Woods v 126 Riverside Drive Corp.

2008 NY Slip Op 32821(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 601631/07

Judge: Jane S. Solomon

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/15/2008

[* 1]

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

PRESENT: Solomon, *Justice* PART 55

Woods

-v-

126 Riverside Drive Corp

INDEX NO. 601631/07

MOTION DATE 3/10/08

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion to/for Compel/SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-10
Replying Affidavits	11-13

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.

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

FILED
OCT 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/14/08

JANE S. SOLOMON, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55
-------------------------------------x
GERARD AND PAMELA WOODS,

Plaintiffs,

-against-

126 RIVERSIDE DRIVE CORP., THE BOARD OF DIRECTORS OF 126 RIVERSIDE DRIVE CORP., jointly and severally, HOFFMAN MANAGEMENT CORPORATION, and John Does 1-10, fictitiously named persons, and ABC Corporations 1-10, fictitiously named business entities,

Defendants.
-------------------------------------x

Index No.: 601631/07

DECISION and ORDER

FILED
OCT 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

JANE S. SOLOMON, J.:

Plaintiffs move to compel disclosure in this lawsuit by the owners of a cooperative apartment unit against the cooperative corporation building owner, its board of directors and managing agent. Defendants cross-moved for summary judgment dismissing the complaint in its entirety. Plaintiffs' motion was addressed in an interim order issued on January 28, 2008. The cross-motion is addressed herein.

Plaintiffs Gerard and Pamela Woods agreed to purchase a penthouse unit in a building located at 126 Riverside Drive in Manhattan, pursuant to a contract for sale dated October 1, 2003 (Sales Contract). David Eisner, the seller, was a lessee-shareholder who had engaged a broker to market the unit. The building is owned by defendant 126 Riverside Drive Corp (126 Riverside). The owner's managing agent was defendant S.A.M

Management Company, s/h/a Hoffman Management Corporation (Managing Agent).

The unit includes exterior roof space, upon which there was a deck at the time plaintiffs agreed to purchase it. The deck had been installed some years earlier. The proprietary lease provides that the lessee shall enjoy exclusive use of the roof adjoining the penthouse, subject to such regulations as may be imposed by the Board of Directors (Proprietary Lease, annexed to Affidavit of Roger D. Olson, Ex D ["Lease"], paragraph 7). The lessee is prohibited from erecting or installing any structure without prior written approval of the Board (id.). The Lease further states that the lessee shall not make alterations to the unit, including the roof, without first obtaining written consent of 126 Riverside, which consent will not be unreasonably withheld (Lease, paragraph 21 [a]).

Plaintiffs allege that they told Mark Hoffman, the principal of the Managing Agent, that the existence of the roof deck was an underlying reason that they desired to purchase and one day reside in the apartment. Defendants allegedly informed plaintiffs that the roof deck was usable, functional, properly built, properly maintained, in compliance with all regulations and safe for its intended purpose (Complaint, paragraph 12). Mr. Woods submits an affidavit opposing the cross-motion in which he states that when plaintiffs were interviewed by the Board in

connection with the purchase, they were told that the roof deck was great for entertaining, and that the previous owner had large parties there. He also claims that before he entered into the sales contract, he was shown photographs of the roof deck by employees of 126 Riverside and the managing agent, and was escorted by these employees while he inspected the roof, and they told him of the many parties held there. These allegations are denied by defendants, who deny ever showing photographs to a potential buyer. Defendants submit the photographs plaintiffs allege they relied on in document production, which photographs clearly are from the internet web site of the seller's broker.

Plaintiffs allege that they learned some time after October 1, 2003 that the roof deck was not usable, functional, etc., (Complaint, paragraph 16), and undertook to correct the roof deck problems. Plaintiffs allege that defendants delayed their effort to correct the issues regarding the roof deck, and delayed them from living in and fully utilizing the unit. They also complain that defendants have caused them to expend "excessive monies" in correcting problems with the roof deck (Complaint, paragraph 19), and that defendants treated plaintiffs differently from other unit owners (Id., paragraph 21). The complaint alleges twelve causes of action, including "breach of duty of care" by the Board of Directors, violation of the business judgment rule, breach of fiduciary duties, breach of

contract, unjust enrichment, breach of implied contract, breach of duty of good faith, misrepresentation, negligent misrepresentation, negligence and fraud.

The Sales Contract between the prior owner and plaintiffs contains a provision stating that plaintiffs agreed to take the unit in "as is" condition (Sales Contract, Section 7). At the closing, plaintiffs agreed to accept an assignment of the proprietary lease from the seller to themselves, which included an agreement that they accepted the unit "as is", that 126 Riverside had no obligation to make any repairs to the unit, and that 126 Riverside had not made any representation to plaintiffs regarding the unit apart from statutory obligations with respect to lead paint (Assumption of Lease, annexed to Olson Aff., Ex F).

In May 2004, plaintiffs sought permission from the Board to make alterations to the interior of the apartment. The Board consented. Approximately two years later, after extensive interior renovations, plaintiffs removed some or all of the roof deck. They sought permission to build a new roof deck that was larger and would include elements not present in the original deck, such as multiple layers of decking, steel beams, built-in planters, a gazebo, privacy fences and alterations to the building's ventilation pipes. Plaintiffs submitted plans for the proposed roof deck to the Managing Agent for Board approval. The plans were sent to an architect for review, who recommended that

the Board not grant approval (Letter of Howard L. Zimmerman Architects, PC ["Zimmerman"], dated June 26, 2006, annexed to Olson Aff., Ex I). After this, plaintiffs' architect submitted revised plans, which Zimmerman also reviewed and recommended against approving. One of the concerns raised by Zimmerman was whether the proposed roof deck was too heavy, and the area under the deck was inspected. In March 2007, plaintiffs' architect consulted a structural engineer, who opined that the proposed deck could be installed, but that no more than ten people should be permitted to use it at a time (Letter of Larry T. Bowman, PE, dated March 19, 2007, annexed to Olson Aff., Ex L). He gave no opinion regarding the number of people who could have used the deck in its smaller original configuration.

