[* 1]

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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Index Number : 111693/2004

WEISSMAN, JOEL

VS.

20 EAST 9TH STREET

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 is determined in accordance with the annexed decision and order.

FILED
APR 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: March 25, 2009

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 11

----------X

JOEL WEISSMAN, as Trustee of the Faye Levine Supplemental Needs Trust and as Executor of the Estate of Lillian H. Levine, MINA MCEVOY, Individually, and as Trustee of the Fay Levine Supplemental Needs Trust and as Executor of the Estate of Lillian H. Levine, and FAYE LEVINE,

INDEX NO. 111693/04

Plaintiffs,

-against-

20 EAST 9TH STREET CORPORATION,

Defendant.

----------X

JOAN A. MADDEN, J.:

This case raises troublesome issues involving a mentally ill 64-year old woman who is at risk of losing the home she has occupied in a cooperative building for more than 32 years, and the competing interests of the cooperative shareholders. In view of a decision on an appeal in this action granting a conditional order of preclusion, plaintiffs are barred from presenting evidence as to plaintiff Faye Levine's mental condition in connection with her claims that defendant discriminated against her based on her mental disability. Thus, the court's ability to consider Ms. Levine's mental condition in fashioning a remedy which considers her interests in preserving her home, while at the same time protecting the interests of defendant cooperative corporation, is severely limited.

As the First Department Appellate Division has already held, plaintiff Faye Levine suffers from "significant mental illness." Weissman v. 20 East 9th Street Corp., 48 AD3d 242, 243 (1st Dept 2008). Specifically, the record indicates that Ms. Levine has been clinically diagnosed as

having bi-polar disorder, psychotic episodes, and "schizoaffective disorder," which causes, *inter alia*, delusional and paranoid behavior. In 1976, Faye Levine's mother, Lillian Levine, purchased, as the shareholder, apartment 8T in the cooperative building known as 20 East 9th Street, for Faye's exclusive use and occupancy. Lillian Levine also created a Supplemental Needs Trust for Faye's benefit, designating another daughter, plaintiff Mina McEvoy, and her accountant, plaintiff Joel Weissman, as trustees. Lillian Levine died in November 1999 and her will provided for the transfer of her ownership interest in the apartment to the trustees, McEvoy and Weissman, with Faye Levine retaining use of the apartment for the duration of her lifetime.

In April 2001, McEvoy submitted an application to defendant 20 East 9th Street Corporation, the cooperative corporation which owns the building, to transfer to the trust the shares and the proprietary lease for the apartment, which defendant denied. On or about March 28, 2004, McEvoy submitted a second application to transfer the shares and proprietary lease to herself individually, which defendant denied on July 22, 2004.

Meanwhile, in February and August 2004, defendant served McEvoy and Weissman, as the executors of Lillian Levine's estate, with termination notices, seeking to terminate the proprietary lease based on the executors' alleged failure to provide for a timely transfer of the apartment after the death of Lillian Levine, in accordance with paragraph 31(b)(v) of the proprietary lease.[1] In 2004, defendant commenced two separate summary holdover proceedings

---

[1]Paragraph 31(b)(v) gives the cooperative corporation the right to terminate the proprietary lease upon the happening of certain specified events, including:

> (v) the lease or any of the shares to which it is appurtenant shall pass by operation of law or otherwise to anyone other than the Lessee herein named or a person to whom such Lessee has assigned this lease in the manner herein permitted, but this subsection (v) shall not be applicable if this lease shall devolve upon the executors

in Civil Court, against McEvoy and Weissman, as executors of the estate of Lillian Levine, both of which were dismissed.[2]

On or about August 13, 2004, plaintiffs commenced the instant action against the cooperative corporation, asserting eight causes of action for discrimination in housing based on Faye Levine's mental disability, in violation of federal, state and local laws, and for violations of the proprietary lease. The complaint seeks damages, and declaratory and injunctive relief, including an order compelling defendant to consent to the transfer to McEvoy. Defendant answered the complaint and asserts counterclaims for ejectment and possession of the apartment,[3] attorneys fees and a declaration that "its denial of the McEvoy transfer application was in the proper exercise of its business judgment, and reasonable."

---

shall have been transferred to any assignee in accordance with Paragraph 16 hereof.

[2]The record contains a copy of a June 2, 2004 order of the Hon. Gerard Lebovits, dismissing the first summary holdover proceeding on the ground that petitioner coop "manifested a knowing and voluntary waiver of its right to bring this proceeding relying on its current termination notice" served on February 11, 2004, by sending McEvoy a transfer application on February 23, 2004, which was after the February 20, 2004 termination of the lease and before the March 2, 2004 commencement of the summary proceeding. 20 East 9th Street Corp. v. McEvoy, Civil Court of the City of New York, County of New York, Index No. 058610/2004.

The record does not contain a copy of the order dismissing the second summary holdover proceeding, so it unclear why that proceeding was dismissed. However, the grounds for termination in the second termination notice which is dated August 4, 2004, appear to be identical to those in the first notice, as the second notice states that "you are currently in violation of paragraph 31(b)(v) of your proprietary lease . . . by reason of the fact that the . . . lease and the stock certificate . . . have passed by operation of law to the Estate of Lillian H. Levine, and that more than eight (8) months have passed since the death of Ms. Levine without the stock and lease being transferred in accordance with paragraph 16 of said proprietary lease."

