

Sigmond v Sung

2007 NY Slip Op 30569(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0106345/2006

Judge: Judith J. Gische

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

PRESENT. HON. JUDITH J. GISCHE

PART 10

Index Number : 106345/2006

SIGMOND, CAROL A.

vs

SUNG, MARGARET

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

APR 04 2007

Dated: _____

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: PART 10

CAROL A. SIGMOND, on behalf of herself
and all other similarly situated owners of
condominium units in The 1411
Condominium,

Plaintiffs,

-against-

MARGARET SUNG,
NEIL L. ROCK, CLAUDIO MARTIN WEISZ,
PHYLLIS F. BECK, MAE MORIN CHRIS MIN,
and PHILLIPE SEEMAN, individually and as
members of the RESIDENTIAL BOARD OF
MANAGERS of THE 1411 CONDOMINIUM,
and THE 1411 CONDOMINIUM,
Defendants.

Decision/Order

Index No.: 106345/06
Seq. No. : 003

Present:
Hon. Judith J. Gische
J.S.C.

FILED
APR 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Defs' motion (3212) w/ MS, SR, RJB affids, exhs	1
Defs exhs book 1 (A-G) & 2 (H-Q) (sep backs)	2, 3
Pltff x/motion (3212) w/CAS affid, exhs	4
Defs' reply w/AET affid, exhs	5
Pltff reply and in support w/CAS	6
Transcript steno record 1/4/07	7

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE, J.

This is an action by a condominium unit owner against the condominium board
and the individual members thereof. The defendants have moved for summary

judgment dismissing the complaint. Plaintiff has cross moved for summary judgment on her 2nd, 4th, 5th and 8th causes of action only. Issue has been joined, but the note of issue has not yet been filed. Although no discovery has taken place yet, neither side raises this as a basis to deny the other party's motion. CPLR 3212 (f). Since these motions are timely, they will be decided. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Background

Carol A. Sigmond, the plaintiff and owner of unit 14 C at 201 East 80th Street, is an attorney representing herself in this action.¹ Defendants are the condominium board and individual owners of the 1411 Condominium. Plaintiff alleges that the condominium board and the individually named members have violated the bylaws and residential bylaws of the 1411 Condominium, violated their fiduciary duties to her, and impaired her rights as an owner.

Plaintiff claims that the defendants violated the bylaws: 1) requiring that she post a security deposit as a condition precedent to her making certain alterations in her apartment, 2) requiring her to abate lead paint conditions in her apartment, 3) encouraging the unit owners to vote in favor of a transfer or so-called "flip tax," based upon the board's false representation that many other condominiums in the area are approving of such an amendment to their respective bylaws, and 4) by having required a capital contribution of by her of \$2,549.48 when she bought her apartment.

Based upon these and other allegations, plaintiff asserts eight (8) causes of

¹Notwithstanding how the caption is styled, plaintiff is bringing this action on her behalf only (see: Order and Steno Record of June 1, 2006 and this court's prior decision dated August 8, 2006).

action in her complaint.

Her 1st and 2nd causes of action are, respectively, for a temporary and permanent injunction barring defendants from conditioning any proposed alterations to apartment 14C upon her signing the proposed alteration agreement and payment of the security fee.

Plaintiff's 3rd and 4th causes of action are, respectively, for a preliminary and permanent injunction barring the defendants from making "false statements" about the popularity of flip taxes among other condominiums in the area to induce owners into voting for this proposed amendment to the bylaws.

The 5th cause of action is for a declaratory judgment that the security deposit required by the defendants when any unit is bought or sold violates the bylaws and that the defendants have acted in bad faith by setting this condition.

Plaintiff's 6th cause of action is to for a temporary and permanent injunction against the defendants from operating "the 1411 Condominium as a cooperative residential corporation, until and unless the [condo] is withdrawn from the Condominium Act . . ."

Her 7th cause of action, asserted against the individual board members only, alleges that they have discriminated and harassed her and breached their fiduciary duties to her "by seeking to reduce their personal obligations as Unit Owners to pay their fair share of the costs for maintaining the [condo] . . ."

Finally, plaintiff's 8th cause of action is for a judgment in the amount of the capital contribution she paid when she bought the apartment.

Having already denied plaintiff's prior motion for temporary stays pending the

hearing in this case (see: Decision/Order dated August 8, 2006), the relief sought by plaintiff in her 1st, 3rd and 6th causes of action for a preliminary injunction is moot. Therefore, the three causes of action are severed and dismissed.

Plaintiff has not directly opposed in her papers (nor did she at oral argument) that branch of defendants' motion seeking summary judgment on the second aspect of her 6th cause of action which is for permanent relief. Nor has plaintiff opposed summary judgment dismissing her 7th cause of action. Those causes of action are, therefore, dismissed, not only because she has not identified any material triable factual disputes, but because no such cause of action - "operating a condominium as a cooperative residential corporation" - appears to exist. CPLR § 3211 (a) (7). Nor is there any basis to impose personal liability on any of the individually named board members upon the facts stated, or arguments made. Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 537-538 (1990); Pelton v. 77 Park Ave. Condominium, __AD3d __, 825 N.Y.S.2d 28 (1st Dept. 2006). Therefore, the 6th and 7th causes of action are also severed and dismissed.

The remaining claims to be decided by the court are plaintiff's 2nd, 4th, 5th and 8th causes of actions. Unless otherwise specified, any reference to "defendants" shall refer to the board of managers, and the 1411 Condominium since the claims against the individually named board members have been severed and dismissed.

