

40 West 67th Street Corp. v Pullman

2001 NY Slip Op 30003(U)

July 6, 2001

Supreme Court, New York County

Docket Number: 4_30012/1783

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 36

40 WEST 67TH STREET CORP.,

Plaintiff(s),

-against-

DAVID PULLMAN, "JOHN DOE" and
"JANE DOE,"

Defendant(s).

INDEX NO. 121783100

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided pursuant to attached Deem.*

Dated: July 6 2000

MARILYN SHAFER
J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
40 WEST 67TH STREET CORP.,

Plaintiff,

Index No. 121783/00

-against-

DAVID PULLMAN, "JOHN DOE" and "JANE DOE,"

Defendants.
-----X

MARILYN SHAFER, J.:

Defendant David Pullman ("Pullman") moves for an order dismissing the Complaint, in an action seeking, primarily, Pullman's ejection from a cooperative apartment because of his allegedly objectionable behavior. Plaintiff asks that the present motion be converted to one for summary judgment, pursuant to CPLR 3211(c), and that judgment be granted in its favor.

I. Facts

Plaintiff 40 West 67th Street Corp. is the owner of a residential apartment cooperative located at 40 West 67th Street (the "Co-op"). Pullman has been the resident of Apartment 7B in the Co-op since October 1998, pursuant to a proprietary lease. He is also the owner of 80 shares of capital stock in the Co-op.

Shortly after Pullman moved into his apartment, he began to complain to the Co-op's managing agent, and the Co-op Board's President, Brian Pusch, about noises emanating from the

apartment above him. He maintains, however, that his efforts were in vain. Pullman has found the situation so distressing, that he has commenced a total of four lawsuits against his upstairs neighbors and the Co-op, in an effort to stop the noise, and recover damages. Two of them, *Pullman v Indictor, et al.* (Index No. 100268/00) (seeking damages) and *Pullman v Indictor, et al.* (Index No. 100122/00) (seeking injunctive relief), have been assigned to this court.

The situation eventually deteriorated to such an extent, that Pullman claims to have been physically assaulted by his upstairs neighbor, Norman Indictor ("Indictor"), allegedly the source of the noise, which assault resulted in Indictor's arrest.¹ Following the alleged assault, Pullman issued a leaflet to the other Co-op shareholders, captioned, "Attack Crime," notifying them, in considerable detail, of the alleged assault upon him by Indictor. Several other similar letters to the Co-op's shareholders followed.

Closely following this court's decision to dismiss the action entitled *Pullman v Indictor, et al.* (Index No. 100122/00), *supra*, as against the Co-op, but not as against Indictor and his wife, Rina, a special meeting of the shareholders was held to discuss the termination of Pullman's tenancy.

Under Article III (First) of Pullman's proprietary

¹Indictor pleaded to an adjournment contemplating dismissal.

lease, a shareholder's tenancy may be terminated on 30 days' notice, by a vote of the owners of two-thirds of the capital stock of the Co-op, at a special shareholders' meeting, on the ground of the shareholder's "objectionable conduct" as a tenant. Pullman received timely notice that such a special meeting would be held, but did not attend.

At the meeting, held on June 27, 2000, a resolution was passed declaring Pullman's tenancy to be undesirable. Some of the grounds cited in the resolution are the circulation of the various written statements, which the resolution characterized as defamatory and derogatory; "causing the arrest" of Indictor; and the commencing of the four lawsuits.

Based on the shareholders' resolution, the Co-op served Pullman with a notice of termination of his lease as of August 31, 2000, calling for the surrender of the premises as of that date. Pullman has not surrendered the premises.

11. The Issues

In this action, plaintiff seeks a judgment awarding it (1) possession of Pullman's apartment; (2) canceling Pullman's stock, and declaring plaintiff's right to issue and sell stock for the apartment; (3) damages for Pullman's use and occupancy of the apartment; and (4) attorney's fees and costs under Pullman's proprietary lease. After the present motion was submitted, plaintiff served an Amended Complaint as of right, seeking the

same relief, but adding the legal and/or factual basis for each cause of action, apparently in response to the issues raised in the present motion. Since the Amended Complaint is not substantially different from the original Complaint, the court shall address the motion to dismiss as if it were directed to the Amended Complaint.

