bad faith on the part of the cooperative board in refusing to allow the construction of a fence in compliance with the Code, and that the responsibility for the noise complained of by the resident of the apartment directly beneath the terrace/roof rests with the cooperative board because of its failure to restore the concrete sound proofing when the roof was redone, clearly present issues of fact and credibility that can only be determined at trial.

It is those claims that form the basis for the proposed counterclaims in the Rutter' cross motion for permission to serve an amended answer. The proposed counterclaims allege that the Rutters are owed $43,000 for the rubber pavers installed on the roof (first counterclaim); that the refusal of the cooperative board of their request to be allowed to install a 10-foot fence that complies with the Building Code was unreasonable, and therefore that plaintiff should be compelled to allow the installation (third counterclaim); a declaratory judgment determining that it was plaintiff's reconstruction of the terrace/roof surface that caused the noise problems in the apartment directly

below the terrace (fourth counterclaim); injunctive relief requiring the cooperative board to install sound proof insulation for the terrace, at the board's expense (fifth counterclaim); breach of the proprietary leases by the cooperative because the Rutters have "been precluded from using their terrace as they had prior to the construction (sixth counterclaim), and for attorney's fees (seventh counterclaim). The second proposed counterclaim, a declaratory judgment that section 27-334 of the Code does not apply to the roof/terrace area is precluded by the decision herein granting summary judgment. Defendants also seek to add a fifth affirmative defense stating that because of the cooperative board's breaches of the lease and bad faith, they are not protected by the business judgment rule.

Leave to amend a pleading shall be freely granted, absent prejudice or surprise (CPLR 3025 [b]; *Edenwald Contracting Co., Inc. v City of New York,* 60 NY2d 957 [1983]). However, to conserve judicial resources, an examination of the proposed counterclaims is warranted (*Non-Linear Trading Co., Inc. v Braddis Assocs., Inc.* 243 AD2d 107 [1st Dept 1998]). Leave to amend will be denied where the proposed pleading fails to state a cause of action (*Tishman Constr. Corp. of New York v City of New York,* 280 AD2d 374 [1st Dept 2001], or is palpably insufficient as a matter of law (*Bankers Trust Co. v Cusumano,* 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]).

Plaintiff states that the third counterclaim is not cognizable because the Rutters' sixth counterclaim seeks money damages, and therefore, the request for injunctive relief does not lie. In the instant case, the ultimate relief sought by the Rutters would be the reconstruction of the terrace/roof so that their children could resume playing ball. Money damages alone will not provide that relief, and therefore the third and fifth counter-claims are viable (*see Schlesinger v Quinto,* 201

App Div 487 [1st Dept 1922]). With respect to the fourth counterclaim, insofar as it seeks a declaration that the cooperative board's reconstruction of the roof was the cause of the noise problems, that counterclaim is viable; however, as plaintiff states, defendants may not seek to absolve themselves of all such allegations forever. Finally, plaintiff is correct in asserting that neither defendants' Notice of Cross-Motion nor defendants' arguments in support of the cross motion gave notice of the proposed fifth affirmative defense. Therefore, the fifth proposed affirmative defense is stricken. That is not to say that the Rutters may not allege that the cooperative board has acted in bad faith, and therefore is not entitled to the defense of the business judgment rule, but merely that defendants may not litigate without proper notice to the opposing party (CPLR 2214 [a]; *see J.A. Valenti Electric Co. v Power Line Constructors, Inc.,* 123 AD2d 604 [2d Dept 1986]).

Accordingly, it is

ORDERED that the motion is granted to the extent of granting partial summary judgment in favor of plaintiff against defendants, and a permanent injunction is granted enjoining the defendants, their children and their guests from engaging in ball playing activities on their terrace, and plaintiff is directed to settle an order on notice with respect to the injunction ; and it is further

ORDERED that the cross motion to amend the answer is granted to the extent indicated herein and denied in all other respects; and it is further

ORDERED that defendants shall serve upon plaintiff a copy of a second amended answer, drawn in conformance with the opinion herein within 20 days of service upon them of a copy of this Order, with notice of entry; and it is further

ORDERED that this action shall continue with respect to the second, third, and fourth causes of action in the complaint, and the first, third, fourth, fifth, sixth, and seventh counterclaims in the second amended answer.

The parties are directed to appear for a pre-trial conference on **MONDAY, MARCH 29, 2004, at 11:30 AM** at 60 Centre Street, Room 438, New York, New York, 10007.

DATED: MARCH 11, 2004

SHERRY KLEIN HEITLER
J.S.C.