

Shapiro v 350 E. 78th St. Tenants Corp.

2008 NY Slip Op 30669(U)

March 10, 2008

Supreme Court, New York County

Docket Number: 0105318/2007

Judge: Jane S. Solomon

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PRESENT: Solomon
Justice

PART 55

Shapiro, Florence

INDEX NO. 105318/07

MOTION DATE 12/17/07

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

350 E. 78th St.

The following papers, numbered 1 to 9 were read on this motion to/for Dismiss Complaint et al.

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-5</u>
<u>6-7</u>
<u>8-9</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memoranda, decisions and orders.

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

FILED

MAR 11 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/10/08

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
FLORENCE SHAPIRO and ADAM SHAPIRO,

Plaintiffs,

-against-

INDEX NO. 105318/2007

350 EAST 78TH STREET TENANTS CORP.,
ROSS J. PATTEN, MARCELLA C. STANLEY,
ELIZABETH KREUGER, JOHN E. SELEY,
STANLEY J. STANLEY, ELIZABETH OTT,
THADDEUS JUDE MORROW,

DECISION and ORDER

Defendants.

-----X
JANE S. SOLOMON, J.

Defendants 350 East 78th Street Tenants Corporation
(the "Corporation"), and the individual defendants, present and
former members of the Corporation's Board, move pursuant to CPLR
§§ 3211(a)(1), (5), and (7), to dismiss the Complaint.

This action concerns use of the roof terraces adjacent
to the plaintiffs' home in the four storey building located at
350 East 78th Street in Manhattan (the "Building"). Plaintiff
Florence Shapiro ("Shapiro") is the proprietary lessee and
stockholder for the duplex penthouse apartment (the "Apartment")
of the Building, in which she lives with her son, plaintiff Adam
Shapiro ("Adam"). Under the governing documents Shapiro has
exclusive access to the front and rear roof areas adjacent to the
penthouse, with the Corporation having a right of access for
maintenance and operations. The governing documents further
require Shapiro (as lessee) to keep the roof clean and maintain
all screen and drain boxes in good condition, and restrict her
from installing any planting, fence or other structure without
prior consent of the Corporation's Board (Proprietary Lease, Aff.

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of Marcy Stanley, Ex. 3, paragraph 7). Shapiro installed in 1994 and maintained until 2005 wooden decking and plantings over a roof membrane installed by the Corporation.

The Complaint alleges that defendants allowed the roof to deteriorate and refused to repair it; that they then required Shapiro to remove the decking and plantings that she had installed, and ousted Shapiro from her use of the roof; that they unreasonably delayed consideration of a sale of the Apartment and frustrated such sale by notifying the would-be purchasers that they would be barred from installing decks on the roof; and that they summarily refused an offer from Adam to replace the roof at his own expense.

The somewhat confusing Complaint alleges the following 10 causes of action: (1) a permanent injunction barring defendants from interfering with plaintiffs' use of the roof; (2) a mandatory injunction requiring defendants to repair the roof so as to allow plaintiffs to use it; (3) damages for breach of a fiduciary duty arising from the retention of a friend of some board members to inspect the roof, and in failing to have it repaired; (4) damages for breach of a fiduciary duty arising from interference with Shapiro's proposed sale of the Apartment; (5) partial actual eviction; (6) treble damages for a violation of Real Property Actions and Proceedings Law ("RPAPL") § 853; (7) unspecified damages for interference with the use of the roof, and/or costs to correct the problems with the terrace; (8) damages for interference with the proposed sale of the Apartment;

(9) damages for negligence, fraud and breach of contract for interference with her use of the roof; (10) an injunction requiring the Corporation to add Adam as a co-lessee to Shapiro's lease and as a shareholder in the Corporation.

Defendants' Answer includes five counterclaims, namely: (1) damages for breach of Shapiro's duty to the Corporation as its president for negligently installing and maintaining the roof decks; (2) damages for breach of the proprietary lease and the Corporation's other governing documents for improperly installing decks on the roof and failing to maintain draining systems; (3) reimbursement of costs and attorneys fees under CPLR § 8303-a for plaintiffs bringing this action frivolously; (4) damages for Shapiro's breach of the proprietary lease in maintenance of the roof, which required the Corporation to hire an engineer to repair the roofs; and (5) an injunction requiring Shapiro to provide keys and access to the roof. Plaintiffs did not reply to these counterclaims, and, together with their motion for summary judgment dismissing the Complaint, defendants also moved for default judgment on these counterclaims. Subsequently, plaintiffs delivered keys to a member of the Board, and defendants have withdrawn their application for a default judgment, as well as the fifth counterclaim.

