

Espinal v 484 West 165th St. Hous. Fund Dev. Corp.
2009 NY Slip Op 30614(U)
March 18, 2009
Supreme Court, New York County
Docket Number: 108307/07
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 108307/2007
ESPINAL, GENARO
vs
484 WEST 165TH ST.
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. 108307/07
MOTION DATE _____
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-L
Answering Affidavits — Exhibits 1-32
Repeating Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

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

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

FILED
MAR 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 18, 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

2]
SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
GENARO ESPINAL and JULIO A. ARAUJO,

Plaintiffs,

Index No.: 108307/07

-against-

Decision and Order

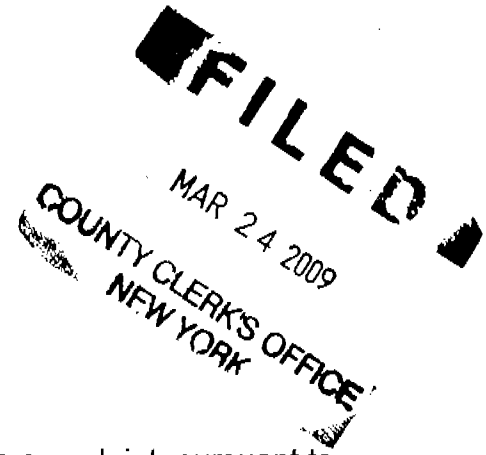
484 WEST 165TH STREET HOUSING FUND
DEVELOPMENT CORPORATION ("HDFC") and
JOSE A. PEREZ, FEDERICO JIMENEZ, MARIA
JIMENEZ, as HDFC board members,

and

ANA TAPIA, JANINI LUGO, as individuals,

Defendants.

-----X
SHULMAN, J.



Defendants seek summary judgment dismissing the complaint, pursuant to CPLR 3212, as well as an order directing plaintiffs to turn over all corporate books and records in their possession that pertain to defendant 484 West 165th Street Housing Development Fund Corporation, plus attorneys' fees. Plaintiffs oppose the motion.

Plaintiffs are residents and shareholders of the defendant 484 West 165th Street Housing Fund Development Corporation ("HDFC"), and have asserted several causes of action against the defendants, who include both board and non-board members. It is noted that the complaint does not divide or specify the causes of action, but contains 55 paragraphs and prayers for nine forms of relief. Defendants, in the instant motion, have divided plaintiffs' claims into eight causes of action, and plaintiffs have responded according to defendants' characterization. Therefore, in order to decide this motion in

the most efficient manner, the court will follow the parties' allocation of claims and defenses.

The defendants' motion is supported with an affirmation of the attorney representing defendants, plus the complaint, answer, notice to admit, minutes of the board, board resolutions relating to the sale of shares, responses to plaintiffs' notice to produce, demands for production, regulatory agreement between the Department of Housing Preservation and Development and defendant corporation, a stipulation between defendant and plaintiffs, and a copy of the proprietary lease for the cooperative.

DISCUSSION

CPLR 3212 (b) states, in pertinent part:

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings, and by any other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.

Although it is well-settled that "an attorney's affirmation may be used as a vehicle to introduce documentary evidence in support of a motion for summary judgment" (*Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324, 325 [1st Dept 2004]); *Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 [1st Dept 2006]), an affirmation of an attorney who has no personal knowledge of the facts has no probative value with respect to details not contained in the supporting documents. See *Oquendo v Rosgro Realty Corp.*, 117 AD2d 528 (1st Dept 1986). As a consequence, only those items in

the instant motion that are supported by documentary evidence may be determined by the court. Each of the causes of action will be discussed in turn.

(1) Removal of the board members for breaches of fiduciary duty.

Defense counsel asserts that defendants Federico Jimenez and Maria Jimenez are no longer board members, and so this action should be deemed moot as to them. However, since some of the actions complained of occurred while they were board members, the action cannot be dismissed against them simply because, at this point, they are no longer on the board.

The other assertion of defense counsel concerns four uses of corporate funds complained of by plaintiffs, to which counsel states that “[d]efendants have initiated good faith efforts to fully address alleged building Code complaints ... (Aff. at 12).” However, this is a conclusory statement, and the attorney does not indicate how he would have such knowledge, nor do the documents attached to the motion address this issue. Therefore, summary judgment with respect to this cause of action is denied.

(2) Remove Jose A. Perez as managing agent because in his dual role as board president and managing agent he has failed to live up to his responsibilities and fiduciary duties.

This is a conclusory statement on plaintiffs' part, and fails to state a cause of action. Therefore, summary judgment with respect to this cause of action is granted, based on the allegations in the complaint.

(3) Plaintiffs should be allowed to examine corporate books and records.