Plaintiffs commenced this lawsuit soon thereafter. The gist of their claim is that in October 2003, they desired an apartment with a roof deck on which they could entertain guests, and they were mislead into believing that the penthouse unit in 126 Riverside had such a roof deck. Also, plaintiffs contend that the Board improperly interfered with their efforts to install a new roof deck.

DISCUSSION

The first cause of action alleges that the Board breached a duty of care to manage 126 Riverside responsibly, professionally and in the plaintiffs' best interest, and this resulted in an injury to plaintiffs. As best can be discerned from the complaint, plaintiffs contend that the Board had a duty to inform plaintiffs that the roof deck was not usable before they agreed to purchase the unit, and after the purchase, the Board had a duty to approve plaintiffs' proposed new roof deck without delay. Nevertheless, it appears that no one interfered with plaintiffs' use of the "as is" deck, and the dispute arose when plaintiffs sought to build a dramatically enhanced deck, not a replacement on the original scale.

Neither the complaint, nor plaintiffs' submissions opposing the cross-motion, demonstrate any reasonable reliance upon a defendant's misrepresentation in connection with the purchase. The fraud and misrepresentation claims are not pleaded with the specificity required under CPLR 3016(b).

For example, Mr. Woods claims that he was shown photographs of the roof deck by employees of 126 Riverside and the Managing Agent. The photographs were provided when he visually inspected the roof deck. Plaintiffs give no explanation as to how the photographs created an enhanced expectation, or why they lead plaintiffs to believe that the roof was structurally

[* 8]

sound for the installation of a substantially larger, more elaborate roof deck two years hence. Mr. Woods's affidavit also serves as an admission that he had the opportunity to inspect the roof before entering into the Sales Contract, and long before the closing. The Appellate Division, First Department, has held that where a purchaser had an opportunity to examine the physical condition of the premises before purchasing, he cannot complain that he was induced to purchase by misrepresentation regarding that condition (see, E. End Corp v Roc-East End, 128 AD2d 366 [1st Dept 1987], and 198 Ave. B. Assoc. v Bee Corp., 155 AD2d 273 [1st Dept 1989]).

To make out a claim for unjust enrichment, plaintiffs must show that it is against equity and good conscience to permit defendants to keep that which plaintiffs seek to recover (Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415 [1972]). Plaintiffs do not identify what defendants allegedly have taken, nor any equitable basis for the court to exercise its power to compel defendants to return it. Therefore, the unjust enrichment claim is dismissed.

With respect to defendants' alleged breach of a fiduciary duty, there was no such duty owed to plaintiffs in their purchase of the unit from the prior lessee-shareholder (Messner v 112 East 83rd Street Tenants Corp., 42 AD3d 356 [1st Dept 2007]). The Board's refusal to approve plaintiffs' plans

for a new roof deck also did not constitute a breach of fiduciary duty, for the reasons explained below.

Plaintiffs make no factual allegation to refute defendants' proof that the decision to withhold approval of the new roof deck as proposed was made "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (Levandusky v One Fifth Ave. Corp., 75 NY2d 530, 538 [1990]). The Board's determination was rationally based upon the opinion of the architect it consulted, and the Board's action had a legitimate relationship to protecting the interests of all shareholders. When they executed the Lease, plaintiffs acknowledged and acquiesced to the Board's right to reasonably withhold consent to alterations. Therefore, defendants have shown their conduct was consistent with the proper exercise of judgment under the "business judgment rule", and plaintiffs' claims alleging violations of that rule likewise are dismissed.

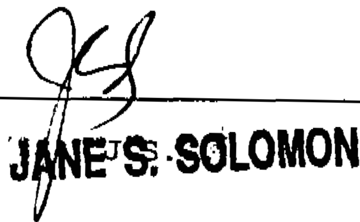
Finally, the negligence claims also are dismissed. In the complaint, plaintiffs allege that defendants failed to properly maintain or supervise maintenance of the premises, thereby causing damage to the roof and the deck, and failed to inform plaintiffs of issues concerning the roof and deck. Plaintiffs allege that the court should not address this issue because discovery is not complete. However, there is no prima

facie claim of negligence. Plaintiffs allege that the roof and deck were not properly designed, built or maintained for "its intended use." Of these, the only shortcoming attributable to 126 Riverside or the Managing Agent is a failure to properly maintain the roof, but the claim made by plaintiffs, however, is that the roof will not support the enhanced deck they want(there is no dispute that the roof supported the original deck). On these facts, defendants have no duty to provide a roof structurally capable of supporting plaintiffs' proposed roof deck. Plaintiffs other arguments have been considered, and are unavailing. Accordingly, it hereby is

ORDERED that defendants' cross-motion for summary judgment is granted, and the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements to defendants as taxed.

Dated: October 14, 2008

ENTER



JANE S. SOLOMON

FILED
OCT 15 2008
COUNTY CLERK'S OFFICE
NEW YORK