Pullman argues that the action cannot be maintained, because, under Real Property Actions and Proceedings Law ("RPAPL") 711(1), plaintiff does not have the right to eject Pullman based only on a shareholders' vote, and without a hearing on the issue of whether Pullman's tenancy is actually "objectionable." Pullman also argues, in his reply to the motion, that (1) the present action is retaliatory under Real Property Law 223-b; and (2) his written statements to the other shareholders are protected by a qualified privilege.

Plaintiff, in its opposition, maintains that the business judgment rule prohibits the court from second-guessing the decision of the Co-op Board, in the absence of any showing of a discriminatory reason for terminating Pullman's tenancy.

In a conference before this court on June 1, 2001, plaintiff's request to have the present motion treated as one for summary judgment under CPLR 3211(c) was granted. Plaintiff submitted additional papers on the matter on June 20, 2001. No further submissions have been received from Pullman.

111. Discussion

RPAPL 711(1) states, in pertinent part:

A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deem the tenant objectionable, *shall not be maintained unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable* [emphasis added].

The Appellate Term, First Department, has found that the requirements of RPAPL 711(1) apply to a holdover proceeding brought by a co-op against a shareholder-tenant "under a proprietary lease providing for termination of the tenancy upon a finding of undesirability by the Board of Directors." *Adams Hotel Owners, Inc. v Wolf*, 64 Misc 2d 614, 615 (App Term, 1st Dept, NY County 1969). Where the cooperative sought to terminate a shareholder's tenancy based on allegedly objectionable conduct, the Appellate Term required that there be a basis for the court to make a determination concerning the charges, whether by the submission of an agreed statement of facts, or a trial. *Id.*

Further, in *Brisbane House, Inc. v Sims* (122 Misc 2d 46 [Civ Ct, NY County 1983]), the court found that RPAPL 711(1) applies to the termination of a cooperative tenancy in a holdover proceeding, despite the language in the shareholder's proprietary lease specifically permitting the termination of the tenancy upon a shareholders' vote upon a finding of objectionable conduct on

the part of the shareholder in question.

In *Brisbane*, shareholders in a cooperative voted to terminate the tenancy of a fellow shareholder due to his objectionable conduct (or that of persons living in or visiting the apartment), based on a lease provision allowing for such a vote. The vote was followed by the service of a notice of termination and the commencement of a holdover proceeding, based on the shareholders' contractual right to decide for themselves with whom they wished to share the cooperative. The *Brisbane* court, relying on RPAPL 711(1) and *Adams Hotel Owners, Inc. v Wolf, supra*, reasoned that allowing a cooperative to evict a shareholder/tenant before the underlying charges of nuisance had been proven before a court, would impermissibly enlarge the cooperative's rights, and would "invest the shareholders with powers of forfeiture that belong clearly to a court of law." *Brisbane House, Inc. v Sims, supra*, at 49.

In spite of the summary nature of the holdover proceeding to which RPAPL 711(1) is addressed, the statute still requires that a cooperative, "by competent evidence establish to the court's satisfaction that a tenant is objectionable"; That is, that an evidentiary hearing must precede any forfeiture of the tenancy. On similar policy grounds, in an ejectment action, which need not be summary in nature, a complete search of the record to determine whether grounds for the ejectment exist

should be the rule, regardless of the contractual mechanism which the cooperative has created to simplify the process. The form of the action or proceeding should not determine whether a cooperative tenancy may be forfeited based only on a resolution of shareholders at a shareholders' meeting.

Based on this finding, and the sensible and clear holdings in *Adams Hotel Owners, Inc. v Wolf, supra*, and *Brisbane House, Inc. v Sims, supra*, this court concludes that the Co-op in the present action may not summarily terminate Pullman's tenancy based on a shareholders' vote finding Pullman's tenancy to be objectionable, but must prove that claim to this court's satisfaction, based on competent evidence. The fact that the grounds for the shareholders' resolution in the present case may be more detailed than the allegations of objectionability set forth by the shareholders in *Brisbane, supra*, does not serve to distinguish *Brisbane* from the present case in any meaningful way.

