[*1] SCANNED ON 9/22/2008

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

PRESENT: LOUIS B. YORK PART 2
J.S.C.

Index Number : 105392/2007

PEACOCK, RUSSELL

vs

HERALD SQUARE LOFT CORP.

Sequence Number : 001

DISMISS

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 ACCOMPANYING MEMORANDUM DECISION.

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/21/08

Guy
LOUIS B. YORK, 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
COUNTY OF NEW YORK: PART 2

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RUSSELL PEACOCK and CONSTANCE HANSEN,

Plaintiffs,

INDEX NO. [redacted]5392/07

- against -

HERALD SQUARE LOFT CORP., LUIS CONTRERAS, DAVID HEELEY, EDUARDO BAUZA, GEORGE BRENNER and ROMAIN GIROD,

Defendants.

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LOUIS YORK, J.:

In this real property action, defendants Herald Square Loft Corp. (HSL), and the individuals of the cooperative board of directors, Luis Contreras, David Heeley, Eduardo Bauza, George Brenner and Roman Girod (the Board) move, pursuant to CPLR 3211 (a) (7) and CPLR 3016 (b), to dismiss the causes of action for: (1) tortious interference with contract as against the Board (first cause of action); (2) breach of fiduciary duty as against defendants (second cause of action); (3) breach of fiduciary duty as against the Board (third cause of action); and (4) breach of contract as against HSL (fourth cause of action), as alleged in the amended complaint (Amended Complaint).

For the following reasons, defendants' motion to dismiss is granted in part and denied in part.

Background

Plaintiffs Russell Peacock and Constance Hansen, are lessees of a penthouse in the building located at 31 West 31st Street,

New York, New York (Subject Premises), and own 3 shares of stock in HSL, a New York corporation. More specifically, plaintiffs are successors-in-interest to a proprietary lease, dated December 15, 1977, between HSL and non-party Jessie W. Sayre (Proprietary Lease).

According to plaintiff Hansen, the Subject Premises consists of approximately 836 square feet (Hansen Affidavit, ¶ 4). In 1977, at the time the Building was converted to cooperative ownership, the Subject Premises maintained, and currently maintains, a 22 foot by 38 foot mechanic's shed allegedly without adequate heat, insulation, water pressure or elevator service for habitation (id., ¶ 5; see also proposed architecture plans dated June 19, 2006, Hansen Affidavit, Ex. F). According to the offering plan, the unit owners had a right to make alterations and additions to the respective units in order to make them habitable for residential occupancy (Offering Plan, Hansen Affidavit, Ex. A).

Paragraph 7 of the Proprietary Lease provides:

> "If the apartment includes a terrace, balcony or a portion of the roof adjoining the penthouse, the Lessee shall have and enjoy the exclusiveness of the terrace or balcony or that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of this lease and to the use of the terrace, balcony or roof by the Lessor to the extent herein permitted."

Paragraph 18 (e) provides:

> "Tenant shall perform, at Tenant's expense, all

work necessary within Tenant's unit to obtain approval of a new Certificate of Occupancy."

Pursuant to Paragraph 21 (a) of the Proprietary Lease,

"The Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld, make in the apartment or building, or on any roof, [* The 11th floor Tenant has exclusive use of the roof area] penthouse, terrace or balcony appurtenant thereto, any alteration, enclosure or addition or any alteration of or addition to the water, gas, or steam risers or pipes, heating or air conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm system, or any other installation or facility in the apartment or building. The performance by Lessee of any work in the apartment shall be in accordance with any applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof. The Lessee shall not in any case install any appliances which will overload the existing wires or equipment in the building."

On March 8, 1994, plaintiffs and HSL entered into a subsequent agreement (March 8th Agreement) regarding the parties' rights and responsibilities with respect to the use, occupancy and development of the roof area appurtenant to the Subject Premises. Paragraph 1 of the March 8th Agreement states that the Subject Premises "may be used for private residential purposes", which is what plaintiffs are seeking to do. The March 8th Agreement further provides that

"Access to the roof shall be provided at all times to the Co-op as set forth below. The Co-op, through its agents or assigns, city officials or hired repair individuals, reserves the right to gain access to the roof for reasonable inspection and/or repair on reasonable notice to the

> Shareholders of the Penthouse or without notice in case of emergency,"

and further that "any and all proposed alternation [sic] to the roof shall satisfy and be in compliance with all applicable New York City Codes currently in effect" (Paragraphs 3 and 5).

Paragraph 7 of the March 8th Agreement states that, "[a]fter the scope of work has been approved by the Board of Directors any and all plans for construction and/or mechanical drawings shall be simultaneously presented to the Board of Directors and the Co-op's engineers for review."

On June 19, 2006, plaintiffs presented the plans to reconstruct the Subject Premises to a two-story apartment pursuant to the terms of the Proprietary Lease and the March 8th Agreement. According to plaintiffs, the proposed alterations comply with all applicable codes and regulations as required under the March 8th Agreement, of which the Board was informed. On November 21, 2006, "the Board voted unanimously not to approve the Project (November 21, 2006 board meeting minutes, Hansen Affidavit, Ex. G). Therein, Defendant Heeley "stated that he voted against the project because he did not feel it was in the best interest of the Co-op. No other Board Members commented on their vote" (emphasis in original) (id.). Defendant Heeley was also adverse to any major construction on the roof, and was of the opinion that no alterations would be in the best interest of the co-op.

