

**Mishkin v The Board of Managers of the 155
Condominium**

2005 NY Slip Op 30149(U)

December 2, 2005

Supreme Court, New York County

Docket Number:

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

RUTH MISHKIN, INDIVIDUALLY, and ON BEHALF OF THE
155 CONDOMINIUM,

INDEX NO. 106769/2003

Plaintiffs,

- v -

MOTION DATE 9/27/05

THE BOARD OF MANAGERS OF THE 155 CONDOMINIUM,
GARY DONG, ARNOLD GITOMER, NEW BEDFORD
MANAGEMENT CORP., MICHAEL WECHSLER, and
THE 155 CONDOMINIUM,

MOTION SEQ. NO. 004

Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 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 this motion is decided in accordance with the accompanying memorandum decision.

FILED
DEC - 9 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/2/05

W
WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 15

-----x
RUTH MISHKIN, INDIVIDUALLY, and ON
BEHALF OF THE 155 CONDOMINIUM,

Plaintiff,

Index No. 106769/03
Motion Seq. 004

-against-

THE BOARD OF MANAGERS OF THE 155
CONDOMINIUM, GARY DONG, ARNOLD
GITOMER, NEW BEDFORD MANAGEMENT CORP.,
MICHAEL WECHSLER and THE 155 CONDOMINIUM,

Defendants.

-----x
WALTER B. TOLUB, J:

Counsel for plaintiff Ruth Mishkin and 155 Condominium moves for an order, pursuant to CPLR 1015 (a), substituting Allan A. Ash (A. Ash) and Joel S. Ash (J. Ash), as Co-Executors for the Estate of Ruth Mishkin, Individually, and on behalf of the Condominium, as plaintiffs in place of Ruth Mishkin, who is now deceased, and amending the title of this action and all pleadings accordingly.

Defendants The Board of Managers of the 155 Condominium (the Board), Gary Dong (Dong), Arnold Gitomer (Gitomer), and the Condominium cross-move for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint.

At the relevant times, plaintiff Ruth Mishkin was a unit owner of an apartment located at 155 East 38th Street, in New York

City. Defendant the Board is elected by the unit owners of the Condominium and is responsible for managing the affairs of the Condominium. At the time of the commencement of this action, defendants Dong and Gitomer were the president and treasurer of the Board, respectively. Defendants New Bedford Management Corp. (New Bedford) and Michael Wechsler (Wechsler) were the Condominium's managing agent¹, and were responsible for, inter alia, collecting condominium fees from the unit owners and paying condominium bills. Wechsler was the owner and principal of New Bedford.

The complaint alleges that, on June 26, 2000, New Bedford and Wechsler withdrew the amount of \$150,000 from the Condominium's operating account without authorization; that they electronically transferred these monies to another account controlled by them, outside of the control or ownership of the Condominium; and that they used these monies for business and/or personal matters unrelated to the Condominium.

The unauthorized withdrawal of the funds was discovered when the Condominium's accountants, Marin and Montayne, LLP (M&M) reviewed the Condominium's books and records for the year 2000. M&M further determined that, as of December 31, 2000, these funds had not been repaid. Wechsler allegedly demanded that M&M not

¹The court notes that, as of May 16, 2003, New Bedford was terminated as the managing agent for the Condominium.

disclose the withdrawal and "hide the funds" so that it would not appear on the financial statements. It is further alleged that Wechsler, Dong and Gitomer objected to M&M's characterization that the monies were "erroneously withdrawn." It is not known to whom or where the funds were transferred, and neither Wechsler nor New Bedford have disclosed this information.

The unit owners were unaware of the unauthorized transfer of monies until April 2002, when the Condominium's 1999/2000 Financial Statement, which was prepared by M&M, was made available to them. The statement indicated that for the year 2000, \$154,140 was due from the managing agent, and noted, in relevant part, as follows:

(3) DUE FROM MANAGING AGENT

On June 26, 2000, \$150,000 was erroneously withdrawn from the [Condominium's] operating account by New Bedford Management. Interest is being accrued on these funds, computed using the prevailing rate of 5.25%.

Plaintiff maintains that the withdrawal by New Bedford and Wechsler of the \$150,000 was improperly disclosed in the 1999/2000 Financial Statement as an "erroneous withdrawal." Plaintiff claims that there was neither a document memorializing the \$150,000 withdrawn by New Bedford and Wechsler, nor any evidence of an obligation on the part of New Bedford and Wechsler to repay the monies until M&M uncovered the \$150,000 withdrawal during the year 2000.

