

**DSW Lenox LLC v Rosetree on Lenox Ave. LLC**

2015 NY Slip Op 32244(U)

November 23, 2015

Supreme Court, New York County

Docket Number: 652786/2011

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 39

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DSW LENOX LLC,

Plaintiff,

**DECISION/ORDER**  
**Index No. 652786/2011**

-against-

ROSETREE ON LENOX AVENUE LLC, ROSETREE  
DEVELOPMENT COMPANY LLC, PETER  
ROSENBAUM, ROY ROSENBAUM, JKT  
CONSTRUCTION INC. D/B/A/ CORCON, THE DESIGN &  
DVELOPMENT GROUP, DAVID OXLEY, BEITIN  
ASSOCIATES, FC CONSULTING ENGINEER PLLC,  
ANDREW PETTIT ARCHITECT, ANDREW PETTIT,  
SIGNATURE BANK, KONE INC., UNITONE  
COMMUNICATIONS SYSTEMS, INC, MAC FELDER  
INC, ROCCO FANELLI, KYROUS REALTY GROUP INC,  
MEISTER SEELIG & FEIN LLP, MATTHEW  
KASINDORF, JOHN DOE, LEO ESSES, COHEN  
TAUBER SPIEVACK & WAGNER PC, LISA SEAY,  
EMILY WOLF, HARIET KYROUS, LYNN TIEWS,  
PLYMOUTH GROUP, MICHAEL DAVIS, JOSHUA  
GOLDMAN, LEE KOONCE, KAREN GASTIABURO,  
KYLER BROWN, WILLIAM FOLEY, WARBURG  
REALTY PARTNERSHIP LTD, RON ACQUAVITA,  
FRANCOISE BERTHOLET, THERESA RACHT

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, plaintiff DSW LENOX (“DSW” or “plaintiff”) moves for leave to reargue this Court’s order, dated May 16, 2014 (“May 2014 Order”), which granted the motions to dismiss and dismissed the Second Amended Complaint (“SAC”) against all non-moving defendants. Kyrous Realty Group Inc., Harriet Kyrous, and Lynn Tiews

(collectively, the “Kyrous Defendants”); Meister Seelig & Fein LLP, Matthew Kasindor, Esq., and Emily Wolf, Esq. (collectively, the “MSF Defendants”); The Design & Development Group and David J. Oxley (collectively, the “DDG/Oxley Defendants”); Signature Bank; The Plymouth Group II, LLC, Michael Davis, and Joshua Goldman (collectively, the “Plymouth Defendants”); and Leo Esses, Esq. and Cohen Tauber Spievack & Wagner P.C. (collectively, the “CTSW Defendants”) oppose DSW’s motion. Additionally, Ron Acquavita, Francoise Berthelot, and Lee Koonce (collectively, the “Board Defendants”) note that DSW’s motion does not seek to reargue the part of the May 2014 Order dismissing causes of action against them.

According to the SAC, this derivative action seeks recovery for construction defects in a building at 381-387 Lenox Avenue (the “Condominium”) in New York, and it also seeks “damages for fraud committed by defendants in connection with the marketing and sale of the units in the [Condominium] pursuant to material misrepresentations and omissions in the Offering Plan which were never disclosed despite the eight amendments thereto.” Plaintiff DSW is allegedly a 30% owner of the Condominium. The Court incorporates by reference the facts of the SAC as discussed in the May 2014 Order, and I only address additional facts as they relate to this motion.

In the May 2014 Order I found, in pertinent part, that the breach of fiduciary duty claims could not be sustained because the board’s decision not to file suit was protected by the business judgment rule. I additionally dismissed the SAC in its entirety because “[e]very cause of action asserted in the Complaint seeks to remedy the same wrongs that the Board voted not to pursue.” I also noted that while some defendants did not move to

dismiss, the business judgment rule nonetheless applied to claims against them, “and ‘[i]t would exalt form over substance’ to await motions from the nonmoving defendants that would be granted as ‘compelled by the doctrine of the law of the case.’” (Citation omitted) Therefore, the claims against the nonmoving defendants were also dismissed.