Discussion

Defendants move for dismissal of the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7). "In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 [2005]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (id.; see also Blonder & Co., Inc. v Citibank, N.A., 28 AD3d 180, 187 [1st Dept 2006]). "Affidavits and other evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims..." (R.H. Sandbar Projects, Inc. v Gruzen Partnership, 148 AD2d 316, 318 [1st Dept 1989]).

Pursuant to CPLR 3016 (b), where a cause of action is predicated upon "misrepresentation, fraud mistake, willful default, breach of trust or under influence, the circumstances constituting the wrong shall be stated in detail." This includes claims based upon a breach of fiduciary duty (see Dove v L'Agence, Inc., 250 AD2d 435 [1st Dept 1998]; Non-Linear Trading Co., Inc. v Braddis Assocs., Inc., 243 AD2d 107, 117 [1st Dept 1998]).

In this case, plaintiffs assert that the defendants,

individually and collectively as the board, breached their fiduciary duty and tortuously interfered with their contract, when they denied plaintiff's application for construction to the subject premises without explanation.

To prevail on a claim for tortuous interference with a contract, "a party must show that the alleged tort-feasor wrongfully interfered with the contract for the sole purpose of harming the plaintiff, or that he committed independent torts or predatory acts towards the third party" without a showing ~~without~~ of economic or other justification (Lerman v Medical Assocs. of Woodhull, P.C., 160 AD2d 838, 839 [2d Dept 1990]; Shea v Hambro Am. Inc., 200 AD2d 371, 372 [1st Dept 1994] [to recover for tortuous interference, plaintiffs must show that the defendants acted with the sole intent of harming plaintiff "without economic or other lawful excuse or justification"]). Conclusory allegations of intent to harm or lack of justification cannot sustain a tortuous interference claim (Bank Leumi Trust Co. of N.Y. v Samalot/Edge Assocs., 202 AD2d 282, 283 [1st Dept 1994]). Here, plaintiffs allege that defendants intentionally interfered with their claimed right to alter the roof for residential purposes. These allegations are conclusory and without more are insufficient (id.). As such, defendants' motion to dismiss the first cause of action is granted.

"A cooperative board owes a fiduciary duty to its

shareholders, and the issue of whether defendant appropriately discharged that duty or acted unreasonably, ... is one of fact" (Stowe v 19 E. 88th St., Inc., 257 AD2d 355, 356 [1st Dept 1999] [citation omitted]). Plaintiffs are not required to plead that the directors acted in self-interest; rather, pleading of an unequal treatment of shareholders is sufficient (Barbour v Knecht, 296 AD2d 218, 224 [1st Dept 2002]; Bryan v West 81 St. Owners Corp., 186 AD2d 514, 515 [1st Dept 1992]).

Moreover, in the pre-discovery stage of litigation, it is not appropriate to dismiss a claim by invoking the business judgment rule, where plaintiffs have provided more than conclusory allegations concerning defendants' fiduciary duties (Louise Laskin Trust -1991 v 775 Park Ave., Inc., 299 AD2d 264 [1st Dept 2002]; Ackerman v 305 E. 40th Owners Corp., 189 AD2d 665 [1st Dept 1993]; Bryan, 186 AD2d at 515). Further, where, as here, a cooperative's governing documents, namely the Proprietary Lease, mandate that any decision concerning alterations to the Subject Premises and roof "shall not be unreasonably withheld," judicial review must be "under a standard of reasonableness rather than the business judgment rule ordinarily applicable to cooperative board actions" (see Braun v 941 Park Ave., 32 AD3d 21, 24 [1st Dept 2006], citing Ludwig v 25 Plaza Tenants Corp., 184 AD2d 623 [2d Dept 1992]; see also Seven Park Ave. Corp. V Green, 277 AD2d 123, 123 [1st Dept 2000]).

Plaintiffs allege that HSL

> "unreasonably withheld its consent to the proposed alterations for reasons unrelated to the legitimate purposes of [HSL] but rather upon the self-interest of [the Board] to either acquire the Subject Premises for themselves or otherwise tortiously interfere with [p]laintiffs' rights under the Proprietary Lease and the March 8 Agreement, and in violation of their fiduciary duties to [p]laintiffs"

(Amended Complaint, ¶ 29; see also id., ¶ 36). While these allegations are stated in general terms, plaintiffs do allege that the Board did not act in good faith or in the interest of the shareholders.

Accordingly, at this stage of the proceedings, defendants motion to dismiss the second and third causes of action is denied.

Plaintiffs assert that their allegations concerning defendants blanket denial of their request to alter the roof structure is unreasonable and therefore in breach of both the Proprietary Lease and the March 8th Agreement. Here, triable issues of fact exist concerning whether the Board's decision was reasonable and in good faith and therefore within the confines of the agreement (see e.g., Rosenthal v One Hudson Park, Inc., 269 AD2d 144 [1st Dept 2000]; Kravtsov v Thwaites Terrace House Owners Corp., 267 AD2d 154, 155 [1st Dept 1999] [cause of action for breach of proprietary lease sustained where plaintiff's allegations were "sufficient to support an inference of a

violation of the obligation of good faith implicit in any contract"]).

As such, defendants motion to dismiss the fourth cause of action is denied.

Conclusion

Accordingly, it is

ORDERED that the motion by defendants Herald Square Loft Corp., Luis Contreras, David Heeley, Eduardo Bauza, George Brenner and Roman Girod to dismiss the amended complaint is granted in part, and the first cause of action is hereby severed and dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve their answers to the amended complaint within 10 days of receipt of this order with notice of entry.

Dated: 8/21/08

ENTER:

J.S.C.

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK
J.S.C.