

D'Emilia v Sandra Greer R.E. Management Corp.

2006 NY Slip Op 30312(U)

April 21, 2006

Supreme Court, New York County

Docket Number:

Judge: Walter Tolub

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SCANNED ON 5/4/2006

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

PRESENT: WALTER B. TOLUB

PART 15

Justice

ROBERT D'EMILIA

INDEX NO. 600536/2005

Plaintiff,

MOTION DATE 11/04/05

- v -

MOTION SEQ. NO. 001

SANDRA GREER R.E. MANAGEMENT CORP.,
A/K/A SANDRA GREER REAL ESTATE,
INCORPORATED; SANDRA GREER
WACHSBERGER A/K/A SANDRA GREER;
SUSAN SALTMAN, THE ATRIUM AT CHELSEA
CONDOMINIUM; THE BOARD OF MANAGERS
OF THE ATRIUM AT CHELSEA CONDOMINIUM;
ROSEMARY PONZO; MARVIN CHRISTIAN;
JOHANNA BARRETT; TERRI COLLINS; RISE
KEARN; DAVID SPIERER; AND JVL REALTY
ASSOCIATES

Defendants.

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Motion Sequences 001, 002 and 003, are consolidated for disposition and resolved in the accompanying memorandum decision.

This constitutes the decision and order of the court.

FILED

MAY 04 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/24/06

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 — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

ROBERT D'EMILIA

INDEX NO. 600536/2005

Plaintiff,

MOTION DATE 11/09/05

- v -

MOTION SEQ. NO. 002

SANDRA GREER R.E. MANAGEMENT CORP.,
A/K/A SANDRA GREER REAL ESTATE,
INCORPORATED; SANDRA GREER
WACHSBERGER A/K/A SANDRA GREER;
SUSAN SALTMAN, THE ATRIUM AT CHELSEA
CONDOMINIUM; THE BOARD OF MANAGERS
OF THE ATRIUM AT CHELSEA CONDOMINIUM;
ROSEMARY PONZO; MARVIN CHRISTIAN;
JOHANNA BARRETT; TERRI COLLINS; RISE
KEARN; DAVID SPIERER; AND JVL REALTY
ASSOCIATES

Defendants.

MOTION CAL. NO. _____

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

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Motion Sequences 001, 002 and 003, are consolidated for disposition and resolved in the accompanying memorandum decision.

This constitutes the decision and order of the court.

FILED

MAY 04 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/21/06

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

ROBERT D'EMILIA

INDEX NO. 600536/2005

Plaintiff,

MOTION DATE 11/22/05

- v -

MOTION SEQ. NO. 003

SANDRA GREER R.E. MANAGEMENT CORP.,
A/K/A SANDRA GREER REAL ESTATE,
INCORPORATED; SANDRA GREER
WACHSBERGER A/K/A SANDRA GREER;
SUSAN SALTMAN, THE ATRIUM AT CHELSEA
CONDOMINIUM; THE BOARD OF MANAGERS
OF THE ATRIUM AT CHELSEA CONDOMINIUM;
ROSEMARY PONZO; MARVIN CHRISTIAN;
JOHANNA BARRETT; TERRI COLLINS; RISE
KEARN; DAVID SPIERER; AND JVL REALTY
ASSOCIATES

Defendants.

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Motion Sequences 001, 002 and 003, are consolidated for disposition and resolved in the accompanying memorandum decision.

This constitutes the decision and order of the court.

FILED

MAY 04 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/21/06

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):

[* 3]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X

ROBERT D'EMILIA,

Plaintiff,

Index No. 600536/05
Motion Seq. 001, 002 003

-against-

SANDRA GREER R.E. MANAGEMENT CORP., a/k/a
SANDRA GREER REAL ESTATE INCORPORATED;
SANDRA GREER; SUSAN SALTMAN; THE ATRIUM
AT CHELSEA CONDOMINIUM; THE BOARD OF
MANAGERS OF THE ATRIUM AT CHELSEA
CONDOMINIUM; ROSEMARY PONZO; MARVIN
CHRISTIAN; JOHANNA BARRETT; TERRI COLLINS;
RISE KEARN; DAVID SPIERER; and JVL REALTY
ASSOCIATES,

Defendants.

