

Picot v 406 W. 47th St. Hous. Dev. Fund Corp.
2005 NY Slip Op 30549(U)
November 10, 2005
Supreme Court, New York County
Docket Number: 105238/05
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ADRIA PICOT a/k/a AUDRIA PICOT and 406 WEST 47TH
STREET HOUSING DEVELOPMENT FUND CORP.,

Index No. 105238/05

Plaintiff,

-against-

406 WEST 47TH STREET HOUSING DEVELOPMENT
FUND CORP., DALIO TERAN, LARRY ROBERTS,
DAVID ARCHER, JUAN BREA, BOARD OF DIRECTORS
OF 406 WEST 47TH STREET HOUSING DEVELOPMENT
FUND CORP., "JOHN DOE" and "JANE DOE" DIRECTORS,

Defendants.

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HON. CAROL EDMOND, J.S.C.

MEMORANDUM DECISION

In this shareholder derivative action, the plaintiff, Adria Picot ("Ms. Picot"), in her alleged capacity as a shareholder on behalf of 406 West 47th Street Housing Development Fund Corp., makes claims against the defendants, 406 West 47th Street Housing Development Fund Corp. ("HDFC"), Dalio Teran, Larry Roberts, David Archer, Juan Brea, and the Board of Directors of 406 West 47th Street Housing Development Fund Corp. (collectively "the directors"), for breaching their fiduciary duties to the corporation, committing corporate waste, breaching the subject lease, punitive damages, and attorney's fees. The directors now move to dismiss the complaint on several grounds. Ms. Picot opposes the motion, and additionally cross moves for leave to amend the complaint to convert the derivative action against the directors into a direct action.

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

Factual and Procedural Background

The City of New York incorporated the HDFC in 1989, pursuant to the Private Housing Finance Law and the Business Corporation Law, to provide low cost housing to low income city residents. The City sold the residential building at 406 West 47th Street to the HDFC for \$5000.00, and the HDFC in turn sold the cooperative apartments in the building for \$250.00 each. Upon gaining title to the building, the HDFC promulgated a Proprietary Lease ("the lease"). Residents of the building, upon purchase of their apartment, consented to the terms of the lease. The purchase of an apartment in the building entitled a resident to shares of stock in the HDFC which corresponded to the purchased apartment's share/percentage of the building. The lease contained, among other provisions, a primary residence requirement for tenant-shareholders, a sublease consent clause, and a cap on any rent charged to an approved subtenant.

In 2001, the directors concluded that Ms. Picot was not utilizing the apartment as her primary residence and commenced an eviction proceeding against her in the Civil Court of the City of New York, entitled *406 West 47th Street HDFC v. Picot* ("the Civil Court action"). The Civil Court found that Ms. Picot both failed to maintain the subject apartment as her primary residence and charged excessive rent to her subtenant. The Civil Court granted a final judgment of possession and a conditional warrant of eviction. On appeal, the Appellate Term, First Department affirmed the trial court (*406 West 47th Street v. Picot*, 2003 NY Slip Op 51471U, 2003 NY Misc Lexis 1532 [App Term, 1st Dept.]). Ms. Picot's subsequent application for leave to appeal to the Appellate Division, First Department was denied. Just prior to the commencement of the present action, in April 2005, plaintiff filed an Order to Show Cause seeking a temporary restraining order and preliminary injunction to enjoin the directors from re-

renting the subject apartment. This Court declined to sign the Order. This action ensued.

Contentions of the Parties

The directors move to dismiss the complaint on the following grounds: (1) pursuant to CPLR 3211(a)(3), Ms. Picot lacks the capacity to bring the current action; (2) pursuant to CPLR 3211(a)(7), Ms. Picot failed to state a cause of action; (3) pursuant to CPLR 3211(a)(5), Ms. Picot's action is claim precluded (*res judicata*); and (4) pursuant to CPLR(a)(5), Ms. Picot's action is issue precluded (collateral estoppel). Additionally, the directors argue that: (5) pursuant to BCL § 627, Ms. Picot must give security of at least \$45,000.00 for the reasonable expenses of defending against her derivative action; (6) pursuant to CPLR 8501(a) and 8503, Ms. Picot must make an undertaking of \$500.00 as an out of state plaintiff in her derivative action; and (7) pursuant to 22 NYCRR § 130-1.1, *et seq.*, Ms. Picot must incur sanctions for bringing a frivolous derivative action.

