

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

2008 NY Slip Op 32293(U)

August 14, 2008

Supreme Court, New York County

Docket Number: 0105318/2007

Judge: Jane S. Solomon

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

PRESENT: HON. SANE S. SOLAMON  
Justice

PART 55

Index Number : 105318/2007  
SHAPIRO, FLORENCE  
vs  
350 EAST 78TH STREET  
Sequence Number : 002  
REARGUMENT/RECONSIDERATION

INDEX NO. 105318/2007  
MOTION DATE 5-28-08  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

Motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-3

4-8

7-9

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum decision and order.

**FILED**

AUG 18 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/14/08



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 55

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

Plaintiffs,

INDEX NO. 105318/2007

-against-

350 EAST 78<sup>TH</sup> 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.

**FILED**

AUG 18 2008

NEW YORK  
COUNTY CLERK'S OFFICE

This action concerns the use of roof terraces adjacent to the home of plaintiff Florence Shapiro ("Shapiro") of a four story building located at 350 East 78<sup>th</sup> Street in Manhattan. On March 10, 2008, I granted the motion of defendants 350 East 78<sup>th</sup> Street Tenants Corporation (the "Corporation"), and the individual defendants, present and former members of the Corporation's Board, to the extent of dismissing part of the Complaint against all defendants, and all claims against the individual defendants (the "Prior Motion").<sup>1</sup> The March 10, 2008 decision and order (the "Prior Order") also dismissed defendants' third counter-claim, and allowed the remainder of the action to continue.

The facts of the dispute are discussed in greater detail in the Prior Order. Briefly, Shapiro contends that her contractual right to use the roof outside her apartment has been violated by the Board, and the Board interfered with her attempt

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<sup>1</sup>Defendants did not move to dismiss the first and second causes of action, which seek injunctive relief.

to sell the apartment by telling the proposed purchasers at their interview that they would not be permitted to use the roof area or to install a new roof deck. The proposed purchasers then withdrew from the transaction.

Shapiro and her son, co-plaintiff Adam Shapiro ("Adam"), now move under CPLR § 2221 to reargue the Prior Motion, arguing that the court erred by misapprehending the law, overlooking plaintiffs' allegations and failing to apply the correct standard of review on a motion to dismiss. Defendants cross-move to reargue the Prior Motion with respect to court's decision on the ninth cause of action, and for renewal of the Prior Motion's application to dismiss the claim for tortious interference, and upon renewal to adhere to the Prior Order's dismissal of that cause of action, and finally, to compel Shapiro to appear for a deposition. The motion and cross-motion are decided as follows.

#### **Standard of Review on the Prior Motion**

Plaintiffs and defendants both argue that the court failed to apply the correct standard of review on a CPLR § 3211 motion to dismiss. Plaintiffs also argue that the court erred by making ultimate determinations on the facts. It is well settled that the court must, "accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). When affidavits and other extrinsic evidence is used, the standard of review is "whether

the proponent of the pleading has a cause of action, not whether he has stated one." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). In their motions to reargue, neither plaintiffs nor defendants demonstrate that the court failed to apply this standard when considering the Prior Motion.

### **Third and Fourth Causes of Action**

The Prior Order dismissed the third and fourth causes of action, in part, by holding that "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." Prior Order, 4. Plaintiffs argue that the court misapprehended these two causes of action in that they do not allege a breach of a fiduciary duty owed to the Corporation, but rather, that the individual Board members and the Corporation (through the Board) breached a fiduciary duty owed to Shapiro, by acting in bad faith and self-interest. Shapiro highlights seven instances in the Complaint where she alleges that defendants breached fiduciary duties owed to her.

Although a shareholder has no individual cause of action for a wrong committed against a corporation, "exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owed to the corporation". Abrams v. Donati 66 N.Y.2d 951, 953 (1985). However, while the Prior Order may have initially characterized the third and fourth causes of action as alleged breaches of the

Board's fiduciary duty to the Corporation, those causes of action were also dismissed because "the allegation that a friend of one or 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." Prior Order, 4.