FILED
MAY 04 2006
NEW YORK
COUNTY CLERK'S OFFICE

-----X

WALTER TOLUB, J.:

Motion Sequence 001, 002 and 003 are consolidated for disposition and resolved in this memorandum decision.

By motion sequence 001, plaintiff Robert D'Emilia moves for an order granting summary judgment pursuant to CPLR 3212 on his first three causes of action. By motion sequence 002, plaintiff moves, pursuant to CPLR 3126, for an order striking the answer and affirmative defenses of defendants. Additionally, plaintiff seeks an order punishing defendants for perjury in this action, directed judgment, sanctions, and/or a referral to a special master to oversee discovery. By motion sequence 003, plaintiff moves, pursuant to CPLR 3126, for an order striking the answers of defendants Susan Saltman, Terri Collins, and JVL Realty

Associates (JVL) for failure to comply with discovery orders. Defendants cross-move for an order imposing sanctions against plaintiff.

Plaintiff is the owner of Unit 12A at the Atrium at Chelsea Condominium (Atrium), a mixed use building located at 181 Seventh Avenue in Manhattan and comprised of 45 residential units, and four commercial units. The building is operated by defendant the Board of Managers of the Atrium at Chelsea Condominium (the Board). The board is comprised of a combination of residential and commercial managers. Defendants Rosemary Ponzio (Ponzio), Marvin Christian (Christian), Johanna Barrett (Barrett), Terri Collins (Collins), Rise Kearn (Kearn) and David Spierer (Spierer) were at one time or another relevant to this litigation, one of the residential managers of the Board. Defendant JVL Realty Associates (JVL Realty) is the commercial manager of the Board.

At one time, D'Emilia was the president of the Board. However, he is no longer a Board member, and in recent years, has been involved in contentious litigation with the Board. In February 2005, D'Emilia commenced the instant action against the Board, the individual Board members, and the real estate manager, Sandra Greer R.E. Management Corp.(Greer Real Estate), as well as Greer Real Estate employees Sandra Greer and Susan Saltman. The complaint alleges four causes of action which include allegations violations of plaintiff's rights to inspect the Atrium's books and records (First Cause of Action); breach of contract (Second Cause of Action); violations of New York law, and By-Laws of the Condominium (Third Cause of Action); and Constructive Trust/Unjust Enrichment (Fourth Cause of Action).

Several provisions of the Declaration and By-Laws are relevant to the instant dispute.

The Declaration and By-Laws defines "common charges" as follows:

“Common charges” means the charges allocated and assessed by the Condominium Board to the Unit Owners , pro-rata in accordance with their respective Common Interests...[Exhibit B No. 3 of the Declaration]

Article III, Sec. 5(a)(1) of the By-Laws states:

[The Board of Managers may exercise its powers] to determine and levy monthly assessments (common charges) to cover the cost of common expenses...The Board...may increase the monthly assessments...if required, to meet any additional necessary expenses, but said increases can only be assessed among the Unit Owners pro rata according to the formula provided for herein.

Article VI, Sec. 2 of the By-Laws states:

The Board of Managers shall, from time to time, but at least annually, fix and determine the budget representing the sum or sums necessary and adequate for the continued operation of the Condominium...The total annual requirements shall be assessed as a single sum against all Units and pro-rated against each of said Units according to the respective Common Interests, appurtenant to such Units.

Article VII, Sec. 1 (3rd paragraph) of the By-Laws requires the Board to obtain an appraisal from a fire insurance company of the full replacement value in connection with the placement of fire insurance.

Article Fifth of the Declaration states:

[U]pon the prior written consent of the Board...any Residential Unit may be used for any home occupation permitted by law which does not violate the Certificate of Occupancy covering such Unit.

Article Eighteenth of the Declaration prohibits nuisances which are a source of annoyance to building occupants or which interfere with the proper use of the property by the residents.

Article IX, Sec. 5 of the By-Laws states that no animals shall be raised, bred or kept in any units, except that dogs, cats or other household pets, not to exceed two per unit, may be kept in the units.

Article XV, Sec. 5 of the By-Laws states that unit owners are entitled to examine the books and records of the Condominium on reasonable notice to the Board, but not more often than once a month.