Plaintiff insists that, under the business judgment rule, this court cannot re-open the issue of Pullman's suitability as a tenant, but may only examine the Co-op's decision to oust Pullman to determine if it was rational, and free of discriminatory purpose. However, the business judgment rule is not applicable here. The business judgment rule "prohibits judicial enquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in

the lawful and legitimate furtherance of corporate powers' [citation omitted]." *Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d 530, 537 (1990). In *Levandusky*, a version of the business judgment rule was applied to shield the decision of a cooperative board of directors in enforcing the cooperative's rules against certain types of renovations.

The Court in *Levandusky*, recognizing that the world of business corporations differed from that of the ordinary cooperative or condominium, determined that decisions of a cooperative board of directors should be upheld "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" *Id.* at 538. In the present case, the Co-op Board, in issuing a Notice of Termination based only on a shareholders' vote finding Pullman's tenancy objectionable, acted beyond its authority, in that it is the province of the court, after due consideration of the evidence, to determine whether a tenancy should terminate on this ground. RPAPL 711(1); *Adams Hotel Owners, Inc. v Wolf, supra*; *Brisbane House, Inc. v Sims, supra*.

Plaintiff's motion for summary judgment is denied. Plaintiff's reiteration of its case against Pullman does not alter the fact that numerous disputes exist concerning the events upon which the Co-op based its finding of Pullman's alleged objectionability. These factual issues, including Pullman's

claim that the present action is retaliatory in nature, under Real Property Law § 223-b, must be tried. In light of the sharp factual disputes, whether the present case rests on a "sound legal foundation" must be determined by the facts which emerge in the course of this litigation. *See, Walentas v Johnes*, 257 AD2d 352, 354 (1st Dept 1999) (action by landlord having a "sound legal foundation" cannot be said to be so devoid of merit as to be undeniably attributable to retaliatory motives).

Plaintiff is correct, however, in decrying Pullman's reliance on the doctrine of qualified privilege, as a defense to plaintiff's claim that Pullman's written complaints against his neighbors and the Co-op were objectionable. Qualified privilege is a defense to an action sounding in defamation. *See, William Stevens, Ltd. v Kings Village Corp.*, 234 AD2d 288 (2d Dept 1996) (qualified privilege defense to defamation claim arising from statements made at shareholders' meeting). It is irrelevant to the present situation, where no action for defamation has been raised.

IV. Conclusion

As originally pled, the Complaint would have to be dismissed, because plaintiff's sole cause of action seeking the termination of Pullman's tenancy was based on the finality of the shareholders' vote, and the Notice of Termination issued by the Co-op Board. In the Amended Complaint, this claim is contained

in the first cause of action, and so, must be dismissed.

However, plaintiff's second cause of action in the Amended Complaint alleges that plaintiff **is** entitled to judgment awarding it possession of the apartment because "defendant Pullman's tenancy is objectionable." Amended Complaint, ¶ 18. Since this is the very issue which, by law, requires a trial, plaintiff has pleaded a viable cause of action. The other claims, for permission to issue new shares for the apartment, and to recover damages, flow from the second cause of action, and ma: be maintained. However, numerous factual issues preclude the grant of summary judgment to plaintiff, pursuant to CPLR 3211

Accordingly, it is

ORDERED that the motion to dismiss is granted only as to the first cause of action in the Amended Complaint, and this cause of action is hereby dismissed; and it is further

ORDERED that plaintiff's request to treat the present motion as one for summary judgment under CPLR 3211(c) is granted; and it is further

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant is directed to serve an answer to the Amended Complaint within 10 days after service of a copy of this order with Notice of Entry.

Dated:

7/6/01

ENTER:

MARILYN SHAFER
J.S.C.
J.S.C.