Plaintiffs further argue that the court prematurely and improperly applied the business judgment rule at the pleading stage. See Ackerman v. 305 East 40<sup>th</sup> Owners Corp., 189 A.D.2d 665 (1<sup>st</sup> Dep't 1993). "At this stage of the proceedings, if plaintiff has made a prima facie case showing lack of such disinterested independence or such dual relation, the complaint may not be dismissed for failure to state a cause of action solely upon the business judgment rule." Scheuer v. 61 Associates Corp., 179 A.D.2d 65, 69 (1<sup>st</sup> Dep't 1992). As I stated in the Prior Order, however, the "Board was not obligated to reject the opinion of the engineer it retained in favor of the one retained by Shapiro." Neither the allegation that the Board did not use the engineer recommended by Shapiro, nor any other allegation raised in the Complaint and supporting affidavits, makes out a prima facie case that any defendant breached a fiduciary duty owed to Shapiro. Thus, the court cannot substitute its own judgment for that of the Board. See Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530 (1990).

Finally, plaintiffs argue that the court misconstrued

the fourth cause of action for breach of fiduciary duty as duplicative of the eighth cause of action alleging interference with a contract. Both causes of action arise from the Board's conduct in connection with the proposed purchasers. A claim relying on separate and distinct facts is not duplicative of another claim which seeks similar relief, (TVGA Engineering & Surveying, P.C. v. Gallick, 45 A.D.3d 1252 [4<sup>th</sup> Dep't 2007]), and plaintiffs contend that these two causes of action allege different theories of liability and rely on separate facts. However, as described above, the fourth cause of action was also dismissed because the Complaint fails to allege facts that show a breach of a fiduciary duty. The eighth cause of action, which alleges an intentional tort that occurred more than one year before the summons and complaint was filed, was dismissed because it was time-barred. Prior Order, 6, and see discussion of the eighth cause of action below.

#### **Fifth and Sixth Causes of Action**

Plaintiffs argue that the court "prematurely and improperly made a finding of fact as to the date of eviction and then erroneously relied on its finding as grounds to dismiss Plaintiff's fifth & sixth causes of action for common law and statutory wrongful eviction as time barred." The statute of limitations for wrongful eviction is one year and "begins to run at such time that it is reasonably certain that the tenant has been unequivocally removed" and has "no right to return." Gold v. Schuster, 264 A.D.2d 547, 549 (1<sup>st</sup> Dep't 1999).

This action was commenced on or around April 19, 2007. Plaintiffs argue that the wrongful eviction occurred on or about May 26, 2006, when a board member sent Shapiro an email stating she would not be able to reoccupy the terraces, whereas defendants point to paragraph 56 of the Complaint, which states that the "Board by letter dated October 24, 2005 formally notified Shapiro of a purported decision by the shareholders ... prohibiting Shapiro ... to install a deck and thereby taking away Plaintiff's right to have use of the Terraces." Shapiro argues that her future correspondence with the Board demonstrates that she had an expectation and an intention to return to the roof, up and until the receipt of the May 26, 2006 email.

Plaintiffs' argument is unpersuasive. That Shapiro was informed at a later date that she would continue not to have access to the roof does not extend the statute of limitations from the date she was originally informed that she would not have access to it.

The court also dismissed the sixth cause of action, a wrongful eviction claim under RPAPL § 853, on the ground that the Complaint does not allege force, threats or unlawful means. Plaintiffs argue that the court misconstrued the applicable law because RPAPL § 853 does not require force in order to show that the eviction was unlawful. See Maracina v. Shirmmeister, 105 A.D.2d 672 (1<sup>st</sup> Dep't 1984). However, as discussed above, the sixth cause of action was also dismissed as time-barred, and this does not require a determination of whether the eviction was

unlawful. See Gold, v. Schuster, 264 A.D.2d 547 (1<sup>st</sup> Dep't 1999).