The Board has adopted House Rules which, among other things, require the payment of a \$100 application fee any time a unit owner submits an application/registration or requests the Board to consent to a request made by the unit owner. Another House Rule establishes a \$50 fee or penalty per day for any violation of the Declaration, By-Laws or House Rules by a unit owner.

The By-Laws provide that Board members are not liable to unit owners in the management of the Atrium except for willful misconduct or bad faith. That provision was enacted while D'Emilia was a Board member.

The first cause of action relates to D'Emilia's right to examine the Atrium's books and records. In March 1994, Justice Ramos issued an order stating that plaintiff has the right to examine records at the office of the managing agent (currently defendant Sandra Greer R.E. Management, hereinafter referred to as Greer). In 1998, in connection with litigation before Justice Ramos, Board and D'Emilia entered into an agreement under which the Board promised to observe the Declaration and By-Laws (1998 Agreement).

D'Emilia states that the Board provided him with the required access to the books and records until the later part of 2001, but then refused plaintiff's request to examine records. D'Emilia then states that in late 2004, when he attempted to obtain access to records, defendants

told him that the entire month of December 2004 would be an inconvenient time for inspection of records. On December 6, 2004, plaintiff contacted Edward Dorney, Esq. regarding the inspection issue, and on December 10, 2004, sent a fax, with three-business days notice, to both Dorney and Greer. Defendants allegedly rejected the request.

Defendants acknowledge plaintiff's right to inspect the Atrium's records, but contend that plaintiff has not proceeded in a proper manner. As for the 2001 incident, Susan Saltman submits an affidavit alleging that D'Emilia had a confrontation with her and Sandra Greer in the lobby of the building, screamed at them and acted in a physically intimidating manner, as a result of which the police were called. As for the 2004 incident, defendants acknowledge that during the holiday season of December 2004, the management office was short-staffed, and the Atrium's lawyer (Dorney) and accountant were not available, so that they did not provide D'Emilia access to the books and records during that month. However, they offered to make the records available to plaintiff in early January 2005. D'Emilia refused that offer and commenced the instant litigation.

The second cause of action alleges that the Board violated the Declaration, By-Laws and the 1998 Agreement by setting common charges (since 1992) without making a proper allocation between the residential unit owners and the commercial unit owners, and without making an analysis or evaluation as to whether any different expenses can or should be included in the allocable shares of common charges to be paid by the commercial unit owners. Plaintiff seeks the return of any improperly charged assessments or common charges.

Common charges on D'Emilia's unit have increased approximately \$44 per year, from \$513.38 in 1987 to \$1,302.24. D'Emilia claims that the common charges for the commercial units have not increased at the same rate as those for residential unit owners.

In 1990, while D'Emilia was Board president, the Board negotiated a settlement with JVL Realty that provided for a formula to be used to assess common charges against commercial unit owners. The charges for the commercial unit owners are calculated using a multiplier of 20.77304% of the total building amount. Defendants claim that from the date of settlement to the present, the Board has followed the formula set forth in the settlement agreement. Plaintiff's complaint in this regard is based upon information and belief, since plaintiff has not listed any specific charges or expenses not assessed against the commercial unit owners which he believes are properly assessable.

The second cause of action further alleges that the Board has failed to collect the \$100 fee imposed in connection with any application by a unit owner to engage in a home occupation, or to collect the \$50 per day penalty for each violation of the home occupation or pet restrictions.

According to D'Emilia, Board member and defendant Rosemary Ponzo has violated the home occupation rules by operating a costume design and interior design business from the unit. However, Ponzo submits an affidavit stating that, other than receiving a few telephone calls and faxes in connection with her business, she does not operate a home occupation from her unit.

D'Emilia alleges that Board member and defendant David Spierer has violated the pet restrictions. However, Susan Saltman's affidavit indicates that when she questioned Spierer as to why he had three pets in the apartment (one pet in excess of the maximum of two), he explained that he was watching the pet for a friend of his who was undergoing chemotherapy. The third pet was gone within two weeks. After this incident, the Board amended the By-Laws to allow additional pets for brief periods of time.

D'Emilia alleges that the Board has failed to enforce the no-nuisance provisions and that

Edward Kirwin (the former owner of Unit 9C and a former Board member) caused noxious odors to emanate from his apartment. Defendants contend that this is an isolated incident which took place more than four years ago, and point out that Kirwin no longer resides in the building.