The directors contend that, according to the lease, upon Ms. Picot's eviction from the subject apartment, Ms. Picot ceased to be a shareholder of the HDFC. The directors argue that under the BCL, a plaintiff in a shareholder derivative action must be a shareholder of the corporation at the time of the commencement of the action. Since Ms. Picot held no shares in the HDFC on May 31, 2005 when this action was commenced, plaintiff lacks the capacity to bring her derivative action.

The directors also contend that Ms. Picot fails to state a derivative cause of action. The director's argue that the fundamental requirement of a shareholder derivative action is that the action benefit the corporation or redress a wrong to the corporation. Since Ms. Picot seeks to redress an alleged wrong that is entirely personal in nature, plaintiff cannot maintain a derivative

cause of action.

The directors also contend that Ms. Picot's action is barred by *res judicata* and collateral estoppel. The directors argue that the claims and issues set forth in the instant action have been previously litigated by the same parties in the Civil Court action. Further, a successful summary proceeding cannot be the subject of a complaint against the directors that they have misused corporate assets or breached their fiduciary duty, which could have been raised before. The issue raised here, i.e., the right of the HDFC to commence and maintain a holdover proceeding against Ms. Picot, has been resolved. Ms. Picot's full and fair opportunity to previously litigate these claims and issues bars her from revisiting the same claims and issues in the current action.

Further, according to BCL § 627, Ms. Picot must give security during the pendency of this shareholder derivative action. In the event that Ms. Picot's complaint is not dismissed, unless Ms. Picot either holds more than 5% of any class of the corporation's shares or Ms. Picot's shares are worth \$50,000.00 or more, Ms. Picot must give security to cover the corporation's costs and expenses likely to be incurred in connection with defending this action. Ms. Picot neither holds more than 5% of any class of the HDFC's shares nor are her alleged shares worth \$50,000.00 or more. The directors submit that \$45,000.00 is the anticipated amount of reasonable legal and administrative fees to be incurred in the event that this matter moves through to trial.

Additionally, according to CPLR 8501(a) and 8503, plaintiff must file an undertaking of \$500.00 to continue to pursue this case as an out-of-state plaintiff. The directors argue that if plaintiff cannot prove New York state residency, this \$500.00 undertaking is mandatory for Ms. Picot to maintain the present action.

The directors finally argue that, according to 22 NYCRR § 130-1.1, *et seq.*, plaintiff's attempt to relitigate claims and issues already disposed of by three other courts is frivolous. Therefore, plaintiff should be sanctioned for the maximum penalty of \$10,000.00

Ms. Picot opposes all seven of the directors' contentions, and additionally cross moves to amend the complaint to assert a direct action against the same parties. In her proposed amended direct complaint, Ms. Picot eliminates her claim for waste of corporate assets, and includes a claim for intentional infliction of emotional distress.

In opposition, Ms. Picot contends that her status as a shareholder of the HDFC has not been determined. The lease states that when the lease is terminated pursuant to section 7.01(c), a tenant/shareholder must surrender her stock certificates to the corporation. Regardless of whether the shareholder surrenders the shares, a shareholder's shares become null and void only upon the HDFC issuing a new lease and new shares to a new tenant for the subject apartment. Ms. Picot argues that since she has not surrendered her shares, and the directors have not presented any evidence of issuing a new lease or new shares for the subject apartment, her shareholder status has not been determined.