The court's decision and order is as follows:

Background

In support of her 2nd and 5th causes of action, plaintiff contends that the defendants have no right to condition any alteration work to her unit upon her first

signing the "apartment decorating agreement" they have presented to her and requiring her to post a security deposit to cover any damages that may occur as a result thereof. Plaintiff contends these conditions violate Article 7 of the bylaws because it protracts the board's approval of her proposed alterations, thus constituting an "unreasonable" withholding of the board's approval until (and unless) she signs the agreement and gives the deposit.

Plaintiff also contends that because she is already required to maintain insurance coverage for the board's benefit, they have subrogated their claims (if any) to such insurance, and therefore cannot have it both ways.

Plaintiff separately contends that it is inappropriate for the board to unilaterally decide how much of the deposit it can keep - even the entire amount - in the event it decides her alterations caused any damages.

The defendants oppose her cross motion, and argue in support of their own motion for summary judgment, that under Article VII, Sections 1 and 6.1 (C) of the residential bylaws, the board has the express right to approve of alterations by a unit owner and require the unit owner to obtain insurance coverage. Defendants further argue that under Article III section 9 (b) they also have the right to impose charges in connection with such alterations, etc., separate and apart from the insurance requirement.

With respect to plaintiff's "flip tax" (4th) cause of action, plaintiff argues that it is false that other condominiums are wholesale approving of such amendments to their bylaws. She contends further that these statements are merely intended to spread misinformation to induce less savvy unit owners into approving an amendment to the

bylaws that may have a negative effect on the value of their apartments. In response, and in support of its own motion for summary judgment, the board contends that it is up to the unit owners to vote on this proposed amendment if and when the time comes, and to decide whether to amend the bylaws, thereby enacting it. Defendants contend they only sent out the February 28, 2006 letter that plaintiff complains as a "feeler" to see whether there was any support for this proposal and get feedback, not to circumvent the process set forth in the bylaws.

Finally, in support of her 8th cause of action, plaintiff argues that the board had no right to impose the capital contribution requirement upon her and that it directly contradicts the bylaws because it is "a burden on the sale of the unit." The board contends that plaintiff does not have standing to seek a "refund" of this payment because: 1) she already paid it as a condition of buying her apartment, and 2) the bylaws provide for its imposition when the title of the unit changes hands.

Discussion

On a motion for summary judgment, the moving party bears the burden of proving that it is entitled to summary judgment as a matter of law. Only if this initial burden is established must the opponent demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). The disputed issues must be real and not just shadowy semblances, which is why summary judgment requires parties to lay bare their proof. SJ Capelin v. Globe, 34 NY2d 338 (1974).

Condominium boards have been compared to "little democratic sub societ[ies]" serving owners who often have divergent, if not competing, interests Levandusky, 75

NY2d at 536. It is well established in this state's jurisprudence that the courts should not inquire into or intervene with the actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.' So long as the corporation's directors have not breached their fiduciary obligation to the corporation. Levandusky, supra; Pelton v. 77 Park Ave. Condominium, supra. Although plaintiff presents many reasons why she disagrees with the board of managers and its members, she has not provided a single basis for her to be awarded summary judgment on her cross motion, or to deny the motion by the defendants.

Aside from reiterating the same statements she makes in her complaint, providing some boilerplate case law about the burdens of proof on these motions, and a great deal of rhetoric, plaintiff does not provide any evidentiary support or frame material factual disputes for trial that would justify denying the board's motion, let alone granting her summary judgment.

The bylaws reserve to the board broad powers on how best to protect the interests of other unit owners against any damages that may occur from alterations by a unit holder in his or her individual unit. The fact that the board may have the right to keep any part of the deposit, or even the whole deposit, plaintiff has been asked to provide as a condition to making the alterations, does not frame a presently justiciable dispute.

Nor are plaintiff's arguments persuasive, that by having her sign an alteration agreement and provide a security deposit for the repairs, the board is either delaying or withholding its consent. Any delay falls directly upon plaintiff who has refused to sign

the agreement or provide the security simply because she is of the opinion she should not have to.

The arguments plaintiff makes about the flip tax are largely incomprehensible. The board is not requiring that any unit owner vote in a particular way, but merely taking an opinion poll. It is up to the unit owners to vote in favor of (or veto) the proposed amendment. Any argument that the other owners are easily influenced by misinformation is of no moment and gives her fellow owners little credit. Like plaintiff, they can do their own research and make up their own minds about whether a flip tax is advantageous or not to their financial investment.

Finally, plaintiff has no right to a refund of the capital contribution that she voluntarily paid when she bought the unit and is disclosed in the offering plan as something that has to be paid each time there is a closing of title. She could have refused to buy the unit, had she been so inclined, thus any statement that it was "extorted" from her bears no further discussion. Now that she owns the unit, whether she pays it, or builds it into the sale price, is for her to decide at the appropriate time.

Plaintiff has presented a number of other arguments in support of her claims (e.g. about lead abatement, the underlying basis for the transfer tax, etc.) Whether taken individually or considered collectively, none of these arguments provide a basis for granting plaintiff's motion for summary judgment or setting forth material factual disputes for trial that would required the denial of defendant's motion.

Conclusion

For the foregoing reasons, defendants have proved they are entitled to summary judgment dismissing each cause of action set forth in the complaint. Plaintiff has failed


to prove her claims or set forth material triable factual disputes that would warrant the denial of defendants' motion. Therefore, defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. The clerk shall enter judgment in favor of all the defendants against the plaintiff.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 4, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

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