Discussion

Defendants address neither of the first two causes of action in their motion papers, so the requests for injunctive relief therein survive this motion, except that the claims are

dismissed as to the individual defendants for the reasons set forth below.

With respect to the third and fourth causes of action, allegations that individual Board members breached their fiduciary duty to the Corporation may only be brought derivatively, and may not be maintained by plaintiffs in their individual capacities. Abrams v. Donati, 66 N.Y.2d 951 (1985). Accordingly, the claims are dismissed.

Moreover, as to the third cause of action, the allegation that a friend of two of the Board members was retained to inspect the roof does not, of itself, give rise to a breach of a fiduciary duty. The Complaint fails to allege any facts showing that anyone involved had a conflict of interest or that judgment was skewed to reach a result desired by certain Board members. As for the remainder of this claim, absent a breach of a fiduciary duty, a court cannot substitute its own judgment for that of a cooperative or condominium board. See Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530 (1990). Under the business judgment rule, a court's inquiry is limited to (1) whether the board acted within the scope of its authority under the by-laws, and (2) whether the action was taken in good faith to further a legitimate interest of the Corporation. Schoninger v. Yardarm Beach Homeowner's Assoc., Inc., 134 A.D.2d 1 (2nd Dep't 1987). The Board was not obligated to reject the opinion of the engineer it retained in favor of one retained by Shapiro. Finally, as against the Corporation, the fourth cause of action

informing would-be purchasers of the status of the roof.

The fifth cause of action for wrongful partial eviction, as pleaded, is dismissed as time-barred. An eviction is governed by a one year statute of limitations, and occurs when a plaintiff is caused to become unable to use a demised space for the purpose for which it was intended. Oresky v. Azzouni, 232 A.D.2d 463 (2nd Dep't 1996). However, the relief sought is preserved in Shapiro's claims for breach of contract and permanent injunction.¹

The sixth cause of action ^{not only} ~~is also dismissed because it~~ ^{but is dismissed because} is time-barred, ~~and because~~ RPAPL § 853 provides damages where "a person is ... put out of real property in a forcible or unlawful manner, or, after he has been put out, is held or kept out by force or by putting him in fear of personal violence or by unlawful means" (Sam & Mary Housing Corp. v Jo/Sal Market Corp., 100 A.D.2d 901 [2nd Dep't 1984], *aff'd* 64 N.Y.2d 1107 [1985]). Here, the Complaint ^{does not} ~~alleges~~ ^{neither} force, ~~nor~~ threats, ^{or} unlawful means. While plaintiffs allege that Shapiro was induced to remove her decking, furniture, and plants by a misrepresentation, they acknowledge that she removed those items voluntarily.

The seventh cause of action is dismissed because it is redundant of the surviving claims for breach of contract and ~~and~~

¹ Shapiro alleges facts to support a claim for breach of the covenant of quiet enjoyment. While this is not specifically pleaded in the complaint, that basis for recovery is preserved in the breach of contract claim.

duplicates the eighth cause of action discussed below.

The fifth cause of action for wrongful partial eviction, as pleaded, is dismissed as time-barred. An eviction is governed by a one year statute of limitations, and occurs when a plaintiff is caused to become unable to use a demised space for the purpose for which it was intended. Oresky v. Azzouni, 232 A.D.2d 463 (2nd Dep't 1996). However, the relief sought is preserved in Shapiro's claims for breach of contract and permanent injunction.¹

The sixth cause of action not only is time-barred, but is dismissed because RPAPL § 853 provides damages only where "a person is . . . put out of real property in a forcible or unlawful manner, or, after he has been put out, is held or kept out by force or by putting him in fear of personal violence or by unlawful means" (Sam & Mary Housing Corp. v Jo/Sal Market Corp., 100 A.D.2d 901 [2nd Dep't 1984], *aff'd* 64 N.Y.2d 1107 [1985]). Here, the Complaint does not allege force, threats, or unlawful means. While plaintiffs allege that Shapiro was induced to remove her decking, furniture, and plants by a misrepresentation, they acknowledge that she removed those items voluntarily.

The seventh cause of action is dismissed because it is redundant of the surviving claims for breach of contract and injunction.

¹ Shapiro alleges facts to support a claim for breach of the covenant of quiet enjoyment. While this is not specifically pleaded in the complaint, that basis for recovery is preserved in the breach of contract claim.