Ms. Picot also contends that she states causes of action for breach of contract and fiduciary duty, and that she is entitled to assert a derivative cause of action, or direct causes of action for such claims. Ms. Picot is entitled to assert that by commencing eviction proceedings against her, the directors failed to use corporate earnings toward the alleged "exclusive purpose" of the HDFC, i.e., the development of a housing project for persons of low income. Ms. Picot can also assert a direct action against the directors for breach of their fiduciary duties during her time as a shareholder. Plaintiff maintains that this breach is evidenced by the directors' improper

election of board members, improper holding of meetings, improper notices for meetings, and improper disclosures of financial statements. Ms. Picot additionally submits that the directors breached their fiduciary duties by allowing one director, Larry Roberts, to waste corporate assets by evicting Ms. Picot and then using the subject premises as storage space for himself and his dogs.

Ms. Picot contends that this action is neither claim nor issue precluded. The Civil Court action and the subsequent appeals addressed the claims regarding the primary residence of Ms. Picot and rent gouging. Ms. Picot argues that this case will determine whether the directors breached their fiduciary duties, wasted corporate assets, breached the lease, and failed to follow proper procedures to evict her. Ms. Picot maintains that the inappropriate and improper use of power by the directors is the main issue of this case, a distinct issue from the 2001 eviction proceeding.

Ms. Picot further contends that she is not required to post security during the pending action. Assuming that she may maintain her derivative action as a current shareholder, Ms. Picot asserts that her shares are worth more than \$50,000.00. Ms. Picot further submits that even if she were required to post security, the amount of \$45,000.00 offered by the directors has no basis and must not be followed by the Court.

Also, Ms. Picot is not required to make an undertaking of \$500.00 as an out-of-state plaintiff. Ms. Picot maintains that, although rendered homeless following her eviction from the subject apartment, she has stayed in several homeless accommodations and with friends throughout New York City. Thus, the request for a \$500.00 undertaking must be denied.

Ms. Picot finally contends that the action is not frivolous and has a sound legal basis. Ms.

Picot argues that the directors have repeatedly breached their fiduciary duties to Ms. Picot and other HDFC shareholders, as well as other unspecified transgressions throughout the past several years.

In support of her cross-motion, Ms. Picot argues that if the Court deems Ms. Picot incapable of bringing a derivative action, she may bring a direct action against the directors and the HDFC.

Ms. Picot maintains that the directors breached their fiduciary duty to Ms. Picot during the course of Ms. Picot's time as a shareholder. Ms. Picot asserts that the sole corporate purpose of the HDFC is to provide affordable low cost housing to low income residents. While Ms. Picot owned shares in the HDFC as a resident, the directors undermined that single corporate purpose by initiating and carrying out the improper eviction of Ms. Picot.

Further, in February 2000, the directors amended the by-laws without consulting two-thirds of the shareholders, allowed other HDFC residents to change subletting fees and then "warehouse" their apartments, and made various decisions without following proper voting procedure. Because the directors have breached the express and implied covenants of the lease, Ms. Picot claims damages in the amount of \$1,000,000.00.

Ms. Picot contends that the directors are liable for intentional infliction of emotional distress. Ms. Picot argues that the directors' initiation and maintenance of the eviction proceeding were extreme and outrageous, and caused Ms. Picot severe emotional distress.

Ms. Picot further contends that, due to the directors' intentional breach of the lease and improper eviction proceeding, she is entitled to \$1,000,000.00 in punitive damages.

In her proposed amended complaint, Ms. Picot finally contends that she should be

reimbursed for attorney's fees. Real Property Law § 234 states that a tenant is entitled to recover legal fees when (1) the lease contains a provision for a landlord's recovery of attorney's fees when the landlord brings an action against a tenant, and (2) a tenant brings an action against the landlord for breaching the lease, or the tenant successfully defends a landlord's legal action. Section 7.02(a)(ii) of the lease provides that the HDFC may be reimbursed for its legal fees when bringing an action against a tenant. Thus, Ms. Picot argues that she is entitled to reimbursement for her attorney's fees in her present suit against the defendants for breaching several covenants of the lease.

