

49 West Tenants Corp. v Seidenberg

2003 NY Slip Op 30014(U)

March 17, 2003

Supreme Court, New York County

Docket Number: _300122/2812

Judge: Leland G. DeGrasse

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

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49 WEST TENANTS CORP.,

Plaintiff,

-against-

PEARL SEIDENBERG,

Defendant.

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Index No. :
122281/02

Cal. No. : 115
of 12/17/02

DeGRASSE, J. :

In this action arising from a dispute between a residential cooperative corporation and one of its tenant shareholders, defendant moves to dismiss. Plaintiff cross-moves to amend its complaint.

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FACTS

Defendant Pearl Seidenberg has resided at 49 West 12th Street in Manhattan since 1969. Seidenberg purchased her apartment in 1983 after the building converted to cooperative ownership. The building is owned by plaintiff.

Plaintiff alleges that defendant has engaged in unsafe behavior in her apartment that has endangered the apartments, personal property, and perhaps even the lives, of her fellow shareholders. In 1995 plaintiff's attorneys notified defendant by letter of gas odors and smoke emanating from her apartment. This letter states in relevant part:

... As a result of several disturbing

occurrences involving your apartment, the Board of Directors has asked us to write to you to express their concern for your safety and the safety of the other tenants in the building. It has been reported that the smell of gas was emanating from your apartment. Either there was a leak in your stove or its connections to the pipes, or the burners are being turned on and no flame is igniting. The Managing Agent has informed us that Con Edison has been to your apartment and has made an adjustment to the burners. If you should smell gas again, please contact Con Edison or the Managing Agent immediately.

The other concern of the Board is the occasion in which you apparently fell asleep while cooking and the fire department had to be called because of the smoke coming from your apartment. As this is a multiple dwelling, the safety of all of the tenants is affected by the actions of each individual tenant. We ask that you contact us upon receipt of this letter to discuss these occurrences and to assure us that the steps have been taken to prevent any future problems.

Defendant allegedly did not respond to this letter.

In 1998 there was a fire in defendant's apartment which plaintiff alleges was serious enough to cause the death of one of defendant's pets.

Plaintiff avers that defendant was uncooperative and unconcerned about the complaints of the coop's board and fellow tenants regarding these incidents. At some unspecified time, the managing agent installed a smoke detector outside of the main entrance to her apartment, and replaced her gas stove with an

electric stove. According to the affidavit submitted by Allen Livera, there have been two electrical fires at the apartment since defendant's gas stove was removed.

One of these was a serious fire in June 2002. Allegedly, defendant did not call the fire department when this fire broke out, but rather simply exited her apartment without closing the door. Around the time of this fire, the coop's board began to receive complaints from shareholders of apartments on defendant's floor about odors and smoke emanating from defendant's apartment. The board determined that it was necessary to terminate defendant's lease pursuant to paragraph 31(g) of the proprietary lease.

According to plaintiff, a special meeting on September 18, 2002, was held at the request of a requisite number of shareholders to vote on the termination of defendant's lease. All shareholders were allegedly notified of this meeting by a notice mailed September 5, 2002.

At the meeting, shareholders representing more than two-thirds of the outstanding shares voted to oust defendant. It is unclear from the record before the court what notice was sent to the defendant after this vote.

DISCUSSION

Defendant argues that the complaint does not plead the requisite acts that would trigger plaintiff's authority to

terminate defendant's lease pursuant to paragraph 31(g), the provision of the proprietary lease invoked by defendant. In her reply papers defendant states that the proposed amended complaint does not cure these omissions. The discussion that follows is based upon the allegations of the amended complaint.

Paragraph 31 lists several grounds by which the 'coop car! terminate a shareholder's lease. Here, plaintiff has chosen to rely on the grounds stated in sub-paragraph (g):

TERMINATION OF LEASE BY LESSOR

If upon, or at any time after, the happening of any of the events mentioned in subdivisions (a) to (j) inclusive of this Paragraph 31, the Lessor shall give to the Lessee a notice stating that the term hereof will expire on a date at least five days thereafter, the term of this lease shall expire on that date so fixed in such notice as fully and completely as if it were the date herein definitely fixed for the expiration of the term, and all right, title and interest of the Lessee hereunder shall thereupon wholly cease and expire

(g) If at any time the Lessor shall determine, upon the affirmative vote of two-thirds of its then issued and outstanding stock at a shareholder's meeting duly called for that purpose, that because of objectionable conduct on the part of the Lessee, or of a person dwelling or visiting in the apartment, repeated after written notice from Lessor the tenancy of the Lessee is undesirable; it being understood, without limiting the generality of foregoing, that repeatedly to violate the House Rules hereto

attached or hereafter established in accordance with the provisions of this lease, or to permit or tolerate a person of dissolute, loose or immoral character to enter or remain in the Building or the apartment shall be deemed to be objectionable conduct

Defendant first argues that plaintiff has not pleaded facts that constitute "objectionable conduct" under the lease. Defendant argues that objectionable conduct includes only intentional acts.