#### **Seventh Cause of Action**

The Prior Order dismissed the seventh cause of action as redundant of the surviving claims for breach of contract and injunction. Plaintiffs do not specifically address the seventh cause of action in their motion papers, and the court's decision in the Prior Order with respect to it will not be disturbed.

#### **Eighth Cause of Action**

Plaintiffs argue that this court improperly applied a one-year statute of limitations to this cause of action alleging tortious interference with contract, and that the applicable statute is three years (see CPLR § 214[4]; American Federal Group, Ltd. v. Edelman, 282 A.D.2d 279 [1<sup>st</sup> Dep't 2001]). Defendants do not explicitly address the issue of timeliness, but move for renewal of the court's decision, arguing that even if this cause of action is not time-barred, documents recently obtained from Shapiro through discovery defeat the claim. Specifically, they argue that Shapiro's contract for the sale of her apartment was voidable, and any alleged action the Board took cannot give rise to a claim for tortious interference with a voidable contract. Further, defendants argue that discovery has shown that the would-be purchasers's of Shapiro's apartment would have purchased it for about \$100,000 less without exclusive roof access, and that this is evidence that roof rights were not critical to the contract. They contend that this shows

plaintiffs were not ready and willing to sell the apartment, and therefore this claim cannot survive.

Plaintiffs counter that the \$100,000 proves the importance of the roof rights to the contract. Indeed, the price difference alleged by defendants may represent a measure of Shapiro's damages. The Complaint alleges that the Board told the proposed purchasers that they would not be permitted to use the roof or install a new deck. This "absolute restriction" (Complaint, paragraph 58) imposed by the Board, the terms of the offering plan and proprietary lease notwithstanding, caused the proposed purchasers to pull out of the transaction, and Shapiro was thereby deprived of the fair market value of her apartment.

Upon reargument, the Court finds that it erred in applying a one year statute of limitations (see American Federal Group, Ltd. v. Edelman, 282 A.D.2d 279), and that the factual predicate of the tortious interference claim is sufficiently different from the breach of contract claim that it does not duplicate it. The Board's argument that usage of the roof was not critical to the proposed sale, or that Shapiro independently caused the sale to fall through, only present issues of fact that are not properly resolved upon a motion to dismiss.

#### **Ninth Cause of Action**

In the Prior Order, I held that "[t]he breach of contract claim alleged in the ninth cause of action also survives ... 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." On their motion to reargue, plaintiffs argue that the "ordering" paragraphs "inconsistently and in contradiction" to this quoted text, dismissed the Complaint against the individual Board members. Plaintiffs are incorrect. As with the prong of the ninth cause of action alleging fraud, the breach of contract action may only be brought against the Corporation because there is no allegation of wrongdoing by any individual defendant acting independently, rather than in their capacity as a Board member acting on behalf of the Corporation.

Defendants also move to reargue the ninth cause of action. With respect to the intentional misrepresentation or fraud prong of this cause of action, defendants argue that the court incorrectly found this claim was filed timely. Under CPLR § 213(8), an action based on fraud must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff" discovered or should have discovered the wrongdoing occurred.

The Board continued to persuade Shapiro to remove the decking, furniture and plantings she installed on the roof through mid-2005, and she was ultimately told by a letter dated October 24, 2005, that she would not be able to reinstall the decking. When this claim was filed in April 2007, it was timely.

Defendants also move to reargue the breach of contract branch of the ninth cause of action. Defendants argue that the court mistakenly allowed a breach of contract claim to survive

regarding Shapiro's use of the roof due to her rights described in the offering plan and the proprietary lease. They claim that the ninth cause of action does not state a breach of contract claim, but rather is for fraud and injunctive relief. However, pleadings are to be given a liberal construction, and the court inferred a breach of contract claim from the facts alleged in support of the claim, even if it is not cleanly stated. I have since invited plaintiffs' counsel to amend the complaint to set forth their claims more clearly.