In reply, the directors maintain that all of the contentions raised by Ms. Picot in her response in opposition could have been made or were made in defense of the 2001 eviction proceeding. The directors also submit that Ms. Picot's direct causes of action for breach of fiduciary duty, breach of contract, intentional infliction of emotional distress, and punitive damages are nothing more than an attempt to revisit the earlier eviction proceeding. Therefore, both the original and the proposed amended complaint fail to overcome *res judicata* and collateral estoppel.

More specifically, the directors contend that Ms. Picot's cross-motion to amend the original complaint is procedurally improper pursuant to CPLR 3211(e), given that Ms. Picot's cross-motion to re-plead is not supported by evidence as required, but simply rests on a new complaint based on the same facts.

Further, the claim of intentional infliction of emotional distress lacks merit, given that Ms. Picot failed to state or substantiate the elements of an intentional infliction of emotional distress claim. Not only was the HDFC's commencement of the eviction proceeding neither

extreme nor outrageous, but it was necessary and required in the fulfillment of its fiduciary duty to the HDFC's other shareholders.

The directors finally contend that Ms. Picot is not entitled to legal fees since the lease only entitles the HDFC to legal fees for successfully commencing an action against a resident.

In reply, Ms. Picot adds that the complaint may be amended under the circumstances of this action, and that the interests of justice dictate that Ms. Picot be allowed to proceed under the proposed direct complaint. Further, the complaint may be amended since such an amendment will not prejudice the directors and is not plainly lacking in merit. To dismiss the complaint will force her to file the summons and complaint against other shareholders.

Analysis

All of the contentions within both the original derivative complaint and the proposed amended direct complaint are addlegated assertions that consume an insulting use of the Court's resources. The maelstrom of baseless allegations do not warrant judicial analysis. However, the Court is compelled to address the validity of all such claims.

With respect to the original derivative complaint, BCL § 626(b) sets forth certain requirements for bringing a shareholder derivative suit on behalf of a corporation. BCL § 626(b) provides, in pertinent part, that "[i]n any such action, it shall be made to appear that the plaintiff is such a holder [of shares of the corporation] *at the time of bringing the action* and that [s]he was such a holder [of shares of the corporation] at the time of the transaction of which [s]he complains . . ." (emphasis added). Section 7.01 of the lease between the HDFC and Ms. Picot states, in pertinent part, "[i]f at any time during or after the happening of any of the events mentioned in subdivisions (a) to (i) of this Section 7.01 . . . then (1) the term of this lease shall

expire . . . , [and] (2) all right, title, and interest of the Shareholder hereunder shall thereupon wholly cease and expire ” Section 7.01(e) triggers the aforementioned expiration of a Shareholder’s right, title, and interest of its shares when the Shareholder is “in default in the performance of any covenant” of the lease. Section 5.03(b)(i) of the lease contains one such covenant, requiring that “[t]he Shareholder . . . use the Apartment as his or her primary residence ”

The Civil Court of the City of New York previously found that “the subject apartment [was] not Adria Picot’s primary residence.” The Civil Court’s decision, subsequently affirmed on appeal, entitled the HDFC to evict Ms. Picot and gain possession of the subject apartment. Upon that determination by the Civil Court, as Section 7.01 dictates, Ms. Picot relinquished all right, title, and interest of her shares in the HDFC. Hence, Ms. Picot was no longer “a shareholder” of the HDFC on May 31, 2005, the date the current action was commenced. Since Ms. Picot was not a holder of shares of the HDFC at the time of bringing the current action, under BCL § 626(b), Ms. Picot lacks the capacity to bring the current shareholder derivative action. Therefore, the directors’ motion to dismiss the original derivative complaint pursuant to CPLR 3211(a)(3) is hereby granted. The directors’ remaining grounds on which to dismiss the original derivative complaint, as well as their related requests for security and an out-of-state plaintiff’s fee, are deemed moot.

