

Balk v 125 West 92nd Street Corp.

2004 NY Slip Op 30229(U)

September 3, 2004

Supreme Court, New York County

Docket Number: 0107014/2004

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

BALK, LED
-v-
125 West 92nd ST Corp.

INDEX NO. 107014-04
MOTION DATE 6-23-04
MOTION SEQ. NO. 1
MOTION CAL. NO. 2

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 08 2004
NEW YORK
COUNTY CLERK'S OFFICE

This Motion to Dismiss the action is decided in accordance with the accompanying Memorandum decision.

SO ORDERED

Dated: 9/3/04

Bernard J. Fried
BERNARD J. FRIED
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X

LEO BALK and FRANCOIS AVENAS,

Plaintiffs,

Index No.
107014-04

-against-

125 WEST 92ND STREET CORP., GAIL COHEN,
WILLIAM COHEN, FELICE FIRESTONE,
DONALD FIRESTONE, AND EDWARD BOYLE,

Defendants.

-----X

FILED
SEP 08 2004
NEW YORK
COUNTY CLERK'S OFFICE

FRIED, J.:

Defendants 125 West 92nd Street Corp., Gail Cohen, William Cohen, Felice Firestone, Donald Firestone and Edward Boyle move, pursuant to CPLR 3211(a)(1) and 3211(a)(7), for an order dismissing the complaint, based on documentary evidence, and based on plaintiff's failure to state a cause of action.

This case arose out of a dispute among the shareholders of a cooperative corporation, 125 West 92nd Street Corp. (Co-Op). Plaintiff Leo Balk, and defendants Gail Cohen, William Cohen, Felice Firestone, Donald Firestone and Edward Boyle are the shareholders. Plaintiff Francois Avenas, Leo Balk's domestic partner, resides with Balk, but is not a shareholder.

Balk purchased his apartment February 1999, after an interview with the defendant members of the board of directors. Balk informed the board that he was gay and that he

would be residing in the apartment together with Avenas. The board approved Balk's application, knowing that plaintiffs were gay and that Avenas was French. After taking occupancy, Balk became a member of the board, and was treasurer from 2002 to 2004.

Subsequently, disputes arose between Balk and the other directors regarding the management of the Co-Op. Balk and Avenas maintain, and the defendants deny, that the real reason for defendants' antipathy towards them was that both plaintiffs were gay and that Avenas was French. In January 2004, Balk filed a petition in New York State Supreme Court, seeking to dissolve the Co-Op pursuant to Business Corporation Law (BCL) § 1104-a. Balk's complaint also sought damages for various torts and for breach of contract. Balk moved for the appointment of a temporary receiver for the Co-Op, and moved (in a separate motion) for an order seeking to divest the Co-Op and the individual defendants from exercising corporate powers. Both motions were denied by Justice Louis Bart Stone.

The Co-Op has elected to purchase Balk's shares, pursuant to BCL § 1118. Justice Stone ruled that Balk was no longer an officer or director of the Co-Op. Moreover, Justice Stone ruled that the Co-Op was entitled to purchase Balk's shares. Furthermore, Justice Stone dismissed without prejudice the damages claim, on the ground that it is not properly part of a dissolution proceeding.

On August 11, 2004, after a valuation hearing, Justice Stone issued a decision fixing the value of Balk's shares and determining the terms of sale. Significantly, Justice Stone set the valuation date at January 15, 2004 (the day prior to the date of commencement of the dissolution proceeding), and ruled that Balk's damages claims, which had not been asserted until after that date, would not be a factor in the valuation.

The instant complaint alleges that the Co-Op discriminated against plaintiffs based on their sexual orientation, and based on Avenas's national origin. Plaintiffs charge that the defendants:

- unlawfully refused to permit Avenas to attend board and shareholders' meetings even though they had long permitted non-shareholder (heterosexual) spouses to attend meetings;
- made numerous unpleasant and bigoted remarks toward foreigners in the presence of co-shareholders and Avenas;
- refused to provide plaintiffs with access to common utility and storage areas, even though non-resident, non-shareholders have been given access to these areas (plaintiffs do not specify the sexual orientation or national origin of these non-residents);
- attempted to amend by-laws to prohibit the use of dishwashers and washing machines between the hours of 6 AM to 9 AM (although this rule would be facially neutral, plaintiffs maintain that it would have a particularly detrimental effect upon them);
- refused to permit repairs to plaintiffs' windows to be made in a timely manner, thereby allowing a dangerous condition to persist;
- refused to permit plaintiff timely and unfettered access to corporate financial records;
- failed to apply tax abatements as credits toward maintenance charges;
- attempted to change governing rules in an informal manner in order to circumvent corporate requirements, in order to exclude plaintiffs from the decision-making process;

- failed to distribute the minutes of meetings in a timely manner; and
- mismanaged the Co-Op by overpaying real estate taxes, failing to pay bills and corporate taxes, failing to follow up on termite inspections, refusing to switch to metered water billing and delaying major repairs.