Counsel for defendants states that plaintiffs were afforded the opportunity to examine the books at counsel's office on October 16, 2007, and that the motion papers

include defendants' response to plaintiffs' document requests. However, plaintiffs assert that the opportunity to examine the books was limited and rushed, and that they were not allowed to copy the materials. Further, the proprietary lease allows the shareholder to examine these documents, which plaintiffs assert they have not been allowed to do. This raises a question of fact as to whether plaintiffs have had the opportunity to inspect all of the relevant books and records precluding summary judgment on this cause of action.

(4) To undo the sales of the vacant apartments in the building that were sold to immediate family members of the board.

The facts are undisputed that two of three vacant apartments were sold to family members of the board. However, because those persons may qualify as shareholders, this does not mean that the board members automatically self-dealed by selling the units to their relatives. This raises a question of fact precluding summary judgment.

(5) To have the board issue a Certificate of Shares and Proprietary Lease to Julio A. Araujo under his name for apartment #2-A.

In his answer to the instant motion, plaintiff Araujo admits that he did receive these shares on June 8, 2008 (Answer, ¶ 90), thereby rendering this cause of action moot.

(6) An order to have defendants cease and desist from harassing, intimidating, defaming and provoking plaintiffs and from interfering with Julio A. Araujo's covenant of quiet enjoyment.

In a civil action, a cause of action for harassment is deemed to be one for the intentional infliction of emotional distress. See generally *Cavallaro v Pozzi*, 28 AD3d 1075 (4th Dept 2006); *Bunker v Testa*, 234 AD2d 1004 (4th Dept 1996).

To state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct must be so outrageous in character and extreme in degree so as to surpass the limits of decency so as to be regarded as outrageous and intolerable in a civilized society [internal quotation marks and citations omitted].

Leonard v Reinhardt, 20 AD3d 510, 510 (2d Dept 2005). In the instant matter, plaintiffs have failed to allege the extreme or outrageous conduct necessary to support this cause of action.

In order to maintain a cause of action for defamation, the claimant must allege in the complaint the particular words complained of and the time, place and manner in which the words were stated must be set forth clearly. *Rosenberg v Home Box Office, Inc.*, 33 AD3d 550 (1st Dept 2006). This the complaint fails to do, and the requirements for alleging a cause of action for libel or slander are strictly construed. *MaNas v VMS Associates, LLC*, 53 AD3d 451 (1st Dept 2008).

To state a cause of action for breach of the covenant of quiet enjoyment, the person claiming the injury must allege actual or constructive eviction, which is not alleged in the instant matter. See *Duane Reade v Reva Holding Corp.*, 30 AD3d 229 (1st Dept 2006). For all of the foregoing reasons, defendants' motion for summary judgment with respect to the sixth cause of action is granted.

(7) An order enjoining defendants from using corporate funds to defend the lawsuit.

This cause of action has been addressed in the court's decision with respect to motion sequence number 005, and is therefore moot.

(8) Punitive damages.

Punitive damages may not be sought as a separate cause of action. *Weir Metro Ambu-Service, Inc. v Turner*, 57 NY2d 911 (1982); *Tobias v. Tobias*, 192 AD2d 911 (1st Dept 1993). Thus, the eighth cause of action must be dismissed.

Defendants also seek an order directing plaintiffs to turn over to the current board all books and records of HDFC in their possession. However, plaintiffs affirm that all books and records in their possession were turned over to defendant Jose A. Perez on October 1, 2006 (Opp at 35 and 36). Consequently, this request is deemed moot, unless defendants can identify particular records that they allege are still missing.

Lastly, defendants seek attorneys' fees for this action. In support of this prayer for relief, defendants cite to the Proprietary Lease, section 6.01 (c). However, this section of the Proprietary Lease provides for attorneys' fees in situations in which the board must sue a resident for breach of the resident's obligations, which is not the situation in the case at bar. Further, section 6.01 (c) refers to subsections (a) and (b), but there is no subsection (b) appearing in the submitted lease. Consequently, this prayer for relief is denied, without prejudice, to renew at the conclusion of this litigation with the complete Proprietary Lease.

Based on the foregoing, it is hereby

ORDERED that defendants' motion seeking summary judgment is granted to the extent of granting partial summary judgment in favor of defendants and against plaintiffs, dismissing the second, sixth and eighth causes of action; and it is further

ORDERED that defendants' motion seeking summary judgment is denied with respect to the first, third and fourth causes of action; and it is further

ORDERED that plaintiffs' fifth and seventh causes of action are deemed moot; and it is further

ORDERED that the portion of defendants' motion requesting that plaintiffs turn over to the current board all books and records they possess relating to 484 West 165th Street HDFC is deemed moot; and it is further


ORDERED that defendants' request for attorneys' fees is denied, without prejudice; and it is further

ORDERED that the action shall continue as to the first, third and fourth causes of action.

The parties are directed to appear for a status conference on April 21, 2009 at 2:15 p.m. at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

This constitutes the decision and order of the court. Courtesy copies of this decision and order have been sent to the parties or their counsel.

DATED: March 18, 2009



Martin Shulman, J.S.C.

FILED
MAR 24 2009
COUNTY CLERK'S OFFICE
NEW YORK