According to the 2000/2001 Financial Statement, New Bedford had transferred to the Condominium the sum of \$50,000 on January 25, 2001, the sum of \$100,000 on or about May or June 2001, and the sum of \$4,140 as a partial payment of interest on the \$150,000 withdrawal. Plaintiff points out that interest was only paid on the interest due for the year 2000, notwithstanding that the full amount of the withdrawn monies was not repaid until June 1, 2001. Plaintiff contends that, based upon the financial disclosures, she and her agents attempted to investigate the circumstances surrounding the unauthorized withdrawal, but that their repeated requests to defendants of relevant records were refused.

PROCEDURAL BACKGROUND

This derivative action was commenced in April 2003, alleging three causes of action. The first cause of action alleged breach of fiduciary duty against defendants Board, Dong and Gitomer, for failing to comprehensively investigate and address the improper withdrawal of \$150,000 from the Condominium's operating account by defendants Wechsler and New Bedford. The second cause of action sought to compel an accounting of the funds allegedly diverted and misappropriated from the Condominium by Wechsler and New Bedford, a determination of sums due to the Condominium, and an award of costs, attorneys' fees, and expenses. The third

cause of action sought an order discharging defendants New Bedford and Wechsler from their duties as managing agents.

In response to the commencement of the action, defendants moved to dismiss the complaint. By decision dated October 30, 2003, this court denied defendants' motion to dismiss the first cause of action; granted defendants' motion to dismiss the second cause of action to the extent that it sought an award of costs, attorneys' fees and expenses in connection with the pursuit of this action; and dismissed the third cause of action as moot, inasmuch as New Bedford and Wechsler were no longer the managing agents of the Condominium.

Thereafter, plaintiff moved to amend her complaint to add a cause of action containing allegations of breach of fiduciary duty as to New Bedford and Wechsler, and for an accounting of the funds allegedly misappropriated and utilized by New Bedford and Wechsler for purposes unrelated to the Condominium. In addition, plaintiff sought to join A. Ash as a co-plaintiff. By decision and order dated June 17, 2004, this court denied plaintiff's motion which sought the addition of A. Ash as a co-plaintiff; granted plaintiff's motion to amend the second and third causes of action; and denied plaintiff's motion to amend the first cause of action.

PLAINTIFF'S MOTION TO SUBSTITUTE A. ASH AND J. ASH AS PLAINTIFFS

Pursuant to CPLR 1015 (a), "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." Since the Surrogate's Court, New York County, has granted letters testamentary to A. Ash and J. Ash, the executors named in the last Will and Testament of Ruth Mishkin, and they have qualified and have acted as co-executors of the deceased's estate, they are entitled to be substituted as plaintiffs in this action (CPLR 1015 [a]; see also Nunez v Goodman, 264 AD2d 651 [1st Dept 1999]; Meehan v Washington, 242 AD2d 286 [2d Dept 1997]; Macomber v Cipollina, 226 AD2d 435 [2d Dept 1996]).

This court has considered defendants' arguments that A. Ash and J. Ash are not proper representatives of plaintiff for purposes of substitution, and found them to be without merit. Consequently, the motion for an order substituting A. Ash and J. Ash as plaintiffs in this action, and amending the caption of this action and all pleadings accordingly, is granted.

DEFENDANTS' SUMMARY JUDGMENT MOTION DISMISSING THE COMPLAINT

In the first cause of action, plaintiffs allege breach of fiduciary duty against all the defendants. They claim that Dong and Gitomer breached their fiduciary duty to the Condominium and to the unit owners by, inter alia, failing to honestly manage the financial affairs of the Condominium's finances; failing to

discover and/or aiding Wechsler and New Bedford in concealing the unauthorized withdrawal; and refusing to provide plaintiff with proper disclosure regarding the circumstances surrounding the unauthorized withdrawal of the \$150,000.

The Board is alleged to have breached its fiduciary duty by, inter alia, engaging in the above-stated breaches, and by failing to responsibly supervise the Condominium's officers, including Dong, Gitomer, Wechsler and New Bedford. The basis of the claim against Wechsler and New Bedford, is that they breached their fiduciary duty by, inter alia, failing to honestly manage the Condominium's funds and bank accounts, and by engaging in the inappropriate withdrawal of the \$150,000 from the Condominium's operating account.

The second cause of action seeks an accounting by New Bedford and Wechsler based upon the breach of their fiduciary duties, specifically, the \$150,000 unauthorized withdrawal. Plaintiffs claim that defendants have not accounted for their use of the \$150,000, nor the source of the funds with which they repaid the \$150,000. Finally, the third cause of action seeks an accounting from New Bedford and Wechsler for the misuse of the Condominium's funds to pay the obligations of other buildings under said defendants' management. Plaintiffs question a payment drawn from Condominium funds by Wechsler and Bedford, in or about November 2001, of approximately \$3,951, made out to "Antler

Electric," for work performed at a building located at 445 West 54th Street, New York (the 54th Street Proposal), which building was unrelated to the Condominium, but managed by Wechsler and New Bedford.²

Plaintiffs claim that New Bedford and Wechsler schemed to defraud the Condominium by concealing the improper use of the Condominium funds. It is alleged that said defendants altered the 54th Street Proposal to make it appear that the work was to be performed at the Condominium, and that they caused the forged proposal to be maintained by the Condominium in order to make it appear that the payment to Antler Electric was proper.