With respect to Ms. Picot’s cross-motion to amend the complaint to allege direct causes of action for breach of fiduciary duties, breach of contract, intentional infliction of emotional distress, punitive damages, and attorney’s fees, the Court notes that CPLR 3025(b) permits a party to “amend his pleading, ... at any time by leave of court....” CPLR 3025(b) also states that

“leave shall be freely given upon such terms as may be just....” However, the standard permitting a party to amend its pleading is different where the other party has moved for a dismissal of the action based on CPLR 3211(a)(7) for failure to state a cause of action. CPLR 3211(e) states, in pertinent part, that

[w]here a motion is made on the ground set forth in paragraph seven of subdivision (a), ... if the opposing party desires leave to plead again in the event that the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has *good grounds* to support his cause of action ...; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave (emphasis added).

Thus, when a 3211(a)(7) motion is made, leave to amend the opposing party’s pleading cannot simply be “freely given.” In addition to formally correcting the deficient pleading, the opposing/amending party must now make an evidentiary demonstration that she has good ground to support her cause of action (*see Cushman & Wakefield, Inc. v. John David, Inc., et al.*, 25 AD2d 133, 267 NYS2d 714 [1st Dept. 1966]; *see also Harry Levine Corp. v. K. Gimbel Accessories, Inc.*, 41 AD2d 637, 341 NYS2d 114 [1st Dept. 1973]; *Wattson v. TMC Holdings Corp.*, 135 AD2d 375, 521 NYS2d 434 [1st Dept. 1987]). “[I]t is not enough that a party may be able to state a cause of action; there must be some evidentiary showing that the claim can be supported” (*Cushman & Wakefield*, 25 AD2d at 135).

Furthermore, *res judicata*, or claim preclusion, is invoked when a party seeks to relitigate entire causes of action and applies to matters which were actually litigated or could have been litigated in the earlier action (*see DaimlerChrysler Corp. v. Spitzer*, 784 NYS2d 350, 2004 N.Y. Slip Op 24357 [Civ Ct, Kings County, 2004]; *see also Hyman v. Hillelson*, 79 AD2d 725, 726,

affd 55 NY2d 624 [3rd Dept. 1980]). Pursuant to the doctrine of *res judicata*, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O'Brien v. City of Syracuse*, 54 NY2d 353, 357 [1981]; *see also Smith v. Russell Sage Coll.*, 54 NY2d 185 [1981]; *Matter of Reilly v. Reid*, 45 NY2d 24 [1978]; *Feigen v. Advance Capital Mgt. Corp.*, 146 AD2d 556, 558, 536 NYS2d 786 [1st Dept. 1989]; Restatement [Second] of Judgments § 24). Additionally, in order for the doctrine of *res judicata* to apply, the party to be precluded in the current action must have been a party to the prior action where the claim at issue was litigated or could have been litigated (*Reilly*, 45 NY2d at 27).

In the present case, the directors moved for dismissal of Ms. Picot’s action based on, among other grounds, CPLR 3211(a)(7), failure to state a cause of action. Thus, the standard set forth in CPLR 3211(e) is immediately applicable. Ms. Picot’s complaint can only be amended if the causes of action within her opposing papers and proposed amended complaint are well grounded by making an evidentiary showing that the new claims can be supported. While Ms. Picot bolsters her five causes of action in the proposed amended complaint with legal and factual affirmations, her contentions are either barred from this Court’s consideration by *res judicata* or the *Niles* corporate derivative claim doctrine explained *infra*, or fail to qualify as “good grounds” to support her causes of action. In either scenario, such contentions will not sustain the “good grounds” standard imposed by CPLR 3211(e) to amend the original complaint.

