Eden Harbour Condominium Association, Inc v. Eden Harbour, LLC, 062210 CTSUP, MMXCV094010447S

Eden Harbour Condominium Association, Inc. et al

v.

Eden Harbour, LLC MDC Corporation and Town of Old Saybrook

No. MMXCV094010447S

No. 111832

Superior Court of Connecticut

June 22, 2010

Caption Date: June 22, 2010

Judicial District of Middlesex at Middletown

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh):Burgdorff, Mary-Margaret D., J.

MEMORANDUM OF DECISION

Burgdorff, J.

On May 22, 2009, the plaintiffs, Eden Harbour et al., filed a four-count complaint against the defendants, Eden Harbour, LLC, MDC Corp. and Old Saybrook: count one, injunction; count two, unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA); count three, breach of warranty; and count four, appeal of an administrative determination. Counts one and two are directed at Eden Harbour, LLC and MDC Corp.; count three is directed at Eden Harbour, LLC; and count four is directed at Old Saybrook. The defendants Eden Harbour, LLC and MDC Corp. answered the plaintiffs' complaint on May 28, 2009.

On July 20, 2009, the plaintiffs filed an amended complaint adding five new counts and additional allegations to the original counts: count one, injunction; count two, negligence; count three, failure to turn over assets; count four, CUTPA; count five, breach of warranty; count six, failure to maintain property; count seven, failure to set a budget; count eight, appeal of administrative determination; and count nine, negligence. Counts one, two and four are directed at Eden Harbour, LLC and MDC Corp.; counts three, five, six and seven are directed at Eden Harbour, LLC; and counts eight and nine are directed at Old Saybrook. The defendant Old Saybrook filed an answer to the plaintiffs' amended complaint on November 20, 2009. Neither Eden Harbour, LLC nor MDC Corp. answered the plaintiff's amended complaint.

On November 17, 2009, the defendants Eden Harbour, LLC and MDC Corp. filed a motion to strike count four of the plaintiffs' amended complaint supported by a memorandum of law.[1] On February 1, 2010, the plaintiffs filed a memorandum in opposition and the court heard the matter at the short calendar on March 8, 2010.

Practice Book §10-39 provides in relevant part: "Whenever any party wishes to contest... the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted... that party may do so by filing a motion to strike the contested pleading or part thereof." Additionally, "Practice Book... [§10-6] dictates the order of pleadings in a civil case. A motion to strike a complaint must precede the defendant's answer to that complaint. Pursuant to Practice Book... [§10-7], 'the filing of any pleading provided for by the preceding section will waive the right to file any pleading which might

have been filed in due order and which precedes it in the order of pleading provided in that section.' " *Hryniewicz v. Wilson*, 51 Conn.App. 440, 445, 722 A.2d 288 (1999). "By operation of Practice Book §[10-7], the filing of [an] answer to [an] amended complaint acts as a waiver of the right to file a motion to strike the amended complaint." *Wilson v. Hryniewicz*, 38 Conn.App. 715, 719, 663 A.2d 1073, cert. denied, 235 Conn. 918, 665 A.2d 610 (1995).[2]

The defendants' argue that the court should strike the plaintiffs' CUTPA count on two grounds; (1) the statute on which the CUTPA claim is based does not apply; and (2) the plaintiffs CUTPA allegations are legally insufficient. In response to the defendants' first ground, the plaintiffs counter that the defendants have misconstrued the allegations in count four. In response to the defendants second ground, the plaintiffs argue that count four sufficiently alleges a CUTPA claim. Finally, the plaintiffs argue that the court should deny the defendants' motion to strike on the ground that it fails to comply with Practice Book §10-6.

The court first addresses the issue of whether the defendants' motion to strike should be denied because it fails to comply with §10-6. To reiterate, §10-6 requires the defendant to file a motion to strike prior to filing an answer. Further, Practice Book §10-61 provides in relevant part: "When any pleading is amended the adverse party may plead thereto within the time provided by Section 10-8 or, if the adverse party has already pleaded, alter the pleading... within ten days after such amendment or such other time as the rules of practice... may prescribe, and thereafter pleadings shall advance in the time provided by that section. If the adverse party fails to plead further, pleadings already filed by the adverse party shall be regarded as applicable so far as possible to the amended pleading." "This clearly means that after an amended complaint is filed, a defendant has the right to file any pleading permitted under [Practice Book] §10-6..." (Internal quotation marks omitted.) *Williams v. Feely*, Superior Court, judicial district of New London, Docket No. 05 5000295 (October 2, 2006, Hurley, J.T.R.) (42 Conn. L. Rptr. 168, 171 n.2).

