

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

PAUL LOUNSBURY, ADMINISTRATOR C.T.A OF THE
ESTATE OF LAVINA LOUNSBURY,
Plaintiff,

INDEX NO. 101829/15

MOTION DATE 04-13-2016

- v -

MOTION SEQ. NO. 002

THE 26 WEST 74 CONDOMINIUM, THE BOARD OF MANAGERS
OF THE 26 WEST 74 CONDOMINIUM, SUSAN SLAGER, THE
ANDREWS ORGANIZATION, JOHN DOE 1-5, JANE DOE 1-5,
Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to dismiss pursuant to CPLR 3211(a)(1), (3) and (7) upon documentary evidence.

COPY

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

5, 6

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that this Motion to dismiss with prejudice Plaintiff's complaint asserted against all the defendants pursuant to CPLR § 3211(a)(1), (3) and (7) is granted. Plaintiff's cross motion to amend the complaint to add Paul Lounsbury as an individual plaintiff is denied.

Plaintiff brings this action asserting Ten causes of action. The First is for a declaratory judgment, the Second is for a preliminary injunction, the Third, Fourth, and Fifth are for breach of fiduciary duty, the Sixth is for aiding and abetting breach of fiduciary duty, the Seventh is for fraudulent concealment and equitable estoppel, the Eighth is for tortious interference with business relations, the Ninth is for conversion and the Tenth is for breach of the implied covenant of good faith and fair dealing.

These causes of action stem from defendants' alleged interference in plaintiff's use of a medical unit in the condominium premises. It is plaintiff's contention that defendants' harassed, interfered with and obstructed Lounsbury, his tenants and clientele of the medical unit, for which it seeks an equitable remedy as well as compensatory and punitive damages.

Defendants move to dismiss the complaint with prejudice pursuant to CPLR 3211(a)(1) as their defenses are founded on documentary evidence, (3) in that the party asserting the cause of action has no legal capacity to sue, and (7) in that the pleadings fail to state a cause of action. Plaintiff does not oppose the motion with respect to the Second through Tenth causes of action, therefore those causes of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

action are dismissed with prejudice. Plaintiff opposes the motion with respect to dismissal of the First cause of action for Declaratory Relief.

A motion to dismiss based on documentary evidence will be granted only if the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of plaintiff's claims. The documentary evidence must utterly refute plaintiff's allegations and conclusively establish the defense as a matter of law (see Fontanetta v. Doe, 73 A.D. 3d 78 898 N.Y.S. 2d569 [2nd. Dept. 2010]; Crepin v. Fogarty, 59 A.D.3d 837, 874 N.Y.S. 278; Levenherz v. Povinelli, 14 A.D. 3d 658, 789 N.Y.S. 2d 295 [2nd. Dept. 2005]).

A reading of the pleadings shows that Plaintiff's First cause of action for Declaratory Relief is in reality a Breach of Contract claim based on the Estate's rights under the Condominium's governing documents. This cause of action for Declaratory Relief is inappropriate when plaintiff has an adequate remedy in another form of action such as in Breach of Contract (Apple Records, Inc., v. Capitol Records, Inc., 137 A.D.2d 50, 529 N.Y.S.2d 279 [1st. Dept. 1988]; Wilson v. Dantas, 128 A.D.3d 176, 9 N.Y.S.3d 187 [1st. Dept. 2015]; Cherry Hill Market Corp., v. Cozen O'Connor P.C., 118 A.D.3d 514, 987 N.Y.S.2d 146 [1st. Dept. 2014]). Furthermore, the condominium Declaration and By-laws establish the Board's powers and provide that Plaintiff's failure to pay common charges for approximately ten years (since 2006) constitutes a breach discharging any obligation of the board to perform in accordance with the condominium Declaration or By-laws (see Grace v. Nappa, 46 N.Y.2d 560, 389 N.E.2d 107, 415 N.Y.S.2d 793 [1979]; Unloading Corp., v. State of New York, 132 A.D.2d 543, 517 N.Y.S.2d 276 [2nd. Dept. 1987], a party cannot recover for breach of contract when it is established that the party has not performed its obligations under the contract).

Plaintiff has not performed its obligations under the contract, therefore it cannot recover in Breach of Contract.

The evidence presented by, The Condominium Declaration and By-laws, defendants utterly refutes plaintiff's allegations and shows that plaintiff cannot recover against the defendants on its causes of action.

Plaintiff cross moves to amend the pleadings to add Paul Lounsbury as an individual plaintiff. The cross-moving papers do not contain a copy of the amended pleadings. CPLR 3025(b) states..." any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Failure to include the proposed amended or supplemental pleading makes plaintiff's cross motion defective requiring its denial.

Accordingly the motion to dismiss pursuant to CPLR § 3211(a)(1), (3) and (7) is granted, and it is further

ORDERED that plaintiff's cross motion is denied, and it is further