Plaintiff now moves for leave to reargue the May 2014 Order, claiming that I erred in (1) consolidating eight motions to dismiss *sua sponte*; (2)

in granting all eight of the motions to dismiss on the ground that all of the claims asserted in the Complaint sought to remedy the same wrongs the Board Defendants, sued for breach of fiduciary duty, who were purportedly protected by the business judgment rule, voted not to pursue, which was at issue in only one of the motions to dismiss;

and (3) dismissing the SAC against nonmoving defendants.

Plaintiff specifically contends that the allegations against the non-board member defendants were not brought to remedy the same wrongs as those that the board voted not to pursue. Plaintiff submits the affidavit of Stanley Wolfson (“Wolfson”), plaintiff’s managing member, who was present at a meeting of unit owners, “which was held as part of a Board meeting,” attended by Peter Rosenbaum during which “Peter told the unit owners that neither he nor Rosetree had any money and therefore it would be a complete waste of the Board’s money to pursue the litigation they were contemplating against the sponsor.” Wolfson also states that “at this meeting no mention was made as to the many other defendants that would eventually be sued in the Derivative Action, or the causes of action that would be asserted.” Similarly, Wolfson states, “[n]or at any point in its communications with the Board members did DSW reference the identities of the defendants who would ultimately be sued in the Derivative Action.” Plaintiff, therefore,

argues that I erred in finding that the business judgment rule applied to those portions of the SAC that were directed towards non-board member defendants.<sup>1</sup>

The Kyrous Defendants oppose plaintiff's motion on the grounds that the May 2014 Order was correct in applying the business judgment rule to all defendants because DSW sued the Kyrous Defendants derivatively to remedy the Condominium's injury after the Board chose not bring a lawsuit. It also opposes the motion based on improper consolidation pursuant to CPLR § 602(a) because that section relates to "separately pending 'actions,' not pending motions in the same action." Finally, it argues that DSW's motion was untimely.

The MSF Defendants oppose plaintiff's motion on the grounds that the motion is untimely. They also argue that CPLR § 602 is inapplicable and that the plaintiff has failed to meet the standard for reargument as articulated in CPLR § 2221(d). The MSF Defendants further argue that the fraud, fraudulent inducement, GBL § 349, and 15 U.S.C. § 1703(a)(2) claims were correctly dismissed in the May 2014 Order.

The DDG/Oxley Defendants oppose plaintiff's motion on the grounds that the May 2014 Order correctly found that all of DSW's claims were derivative, and, as such were prohibited by the business judgment rule. They additionally argue that CPLR § 602 is inapplicable, and the motion is untimely.

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<sup>1</sup> Plaintiff also responds to this Court's statement in the May 2014 Order, noting "DSW fails to address the movants' arguments as to the effect of the business judgment rule on all of the motions before the Court." DSW maintains that these arguments "were generally made in the form of passing pejorative invective against DSW for suing them, [and] do not show that in asserting claims against these defendants, DSW was seeking to remedy the same wrongs the Board voted not to pursue against Rosetree."

Signature Bank opposes plaintiff's motion on the grounds that the plaintiff has failed to meet CPLR § 2221(d)'s standard for reargument. Specifically, it argues that I properly applied the business judgment rule in the May 2014 Order. Additionally, Signature Bank argues that CPLR § 602 is inapplicable, and that, beyond being prohibited by the business judgment rule, the claims against Signature Bank either fail to state a cause of action or are belied by documentary evidence. The Plymouth Defendants join the arguments in opposition to DSW's motion for reargument made by Signature Bank and the Kyrous, MSF, and DDG/Oxley Defendants.

The CTSW Defendants oppose plaintiff's motion on the grounds that its motion is untimely and CPLR § 602 is inapplicable. They also argue that the May 2014 Order correctly dismissed causes of action against defendants because plaintiff brings suit against defendants for wrongs for which the board voted not to litigate. Moreover, the CTSW Defendants highlight the fact that "Plaintiff timely commenced an action against the Sponsor and the very defendants that Plaintiff claims the Board should have sued." The CTSW Defendants further argue that the conspiracy to defraud, legal malpractice, and disciplinary violation claims were properly dismissed. They also request costs and sanctions for plaintiff's "frivolous conduct."