* 8]
The eighth cause of action, which purports to bring a claim for intentional tortious interference with the contract for sale of the Apartment, also is time-barred. The alleged interference occurred no later than October 10, 2005, when, the Complaint alleges, the Board met with the proposed purchasers and told them that they could neither install a new deck on the roof, nor use the roof in any other way.

The ninth cause of action is dismissed in part. The negligence prong of this claim is untimely because it is based upon defendants' installation of a roofing membrane in 1994, far more than three years prior to the commencement of this action in April 2007. See CPLR § 214. The remainder of the ninth cause of action, however, survives this motion.

The fraud prong alleges that, in mid-2005, defendants persuaded Shapiro to remove the decking, furniture, and plantings that she had installed on the roof, purportedly so as to allow inspection and repair of the roof, but in fact, so as to bar her thenceforth from any use of the roof. This claim is neither untimely nor decisively refuted by any of the documentary evidence that defendants have submitted. However, plaintiffs have not alleged that the misrepresentation was made independently by one or more of the individual defendants, rather than by the Board as a whole acting on behalf of the Corporation. Accordingly, while this cause of action is not dismissed as against the Corporation, it is dismissed as against the individual defendants. See Kravtsov v. Thwaites Terrace House

Owners Corp., 267 A.D.2d 154 (2nd Dep't 1999).

The breach of contract claim alleged in the ninth cause of action also survives. The 1979 offering plan to convert the Building to co-operative ownership provides that the Apartment "will have the exclusive use of the roof of the Front House (and penthouse thereon) subject to the right of Apartment Corporation to have access thereto whenever necessary for the maintenance and operation of the buildings." Shapiro Aff., Ex. A, 2. The proprietary lease provides that:

[i]f the apartment includes a ... roof, and/or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the ... roof and/or that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of this lease and to the use of the ... roof by the Lessor to the extent herein permitted.

Stanley Aff., Ex. 3, at 6. House Rule 29 provides, among other things, that no plantings may be placed on a balcony, terrace, or the roof without prior written approval of the lessor, and paragraph 21 (a) of the lease provides, among other things, that no lessee may make any alteration upon a roof without prior written consent from the lessor. While defendants contend that Shapiro failed to obtain written approval to place a deck or plantings on the roof, defendants' own documents show that, in 1993, the then-president of the board notified Shapiro that she could no longer place furniture and plants directly on the roof and suggested that she build "an appropriate weight-bearing deck" approved by a specified contractor. Stanley Aff., Ex. 4.

Plaintiffs allege that the decks placed on the roof in 1994 were placed according to instructions from that contractor. There is no documentary evidence showing the Corporation's instructions were not honored.

Moreover, even leaving aside all questions as to Shapiro's contractual entitlement to maintain a deck and plants on the roof, defendants' actions with respect to the roof appear to have resulted in a situation where the roof may not even be walked upon. That circumstance violates Shapiro's right to "use" the roof under the offering plan and her proprietary lease. While various Board decisions regarding the roof may be protected as business judgment, that rule does not protect a Board from its own breach of contract. Whalen v. 50 Sutton Place South Owners Corp., 276 A.D.2d 356 (1st Dep't 2000); Diniçu v. Groff Studios Corp., 257 A.D.2d 218 (1st Dep't 1999). This claim, which accrued when Shapiro was barred from using the roof in 2005, is timely. Accordingly, Shapiro has stated a claim for breach of contract.

The tenth cause of action must be dismissed because plaintiffs have not alleged facts to support the relief sought.

Finally, upon searching the record, defendants' third counter-claim is dismissed. That counter-claim demands costs and reasonable attorneys fees from Shapiro under CPLR 8303-a, which authorizes such recovery if the court finds that her claims are frivolous. While some of Shapiro's claims do not survive, her lawsuit patently is not frivolous.

Accordingly, it hereby is

ORDERED that the motion to dismiss is granted to the extent of dismissing the third, fourth, fifth, sixth, seventh, eighth, and tenth causes of action, as well as that branch of the ninth cause of action that alleges negligence, and all claims as against the individual defendants, and said causes of action are severed and dismissed, and the motion otherwise is denied; and it is further

ORDERED that the Complaint is severed and dismissed as against defendants Ross J. Patten, Marcy C. Stanley, Elizabeth Kreuger, John E. Seley, Stanley J. Stanley, Elizabeth Ott, and Thadeus Jude Morrow, and the Clerk is directed to enter judgment in favor of said defendants with costs and disbursements to them as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it further is


ORDERED that upon searching the record, defendants' third counter-claim is dismissed; and it further is

ORDERED that the remainder of the action shall continue.

Dated: March 10, 2008

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