This argument is not supported by the plain language of paragraph 31(g). The term is "objectionable conduct;" it makes no reference to the shareholder's state of mind while engaged in that conduct. The amended complaint and plaintiff's supporting papers allege that defendant did not pay sufficient attention to unlit gas burners and electrical hazards which led to dangerous buildups of gas and smoke, and to fires, in her apartment. Plaintiff also alleges that defendant failed to respond appropriately to the immediate danger of these gas, smoke and fire conditions. Such conduct endangers a tenant's own life and property, and the lives and property of her fellow shareholders, and provide grounds for lease termination. (See Stratton Cooperative v Fener, 211 AD2d 559; 177 East 90th Street Co. v Niemela, 115 Misc2d 189.)

While the amended complaint adequately pleads "objectionable behavior," defendant is on firmer ground in arguing that plaintiff did not follow the notice provisions of ¶ 31(g).

First, there is no letter in the record from Lessor to Lessee that "the tenancy of the Lessee is undesirable." The only letter in the record before the court is the May 1995 letter from plaintiff's then-counsel, which is quoted at length above. This letter is far too amicable to qualify as the notice required by ¶ 31(g). The May 1995 letter contemplates the continuation of defendant's tenancy; it contains no statement that her proprietary lease will be terminated if she does not change the complained-of behavior.

As the existence of an initial notice letter has not been pleaded in the complaint, it follows that no "objectionable conduct" was repeated after such letter, a condition for a termination vote of the shareholders as set forth in ¶ 31(g).

Additionally, plaintiff's proof of the five day notice required by the first portion of ¶ 31 is equivocal. No allegation of this five day notice is contained in the original complaint. The amended complaint states that such notice was sent on December 6, 2002. But the amended complaint *is* dated December 5, 2002, one day before the alleged notice was sent. Accordingly, the complaint fails to adequately plead that this action required by paragraph 31 has indeed occurred.

Plaintiff invokes the business judgment rule in justifying its actions. (Levandusky v One Fifth Ave. Corp., 75 NY2d 530.) However, the business judgment rule does not justify

board action that is taken in violation of the cooperative's own rules as embodied by the proprietary lease or by-laws. (See Dinicu v Groff Studios Corp., 257 AD2d 218, 222-23; Smuckler v 12 Lofts Realty, 178 AD2d 125, 125-6; see also Lane v Sierra Club, 183 Misc2d 944, 949.)

While leave to amend a complaint "shall be freely given upon such terms as may be just," permission to amend is not automatic. In passing on plaintiff's motion this court must consider the merits of the proposed amendment. (Wieder v Skala, 168 AD2d 355.) Here, defendant has demonstrated that the terms of the amended complaint do not state a cause of action under paragraph 31(g) of the proprietary lease, the provision relied upon by plaintiff in seeking the termination of defendant's proprietary lease.

For the above reasons, defendant's motion to dismiss the complaint is granted and plaintiff's cross-motion to amend its complaint is denied.

The branch of defendant's motion by which she seeks to sanction plaintiff is denied. The record before the court indicates that the board had substantial reason to be concerned about defendant's behavior. While plaintiff has failed to plead that it followed the procedural requirements it is bound to follow before evicting a shareholder, it has certainly brought forth facts that defendant has engaged in "objectionable conduct" that provides

the substantive ground for eviction. Accordingly, plaintiff's pleading is not frivolous under § 130-1.1 of the Rules of the Chief Administrator of the Courts. (22 NYCRR § 130-1.1(c)[1]-[3].)

CONCLUSION

Defendant's motion to dismiss the complaint is granted. Defendant's motion for sanctions is denied. Plaintiff's cross-motion to amend its complaint is denied. The clerk shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Date:

MAR 17 2003



J.S.C.