Ms. Picot bases her breach of fiduciary duty claim on the contention that she was “improperly singled out for actions that were not a material breach of the Lease....” Specifically, Ms. Picot asserts that the defendants improperly singled her out by serving a notice to cure

accusing her of illegal subletting, permitting improper eviction proceedings to take place, and permitting another shareholder to store his personal items and pets in her apartment after her eviction. However, the notice to cure and eviction based thereon were subject to the Civil Court proceeding. The Civil Court determined the propriety of the directors' eviction proceedings, ordered an eviction, and the determination was affirmed on appeal. Any defenses to the notice to cure or to the propriety of the eviction proceedings should have, or could have been raised previously. Thus, any alleged infirmities concerning such eviction proceedings were necessarily decided. Therefore, since this Court is barred by *res judicata* from considering any of Ms. Picot's factual allegations in support of her breach of fiduciary duties claim, Ms. Picot has failed to put forth good grounds to support this cause of action.

Ms. Picot bases her breach of contract claim on the contention that "[t]he director-defendants have breached the ... lease by improperly bringing the eviction proceeding...." Ms. Picot additionally asserts that the directors breached the lease by taking the following actions: (1) amending the subletting provisions of the lease without consulting 2/3 of the shareholders; (2) having absentee shareholders provide the directors with proxies after the shareholders had permanently abandoned their apartments; (3) allowing shareholders who do not live in the city and have a home elsewhere to "warehouse" their apartments; (4) tilting the balance of power within the HDFC by voting on behalf of "silent shareholders"; (5) failing to vote on or provide the minutes of board of directors' meetings or general elections; (6) failing to deliver annual reports of HDFC financial affairs; (7) allowing a director to purchase a second apartment in the building without shareholder consultation; (8) harassing shareholders who openly dissent with the directors' decisions; (9) depleting corporate finances without making necessary repairs,

causing the maintenance fees to rise; (10) providing shareholders with false information; (11) holding meetings only every 18 months; and (12) failing to obtain estimates, proposals, or inquiries for repairs, purchases, and supplies.

The directors' alleged "improper" eviction proceeding against Ms. Picot was subject to the Civil Court proceeding. Accordingly, such an allegation concerning the propriety of defendants' eviction proceedings, having already been litigated in the Civil Court, is hereby barred under the theory of *res judicata*. Ms. Picot's other twelve allegations contributing to the directors' purported breach of contract are also excluded from consideration on the merits, but under a different standard. When the directors of a corporation commit wrongs that negatively impact the shareholders collectively, "any cause of action for such alleged wrongs belongs to the corporation alone," and not to any one stockholder in her individual capacity (*see Niles v. New York Central and Hudson River Railroad Co.*, 176 NY 119, 1903 NY LEXIS 784 [1903]; *see also Amella v. Consolidated Edison Co. of New York*, 73 NYS2d 263 [Sup Ct, New York County, 1947]; *Beloff v. Consolidated Edison Co. of New York*, 81 NYS2d 440 [Sup Ct, New York County, 1948]). All twelve of Ms. Picot's allegations against the directors in support of her breach of contract claim, even if true, fail to adversely impact Ms. Picot in her individual capacity. These alleged transgressions harm all of the shareholders of the HDFC collectively. Thus, the proper avenue of relief for such wrongs is through a shareholder derivative suit (*see Amella*, 73 NYS2d at 265). However, as discussed previously, Ms. Picot lacks the capacity to bring such a suit. This Court cannot consider such collective shareholder grievances when offered in support of an individual former shareholder's action. Therefore, since this Court is barred from considering any of the Ms. Picot's allegations in support of her breach of contract

claim, Ms. Picot has failed to put forth good grounds to support this cause of action.

In support of her claim against the HDFC and the directors for intentional infliction of emotional distress (“IIED”), Ms. Picot must show that (1) the defendants engaged in extreme and outrageous conduct, (2) the defendants intentionally or recklessly caused her to experience severe emotional distress, (3) there is a causal connection between the defendants’ conduct and her injury, and that (4) she in fact experienced severe emotional distress (*see Howell v. New York Post Co.*, 81 NY2d 115, 596 NYS2d 350 [1993]). A defendant’s conduct is considered extreme and outrageous when it is “so outrageous in character and extreme in degree as to surpass the limits of decency so as to be regarded as atrocious and intolerable in a civilized society” (*Sheila C. v. Povich*, 11 AD3d 120, 2004 NY App Div LEXIS 10400 [1st Dept. 2004]).