Further, "[w]hile a party has the right to plead further in the event of an amended complaint, there is a ten-day limitation." *Liss v. Milford Partners, Inc.*, Superior Court, complex litigation docket at Hartford, Docket No. X07 CV 044025123S (September 29, 2008, Berger, J.) (46 Conn. L. Rptr. 439, 440); see also *Williams v. Feely*, *supra*, 42 Conn. L. Rptr. 171 n.2 (defendant had ten days to file motion to strike after plaintiff filed amended complaint).

In addition, if the defendant fails to file an amended answer in response to the plaintiff's amended complaint, the court will apply the original answer to the amended complaint so far as possible. *490 West Jackson, LLC v. Lewis*, Superior Court, judicial district of Fairfield, Docket No. CV 07 5011631 (November 17, 2009, Arnold, J.). Consequently, "the earlier answer filed [by the defendant] becomes applicable to the amended complaint and [the] defendant would be barred from filing [a] motion to strike." *Girard v. Girard*, Superior Court, judicial district of Hartford, Docket No. CV 03 0825089S (February 4, 2005, Wagner, J). *See* also *Liss v. Milford Partners, Inc.*, *supra* , 46 Conn. L. Rptr. 440 (defendant waived right to move to strike answered counts where answer to original complaint has been filed and where amendment does not alter the counts previously answered); *Butler v. Buchanan Marine, Inc.*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 95 0149347S (May 22, 1998, D'Andrea, J.) (22 Conn. L. Rptr. 211, 211-12) (defendant barred from filing motion to strike plaintiff's amended complaint because defendant

failed to amend answer pursuant to §10-60 and therefore original answer became applicable to amended complaint); cf. *Chapman v. Norfolk & Dedham Mutual Fire Ins. Co.*, 39 Conn.App. 306, 331, 665 A.2d 112, cert. denied, 235 Conn. 925, 666 A.2d 1185 (1995) (plaintiff's general denial of defendant's original special defenses deemed to apply to amended special defenses after the ten-day limitation had run).

In the present case, the plaintiffs filed their original complaint on May 22, 2009, the defendants filed their answers on May 28, 2009 and the plaintiffs subsequently filed an amended complaint on July 20, 2009. The amended complaint contains the same CUTPA count that the defendants previously answered. As the defendants did not move to strike the amended complaint or file amended answers within the ten-day period provided for in §10-61, their original answers became applicable to the amended complaint so far as possible and were deemed filed ten days later on July 30, 2009.

As noted previously, §10-6 requires the defendants to move to strike the complaint prior to filing their answers. Here, the defendants filed their motion to strike on November 17, 2009, long after their answers have been deemed to be filed. Their motion to strike is, therefore, untimely. Accordingly, the plaintiffs' objection is sustained.

The court notes that the plaintiffs have renumbered the counts and inserted additional allegations into their CUTPA count. Therefore, the court will consider the defendants' original answers as general denials of the allegations in the amended CUTPA count. Cf. *Danbury v. Sayers*, Superior Court, judicial district of Danbury, Docket No. CV 95 0321091S (January 15, 1999, Carroll, J.) (defendant's narrative answer to original complaint considered pursuant to §10-61 to be general denial of allegations in amended complaint).

Because the court denies the defendants' motion to strike on this procedural ground, it need not discuss the merits of the defendants' motion.

Notes:

[1] Old Saybrook is not a party to this motion because count four is directed only at Eden Harbour, LLC and MDC Corp.

[2] Practice Book §10-6 provides in relevant part: "The order of pleading shall be as follows:

"(1) The plaintiff's complaint.

"(2) The defendant's motion to dismiss the complaint.

"(3) The defendant's request to revise the complaint.

"(4) The defendant's motion to strike the complaint.

"(5) The defendant's answer (including any special defenses) to the complaint."