The Board Defendants filed an "affirmation in connection with plaintiff's motion for leave to reargue" on the grounds that plaintiff does not seek leave to reargue the part of the May 2014 Order dismissing causes of action against them. They additionally note that plaintiff recognizes that the causes of action against the Board Defendants "are not central to its claims."

## Discussion

CPLR §2221(d) states, in part,

[a] motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

“Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.” *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep’t 1992) (internal citation omitted).

Pursuant to CPLR § 2221(d)(3), counsel must move for leave to reargue “within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.” On May 19, 2014, the MSF Defendants filed their Notice of Entry with the May 2014 Order. On June 19, 2014, thirty-one days after the Notice of Entry was filed, DSW filed this motion for leave to reargue. Pursuant to the discussion at oral argument, held on February 5, 2015, I deny the motion to reargue as against the MSF Defendants as untimely.<sup>2</sup>

Also as articulated during oral argument, the narrow question that I review on this motion is whether the cases cited by plaintiff indicate that I erred in finding that the application of the business judgment rule effectively ended this lawsuit. The other

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<sup>2</sup> At oral argument, counsel for DSW conceded that the motion against the Board Defendants was also untimely, but agreed that the motion to reargue was not directed at the Board Defendants.

portions of plaintiff's motion are denied because plaintiff has not shown that I overlooked or misapprehended any law or fact.

Plaintiff argues that I erred in finding that the business judgment rule precluded all causes of action in the SAC against all defendants, and it relies on *20 Pine Street Homeowners Association v. 20 Pine Street, LLC*, 2012 N.Y. Misc. Lexis 2365, 2012 NY Slip Op 31302(U), \*5 (Sup Ct, NY County May 16, 2012), *aff'd as modified* 109 A.D.3d 733 (1st Dep't 2013) in support of this argument. For example, DSW argues in some of its reply papers that "in *Pine Street*, in which a derivative plaintiff alleged construction defect claims against multiple defendants including the sponsor, the court sustained the claims against the sponsor even though it dismissed the breach of fiduciary duty claims against the Board members."

*Pine Street*, however, is distinguishable. *Pine Street*, the trial court described the plaintiffs as "owners of condominium units in defendant 20 Pine Street Condominium, and allege that they represent the Homeowners Association (HOA) thereof," and they brought suit "for damages allegedly sustained by plaintiffs as a result of defendants' failure to construct the condominium in accordance with the promises appearing in the offering plan, the plans and specifications filed with and approved by the Department of Buildings (DOB), the New York City Building Code (Building Code), and local industry standards." 2012 N.Y. Misc. Lexis 2365, 2012 NY Slip Op 31302(U), \*5 (Sup Ct, NY County May 16, 2012), *aff'd as modified* 109 A.D.3d 733 (1st Dep't 2013). It is clear from the trial court's opinion that this was a direct, rather than a derivative action. *E.g.*, *id.* at 12 ("Although it is well-settled that 'individual unit owners lack standing to seek

damages for injury to the building's common elements' the offering plan specifically grants such a right to the individual unit owners under circumstances in which the condominium Board fails to act to enforce the Sponsor's obligations" [citation omitted]). Notably, nowhere in the opinion does the trial court claim that this is a derivative action, and I do not find it instructive in this derivative action where DSW has stepped into the shoes of the board of directors. Accordingly, for those defendants as against whom the motion was timely, I deny that part of the motion referencing the business judgment rule because plaintiff has not shown that I overlooked or misapprehended any law or fact.

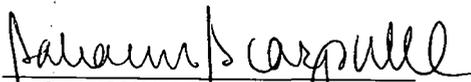
I decline to award costs and sanctions as requested by the CTSW Defendants.

In accordance with the foregoing, it is hereby

ORDERED that the motion of plaintiff for leave to reargue this Court's Decision and Order, dated May 16, 2014, is denied in its entirety.

DATE:

11/23/15

  
SALIANN SCARPULLA, JSC