Defendants also contend that the cases cited in the Prior Order can be differentiated from this one in that a specific cause of action for breach of a lease is not alleged here, and because Shapiro did not have plans and documents for her roof installations filed for approval with the Department of Buildings. They allege that the Board was never fully apprised of Shapiro's alterations in 1993 and that she never received written approval for her various installations.

Moreover, they argue that no cause of action for breach of the proprietary lease can exist here, because, despite Shapiro's exclusive roof access as set out therein, absent a showing of fraud, bad faith or self-dealing, the Board is still protected by the business judgment rule in having Shapiro remove installations from the roof that harm the Corporation. See 10 East 70<sup>th</sup> St. v. Gimbel, 309 A.D.2d 644 (1<sup>st</sup> Dep't 2003); Konrad v. 136 East 64<sup>th</sup> St. Corp., 254 A.D.2d 110 (1<sup>st</sup> Dep't 1998). In addition, a previous failure to object to such installations does

not result in a waiver prohibiting the Board from taking action to protect the Corporation. See Katz v. 215 West 91<sup>st</sup> St. Corp., 215 A.D.2d 265 (1<sup>st</sup> Dep't 1995).

Defendants' arguments are unpersuasive and misconstrue the Prior Order. Specifically, the Prior Order held

... even leaving aside all questions as to Shapiro's contractual entitlement to maintain a deck and plans 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.

This is easily differentiated from the cases cited by defendants where courts have held that no breach of contract occurred when a lessee was simply ordered to remove deck installations.

#### **Tenth Cause of Action**

Plaintiffs argue that this court mistakenly dismissed the tenth cause of action, which sought mandatory injunctive relief compelling defendants to add Adam to Shapiro's proprietary lease. On this motion to reargue, plaintiffs point to a letter dated December 8, 2006, under which Shapiro requests the Board add her son to her proprietary lease and stock due to her advanced age and ill health. Plaintiffs state that they made it clear to the Board that they would provide financial and other information required for this transfer, but that the Board has not provided any reason for refusing this request. Plaintiffs contend that the proprietary lease, offering plan, by-laws and other governing documents afford them a legal right to this

request.

Defendants counter that title to shares in the apartment cannot be transferred upon a mere request, and that the lease sets forth specific procedures that must be followed in connection with such an assignment. Shapiro submits no evidence that she complied with any of these procedures, or that the Board would be compelled to approve the transfer in any event. Accordingly, the motion to reargue the tenth cause of action is denied.

#### **Leave to Amend**

Plaintiffs' motion contains a request that if the court finds that the Complaint and supplemental affidavits do not state any particular cause, they be granted leave to amend pursuant to CPLR § 3025. Plaintiffs' motion papers do not contain a proposed amended complaint. However, at argument I invited plaintiffs to amend the complaint in certain respects, which was discussed at a conference in my court room on August 13. Indeed, the plaintiffs are encouraged to circulate a proposed amended complaint consistent with this decision and order, and if the parties do not stipulate to it, plaintiffs have leave to renew their motion to amend by an order to show cause presented in time for it to be returnable in Part 55 on September 22.

#### **Depositions**

Finally, Defendants cross-motion move to compel Shapiro to appear for a deposition. This part of the motion is moot in light of the August 13 conference, where the parties agreed to put off depositions while they attempt to resolve the roof issue amicably, and scheduled a compliance conference for September 22,

2008. Accordingly, it hereby is

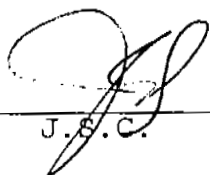
ORDERED that plaintiffs' motion to reargue and defendants' motion to renew with respect to the eighth cause of action alleging tortious interference with contract is granted, and the motion and cross-motion otherwise are denied; and it further is

ORDERED that upon reargument and renewal, defendants' motion to dismiss is denied with respect to the eighth cause of action; and it further is

ORDERED that counsel shall appear for a compliance conference in Part 55, 60 Centre Street, Room 432, New York, NY on September 22, 2008 at 2:30 PM.

Dated: August 14, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

**FILED**  
AUG 14 2008  
NEW YORK  
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