Ms. Picot argues that the directors’ conduct in initiating an eviction proceeding was extreme and outrageous. Additionally, Ms. Picot states that the HDFC and Larry Roberts intentionally brought the eviction proceeding because of Mr. Roberts’s “personal vendetta” against her. Further, Mr. Roberts allegedly tampered with Ms. Picot’s mail after she had been evicted from the apartment. Ms. Picot asserts that she has endured severe emotional distress, so much so that “she has been seeing a doctor and even prescribed medicine to deal with her condition.” Finally, Ms. Picot states how the above-mentioned acts of the defendants, as well as Mr. Roberts using Ms. Picot’s former apartment to “store his personal belongings and to house his pet dogs,” are enough to “emotionally distress any reasonable person.”

The defendants’ initiation of an eviction proceeding against Ms. Picot, an act sustained by the Civil Court and subsequently affirmed on appeal, is neither extreme nor outrageous. In addition, even if Mr. Roberts tampered with Ms. Picot’s mail, this act would not be extreme nor

outrageous and would not sustain a claim for IIED. Therefore, since Ms. Picot's allegations in support of her IIED claim do not begin to satisfy the four element showing necessary to establish an IIED claim, she has failed to put forth good grounds to support this cause of action.

Ms. Picot further claims that she is entitled to punitive damages due to the directors' alleged breach of contract. When a plaintiff's complaint includes a breach of contract claim, the "additional and exemplary remedy" for punitive damages requires that the plaintiff show that (1) the defendant's breach of contract is actionable as an independent tort, (2) such conduct must be characterized as gross and morally reprehensible, and of such wanton dishonesty as to imply a criminal indifference to civil obligations (*see Walker v. Sheldon*, 10 NY2d 401, 223 NYS2d 488 [1961]), (3) the egregious conduct is directed at the plaintiff, and (4) such conduct must be part of a pattern directed at the public generally (*New York University v. Continental Insurance Co.*, 87 NY2d 308, 639 NYS2d 283 [1995]). Punitive damages are generally not recoverable when the alleged breach of contract was a private wrong, and not a transgression targeted at the general public (*see Garrity v. Lyle Stuart, Inc.*, 48 AD2d 814, 370 NYS2d 6 [1st Dept. 1975]; *see also H&R Hats and Novelties, Inc. v. Citibank*, 102 AD2d 742, 477 NYS2d 9 [1st Dept. 1984]).

Ms. Picot alleges that the directors intentionally breached the lease/contract when they brought the eviction proceeding against her in the Civil Court. Further, Ms. Picot asserts that the directors recklessly failed to both establish procedures and measures to prevent such practices, and to actually prevent such practices from occurring. Such wrongdoing allegedly benefits Mr. Roberts personally by maintaining his position of control over the HDFC. Thus, due to Mr. Roberts' alleged personal stake in Ms. Picot's eviction, the eviction proceeding was not initiated through the "independent objective judgment" of the directors.

As discussed previously, the alleged breach of contract arising out of the alleged improper eviction proceeding lacks merit. Notwithstanding the above, none of Ms. Picot's allegations indicate that the directors' alleged breach of contract was somehow directed at the general public. The alleged breach was completely private in nature. Therefore, even with evidence of the directors' alleged transgressions, Ms. Picot would not sustain the "general public" standard necessary to impose punitive damages on the defendants. Therefore, since Ms. Picot's allegations in support of her punitive damages claim do not begin to satisfy the four element showing necessary for such a claim, she has failed to put forth good grounds to support this cause of action.