The complaint further recites that on April 19, 2004, when Balk sought to inspect the roof of the building to investigate possible water damage, defendants Gail and William Cohen refused to permit him to conduct an inspection, and threatened to have him arrested.

The first cause of action alleges breach of contract. Plaintiffs allege that defendants breached the provisions of the proprietary lease which prohibit discrimination on the basis of race, religion, national origin, sex or other ground prescribed by law. Moreover, Balk contends that defendants breached their agreements with him by failing to conduct regular meetings, denying him access to corporate records, failing to hold board meetings, failing to keep minutes of meetings and failing to have a central depository of records.

The second cause of action alleges a breach of the covenant of good faith and fair dealing, citing the following:

- excluding Avenas from meetings;
- making disparaging remarks in the presence of Avenas, such as “foreigner” or “French plumbers;”
- changing the lock to the door providing access to building utilities; and
- refusing to provide Balk with access to records.

The third cause of action alleges breach of fiduciary duty. The fourth cause of action alleges discrimination on the basis of gender and, in Avenas’s case, on the basis of national

origin. The fifth cause of action alleges discrimination on the basis of sexual orientation, and, in Avenas's case, on the basis of national origin. The sixth cause of action alleges negligence. The seventh cause of action alleges gross negligence. The eighth cause of action alleges that defendants William and Gail Cohen engaged in intentional infliction of mental distress.

On a motion to dismiss pursuant to CPLR 3211(a)(7), where the task is to determine whether the pleadings state a cause of action, the complaint must be liberally construed, the allegations must be taken as true, and all reasonable inferences must be resolved in favor of plaintiffs (Cron v Hargro Fabrics, Inc., 91 NY2d 362 [1998]).

The prohibitions of the Executive Law relating to discrimination apply to cooperatives (Axelrod v 400 Owners Corp., 189 Misc 2d 461 [Sup Ct NY County 2001]). The same is true of the prohibitions contained in the New York City Administrative Code (Hill v Douglas Ellimon-Gibbons & Ives, 269 AD2d 117 [1st Dept. 2000]). New York City has long prohibited discrimination in housing on the basis of sexual orientation (NYC Administrative Code § 8-107(5)). More recently, the legislature amended the Executive Law to prohibit discrimination in housing on the basis of sexual orientation (Executive Law § 291). Moreover, Avenas is covered by Executive Law § 291 and NYC Admin. Code § 8-107, which also prohibit discrimination in housing on the basis of national origin.

The fourth cause of action incorrectly uses the word "gender," when the claim is actually based on sexual orientation. Thus, the fourth cause of action is dismissed. The fifth cause of action, however, states potential claims at least at the pleadings stage. If plaintiffs can show that the exclusion of Avenas from shareholder or director meetings (when other

non-shareholders were permitted to attend) was motivated by discriminatory animus, or that anti-gay or anti-French remarks were directed towards Avenas, plaintiffs would have a basis for recovery. Plaintiffs will, however, have to specify the nature of the remarks. Moreover, as for the Co-Op rules governing washing machines, the allegations of the complaint are insufficient because plaintiffs do not specify the manner in which the rules adversely affected them more than the other occupants of the building. Moreover, to the extent that the complaint alleges that plaintiffs were denied keys to the utility area while keys were furnished to non-residents, the complaint must specify the sexual orientation or national origin (whichever is applicable) of the non-residents in question. Plaintiffs are directed to amend the fifth cause of action with reference to the foregoing.

Plaintiffs have a difficult burden to meet if they intend to prove a discrimination claim, particularly if one applies some of the principles that have been applied in employment cases. For example, under the “same actor” doctrine, courts deem it unlikely that the same person who hired plaintiff (knowing plaintiff’s age, gender, ethnicity etc.) would have fired plaintiff because of age, ethnicity or other category (Jetter v. Knothe Corp., 324 F.3d 73 [2d Cir. 2003]).