Plaintiff alleges that since January 1998, the Board has failed to obtain appraisals and properly purchase and allocate the costs of insurance between the residential units and commercial units. However, Joanna Barrett, who is a former Board member, submits an affidavit which indicates that she arranged for the necessary insurance appraisals.

The third cause of action repeats the allegations of the first two causes of action, and seeks return of any common charges improperly imposed.

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Tronlone v Lac D'Aminate du Quebec, 297 AD2d 528 [1st Dept 2002], *aff'd* 99 NY2d 647 [2003]). Where discovery is necessary to resolve disputed issues of fact, a motion for summary judgment must be denied (CPLR 3212[f]; Navedo v. 250 Willis Avenue Supermarket, 290 AD2d 246 [1st Dept 2002]). Since plaintiff has moved to for sanctions by reason of defendants' alleged non-compliance with discovery orders, he himself acknowledges the need for additional discovery. As such, summary judgment on the first three causes of action as sought by plaintiff is denied.

However, although defendants have not cross-moved for summary judgment, CPLR 3212 gives this court the power to grant summary judgment to any party where such relief is appropriate. Upon review of the papers in this action, it is this court's determination that defendants Sandra Greer Real Estate, Sandra Greer and Susan Saltman are entitled to summary judgment.

The management agreement that under which Greer operates is between Greer and Atrium. Since D'Emilia is not in privity of contract with Greer, and is no longer a member of the Board, he lacks standing to assert any claim against Greer (see generally, Cinderella Holding Corp. v Calvert Ins. Co., 265 AD2d 444 [2d Dept 1999]). Moreover, even if plaintiff had standing, plaintiff would have no basis for a case against Greer Real Estate, Greer and Saltman unless it could be shown that they played a role in setting the common charges. The common charges and assessments are determined by the Board, not by Greer Real Estate. Furthermore, even if plaintiff had a legal basis for a claim against Greer Real Estate, he has not shown a basis for holding Sandra Greer and Susan Saltman in their individual capacities.

As for the individual Board members, they are protected not only by the By-Law limiting liability to cases of bad faith but also by the business judgment rule. Actions taken by Board members in good faith, in furtherance of the interests of the condominium, are generally not subject to challenge (Levandusky v One Fifth Avenue Corp., 75 NY2d 530 [1990]). Although JVL Realty is, arguably, an interested Board member when it comes to allocation of common charges between residential and commercial unit owners, the residential Board members are in the same position as plaintiff. If the residential Board members were to favor JVL Realty in the imposition of common charges, they would be acting against their own interests.

Since the facts are very much in dispute, plaintiff's so-called motion to punish defendants for perjury is, at best, premature. Moreover, because of the bitterly contentious nature of this dispute, this court will appoint a referee to supervise disclosure. The referee shall report to the court regarding the further course of discovery and the imposition of sanctions, if appropriate.

Accordingly, it is

ORDERED that the portion of plaintiff's motion seeking partial summary judgment (sequence 001) is denied; and it is further

ORDERED that, upon searching the records, defendants Sandra Greer R.E. Management Corp. a/k/a Sandra Greer Real Estate Incorporated, Sandra Greer and Susan Saltman are granted summary judgment and the complaint is hereby dismissed as against these defendants, and the Clerk is directed to enter judgment in favor of said defendants; and is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the portion of motion sequence 002 and 003 seeking to strike defendants' answers, for sanctions, and to punish defendants for perjury is granted solely to the extent that discovery in this matter is hereby directed to be overseen by a Special Referee; and it is further

ORDERED that the portion of plaintiff's motions seeking sanctions relating to discovery, as well as defendants' cross-motions for sanctions, are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this portion of plaintiff's motion and the defendant's cross motion as identified *supra*, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4402 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that the Special Referee shall supervise the remainder of disclosure in this matter; and it is further


ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee who shall oversee .

Counsel for the parties are directed to appear for a Compliance Court as previously scheduled on May 12, 2006 at 11:00 a.m.

This constitutes the Decision and Order of the Court.

Dated: 4/21/06

ENTER:



Hon. Walter B. Tolub J.S.C.

FILED
MAY 04 2006
NEW YORK
COUNTY CLERK'S OFFICE