Finally, Ms. Picot claims that she is entitled to reasonable attorney's fees for pursuing this action. A plaintiff is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*see Crispino v. Greenpoint Mortg. Corp.*, 2 AD3d 478, 769 NYS2d 553 [2nd Dept. 2003], *citing Hooper Assocs. v. AGS Computers*, 74 NY2d 487, 549 NYS2d 365 [1989]; *see also Glatter v. Chase Manhattan Bank*, 239 AD2d 68, 669 NYS2d 651 [2nd Dept. 1998]). Ms. Picot alleges that both Real Property Law § 234 and Section 7.02(a)(ii) of the lease entitle her to attorney's fees. RPL 234 states, in pertinent part, that

whenever a lease of residential property shall provide that in any action ... the landlord may recover attorneys' fees ... incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease ... there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease....

Section 7.02(a)(ii) of the lease entitles the HDFC to reimbursement for the reasonable attorney's

fees incurred in “relet[ting] the [a]partment as agent for the [s]hareholder.” Ms. Picot contends that Section 7.02(a)(ii) triggers the implied covenant provision of RPL 234, mandating the HDFC to pay Ms. Picot’s attorney’s fees in bringing the present action. However, while Ms. Picot has put forth good grounds to support this cause of action, she offers no valid evidence that the directors or the HDFC “fail[ed] to perform any covenant or agreement on its part to be performed under the lease....” Similarly, Ms. Picot never incurred any expense in “the *successful* defense of any action or ... proceeding commenced by the landlord ...” (emphasis added). Therefore, RPL 234 is inapplicable, and Ms. Picot’s claim for attorney’s fees lacks the evidentiary support required by CPLR 3211(e).

Moreover, since Ms. Picot’s five claims within her proposed amended complaint cannot be maintained, failing to sustain the standard set forth in CPLR 3211(e), her cross-motion for leave to amend the original complaint is hereby denied. Having already granted the directors’ motion to dismiss the original derivative complaint, this court hereby summarily dismisses this entire matter.

In addition, 22 NYCRR § 130-1.1 allows the Court, in its discretion, to impose sanctions on a party who engages in frivolous conduct during the course of an action. The section defines frivolous conduct, in pertinent part, as conduct that is “completely without merit in law and cannot be supported by a reasonable argument” Both Ms. Picot’s original derivative action and her proposed amended direct action are not frivolous and therefore not subject to court sanction.

Ms. Picot asserts her right to bring a derivative action based on the contention that her

shareholder status is undetermined. Ms. Picot refers the Court to Sections 7.02(a)(iii)(C) & (c)(i) of the lease, which respectively state that “[t]here shall be a final accounting between the Corporation and the Shareholder upon ... the date the Corporation gives written notice to the Shareholder that it has relet the Apartment ...,” and that “the Shareholder shall surrender to the Corporation the Certificate for the Shares of the Corporation held by the Shareholder to which th[e] [l]ease pertains.” Ms. Picot contends that because there has been no accounting, and Ms. Picot has not surrendered her shares to the HDFC, one cannot be certain that Ms. Picot is no longer a shareholder. As discussed above, the determination of the Civil Court officially terminated Ms. Picot’s rights, title, and interest in her shares of the HDFC. The sections of the lease on which Ms. Picot relies have no impact on whether she was a shareholder on May 31, 2005. While Ms. Picot’s argument is incorrect, it was not completely frivolous so as to warrant the imposition of sanctions.

Similarly, Ms. Picot’s claims, allegations, and legal arguments within her proposed amended direct complaint, while unpersuasive and lacking merit, are not completely frivolous so as to warrant the imposition of sanctions.

Accordingly, it is hereby

ORDERED that defendants’ motion for dismissal of the original derivative complaint is granted; and it is further

ORDERED that Ms. Picot’s cross motion for leave to amend the original derivative complaint is denied; and it is further

ORDERED that defendants’ motion for sanctions against Ms. Picot is denied; and it is

further

ORDERED that counsel for Ms. Picot shall serve a copy of this Order along with Notice of Entry upon all parties within 20 days from the date of entry of this Order; and it is further

ORDERED that the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the Decision and Order of this Court.



Dated: November 10, 2005

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMED

FILED
NOV 22 2005
COUNTY CLERK'S OFFICE
NEW YORK