Avenas would be entitled to recover for breach of the proprietary lease only if he is deemed to be a third party beneficiary of the lease. A person qualifies as a third party beneficiary only if he is an intended beneficiary and not an incidental beneficiary of the contract (Zelber v Lewoc, 6 AD3d 1043 [3d Dept 2004]). There is nothing in the proprietary lease to indicate that Avenas was an intended beneficiary. Thus, any claim of Avenas for discrimination would have to be based upon the anti-discrimination laws and not upon the

proprietary lease. Moreover, the board of directors does not owe a fiduciary duty to a Avenas, who is non-shareholder (Pesochinsky v 77 Bleecker Street Corp., 250 AD2d 494 [1st Dept 1998]). Thus, to the extent that the first and third causes of action assert a claim on behalf of Avenas, it must be dismissed.

With respect to Balk, the first cause of action mixes allegations of misconduct directed towards him personally with allegations of misconduct relating to general corporate mismanagement. To the extent that the first cause of action alleges that Balk was denied access to corporate records, and that he was subjected to discrimination in violation of the proprietary lease, it must be sustained. However, to the extent that the allegations relate to corporate mismanagement (e.g. failure to hold elections, failure to perform repairs, or overpaying taxes or failing to file tax returns), they specify wrongs to the corporation, not to Balk individually. Such claims must be brought as a shareholders' derivative action ((Abrams v Donati, 66 NY2d 951 [1985]; Hahn v Stewart, 5 AD3d 285 [1st Dept 2004])). This principle holds true not only for the breach of contract claim but for the claim of breach of fiduciary duty. Balk is directed to amend the first and third causes of action to separate the alleged wrongs to the Co-Op from wrongs affecting Balk individually, and to assert an appropriate derivative cause of action. It should be noted here that any derivative cause of action would have to specify either that Balk made a demand upon the board of directors to take remedial action regarding the alleged wrongs, or the reasons that such a demand would have been futile (Marx v Akers, 88 NY2d 189 [1996]). Moreover, the management of the Co-Op is governed by the business judgment rule (Levandusky v One Fifth Ave Apt. Corp., 75 NY2d 530 [1990]). In the absence of any specific allegations of bad faith, fraud, self-

dealing or other misconduct, there is no basis for a claim (Martino v Bd of Managers of Heron Pointe on the Beach Condominium, 6 AD3d 505 [2d Dept 2004]).

The second cause of action, for breach of the covenant of good faith and fair dealing is duplicative of the breach of contract claim (first cause of action) and must be dismissed (New York Univ. v Continental Ins. Co., 87 NY2d 308, 319-20 [1996]; Paull v First UNUM Life Ins. Co., 295 AD2d 982 [4th Dept. 2002]).

The sixth and seventh causes add nothing to the complaint. All the substantive allegations either allege intentional acts directed towards plaintiffs, or make allegations which belong in a shareholders' derivative claim. Thus, the sixth and seventh cause of action must be dismissed.

A cause of action for intentional infliction of mental distress exists only where the defendant's conduct is so outrageous as to exceed all bounds tolerated in a civilized society (Fischer v Maloney, 43 NY2d 553 [1978]). Generally, liability for intentional infliction of mental distress has not been recognized for ordinary discrimination claims (Murphy v American Home Products Corp., 58 NY2d 293 [1983]). Moreover, even assuming the truth of the allegations regarding the threats made by the Cohens (in connection with the rooftop confrontation) do not rise to the level that would constitute intentional infliction of mental distress). The eighth cause of action is dismissed.

Accordingly, it is

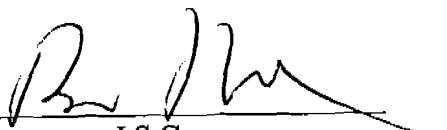
ORDERED that motion is granted to the extent that the first and third causes of action asserted on behalf of plaintiff Avenas are dismissed, that the second, fourth, sixth,

seventh and eighth causes of action are dismissed with respect to both plaintiffs, that Balk is directed to amend the first and third causes of action as indicated in the body of this decision (asserting derivative claims where appropriate), and that plaintiffs are directed to amend the fifth case of action as described in the body of this opinion. Plaintiffs shall serve the amended complaint within 30 days after service of a copy of this order with notice of entry.

The foregoing constitutes the decision and order of this court.

Dated: 9/3/04

ENTER:


J.S.C.
BERNARD J. FRIED
J.S.C.

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