Defendants argue that this action should be dismissed because: (1) A. Ash already reviewed the financial records of the Condominium; thus, an accounting is unnecessary; (2) all funds known to be misappropriated by Wechsler and New Bedford have been accounted for and returned to the Condominium; and (3) judicial review of the Board's decisions is limited by the business judgment rule.

Defendants claim that the Board obtained redress from Wechsler and New Bedford for the misuse of the \$150,000 of the Condominium's funds by obtaining the return of the \$150,000 plus \$4,240 in interest, equivalent to 3.42%, prior to the

²The Board acknowledges that the expenditure of \$3,900 to Antler Electric should not have been paid from the Condominium's funds.

commencement of this action. They further maintain that the Board properly exercised its business judgment not to sue over the additional couple of thousand dollars of interest, and to settle the claims against New Bedford and Wechsler by negotiating a proposed Stipulation of Discontinuance of this action (the Agreement) with New Bedford and Wechsler.

The Agreement, dated July 11, 2005, provides, among other things, that: "New Bedford shall pay to the Condominium the sum of \$10,000 as reimbursement of the said \$3,951 and as additional interest * * * upon order of this Court dismissing this action with prejudice." It further states that, upon dismissal of this action and payment to the Board of the \$10,000, the defendants would exchange general releases. Defendants urge that the \$10,000 more than makes up for the \$3,951 and the additional interest that plaintiffs claim should have been paid by Wechsler and New Bedford.

It is well settled that the drastic remedy of summary judgment is an exercise in issue-finding, not issue-determination, and may not be granted when material and triable issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). Credibility of the parties is not a proper consideration in resolving conflicting evidence on a motion for summary judgment (S.J. Capelin Assocs. v Globe Mfg.

Corp., 34 NY2d 338, 341 [1974]). Clearly, there are serious factual issues in this case that preclude summary judgment.

As noted in an earlier decision of this court, while the board of managers of a condominium complex owes a fiduciary duty to its unit owners (Levandusky v One Fifth Avenue Apartment Corp., 75 NY2d 530, 537-538 [1990]; see also Board of Managers at Fairways at N. Hills Condominium v Fairway at N. Hills, 193 AD2d 322 [2d Dept 1993]), the business judgment rule may be a defense to a claim against actions of corporate directors for breach of fiduciary duty (Hochman v 35 Park West Corp., 293 AD2d 650 [2d Dept 2002]).

However, it is well settled that the business judgment rule does not apply to boards or individual directors who fail to act in good faith or within the scope of their authority (see Levandusky v One Fifth Avenue Apartment Corp., 75 NY2d at 538; Board of Managers of the 229 Condominium v J.P.S. Realty Co., 308 AD2d 314 [1st Dept 2003]). The board members' actions must be "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (Auerbach v Bennett, 47 NY2d 619, 629 [1979]).

Based upon a review of the record, including the plaintiffs' supporting papers challenging defendants' actions, this court finds that triable issues of fact exist regarding whether the moving defendants acted for the common general interests of the

Condominium, within the scope of their authority, and in good faith. Since there is a question as to whether the moving defendants breached their fiduciary duty of care and loyalty, it cannot be presently determined that the moving defendants engaged in the type of actions that would shield them from judicial inquiry under the business judgment rule. Based upon the foregoing, plaintiffs' claims should be allowed to proceed to trial (see Michaelson v Albora, 12 AD3d 648 [2d Dept 2004]).

Accordingly, it is

ORDERED that plaintiff's motion is granted, and that Allan A. Ash and Joel S. Ash, as co-executors for the estate of Ruth Mishkin, deceased, be substituted as plaintiffs in the above-entitled action in the place and stead of plaintiff Ruth Mishkin, Individually, and on behalf of the 155 Condominium, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting the names of Allan A. Ash and Joel S. Ash, as co-executors of the estate of Ruth Mishkin, deceased, as plaintiffs in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon the Clerk of the Court and

upon the Clerk of the Trial Support Office, Room 158, who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that defendants' motion for summary judgment is denied.

Counsel for the parties are directed to appear for a compliance conference in IA Part 15, Room 335, New York County Courthouse, 60 Centre Street, New York, New York, on February 3, 2006 at 11:00 a.m.

This constitutes the decision and order of the court.

DATED:

12/2/01

ENTER:



HON. WALTER B. TOLUB, J.S.C.

FILED

DEC - 9 2008

COUNTY CLERK'S OFFICE
NEW YORK