[3]The Second Counterclaim seeks possession of the apartment on the identical grounds grounds as the two summary holdover proceedings, i.e. termination of the proprietary lease by "a written notice dated August 4, 2004," in accordance with paragraph 31(b)(v), based on the estate's failure to transfer the apartment within eight months of Lillian Levine's death.

On September 13, 2006 and February 8, 2007, another justice of this court issued discovery orders directing Faye Levine to submit to a medical examination by defendant's psychiatrist. When Ms Levine failed to comply, defendant's motion to dismiss the complaint was granted by an order dated June 14, 2007.[4] Plaintiffs appealed, and on February 7, 2008, the Appellate Division First Department modified the underlying order, "to grant the motion [to dismiss] to the extent of precluding plaintiffs from presenting evidence at trial of plaintiff Faye Levine's medical condition, or of defendant's alleged discrimination based on that condition, unless Faye Levine is produced for a medical examination by defendant's psychiatrist within 90 days of service of a copy of this order, in which event the motion for sanctions denied and the complaint and counterclaims reinstated." Weissman v. 20 East 9th Street Corp., supra at 243. The First Department determined that "[t]he remedy of striking a complaint pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party demonstrates that the non-disclosure was willful, contumacious or due to bad faith. Here, plaintiff Faye Levine failed to appear for an independent medical examination by defendant's psychiatrist due to significant mental illness, not willful or contumacious behavior. Accordingly, a sanction short of dismissal of the complaint, but one commensurate with Faye Levine's failure to appear for an independent medical examination, is warranted if Faye Levine fails to appear for such an examination as directed above [citations omitted]." Id.

On February 13, 2008, defendant's counsel served notice of entry of the First Department's order, which triggered the 90-day time period for Faye Levine to appear for the

---

[4]The order dismissing the complaint also severed defendant's counterclaims with leave to re-file in Civil Court.

examination. Also on February 13, 2008, defendant's counsel wrote to plaintiffs' counsel offering three alternative dates for the examination, with a reminder as to the consequences of Ms. Levine's failure to cooperate. By letter dated February 26, 2008, plaintiffs' counsel responded that he had "spoken with Dr. Mark Novick [Levine's treating psychiatrist] who has scheduled Faye Levine for an appointment in his office on March 18, 2008 at 2:00 p.m. Dr. Novick scheduled this appointment to facilitate Dr. Schwartz' IME."

Faye Levine failed to appear for the examination on March 18, 2008. On March 24, 2008, defendant's counsel wrote to plaintiffs' counsel that "Dr. Schwartz appeared at Dr. Novick's offices even though Dr. Novick had earlier advised Dr. Schwartz that Levine had no intention of appearing before him. In a further effort to conduct the IME, both Drs. Novick and Schwartz even went to the building and knocked on her door later that afternoon but were greeted with silence." Defendant's attorney advised that "while it appears that there is little realistic prospect that Levine will ever appear for her IME within the 90 day examination period . . . , Dr. Schwartz will continue to make himself available for Levine's IME at a mutually convenient date/time/place, including at the offices of Dr. Novick, for the duration of said 90 day examination period. We are constrained, however, to remind you that we intend to avail ourselves of the preclusionary remedy provided to the Co-op in the Order should the 90 day examination period delineated in the Order conclude without Faye Levine having been produced for her IME." The letter noted that the 90-day period would expire on May 19, 2008.

Defendant's counsel received no response to his March 24, 2008 letter, and on April 24, 2008, he again wrote to plaintiffs' counsel that "[t]o date you have not offered to make Levine available for the IME. Accordingly, we again remind you that after May 19, 2008, we intend to

avail ourselves of the preclusionary remedy." Defendant's counsel again received no response, and Ms. Levine was not produced for the IME within the 90-day period mandated in the First Department's order.

Defendant is now moving for summary judgment dismissing the complaint, based upon the effect of the First Department's order.[5] The motion is granted in part, with respect to the first, second, third and fourth causes of action for discrimination, since the court is constrained by First Department's order expressly directing preclusion upon plaintiffs' failure to comply with the condition.

As the First Department's conditional order of preclusion was self-executing, plaintiffs' failure to produce Faye Levine for a medical examination by defendant's psychiatrist within 90 days, rendered the order absolute, see Wilson v. Galicia Contracting & Restoration Corp., 10 NY3d 827 (2008), Northway Engineering, Inc. v. Felix Industries, Inc., 77 NY2d 332, 334 (1991), Calder v. Cofta, 49 AD3d 484 (2nd Dept 2008), VSP Assocs, P.C. v. 46 Estates Corp., 243 AD2d 373 (1st Dept 1997), and plaintiffs are now precluded "from presenting evidence at trial of plaintiff Faye Levine's medical condition, or of defendant's alleged discrimination based on that condition." Since the conditional order of preclusion now prevents plaintiffs from making out a prima facie case with respect to Ms. Levine's claims of disability discrimination, defendants are entitled to summary judgment dismissing the discrimination claims. See Calder v. Cofta, supra at 485; Koslosky v. Khorramian, 31 AD3d 716 (2nd Dept 2006); Echevarria v. Pathmark Stores, Inc., 7 AD3d 750, 751 (2nd Dept 2004).

---

[5]The case was not assigned to this court until after the 90-day period expired and defendant submitted the instant summary judgment motion.

Defendant is also moving for summary judgment dismissing the balance of the complaint, asserting claims for breach of the proprietary lease. Specifically, the fifth cause of action alleges that defendant violated paragraph 16(b) of the proprietary lease by unreasonably withholding its consent to Mina McEvoy's application to transfer the apartment to herself individually, and seeks a judgment compelling defendant to consent to such transfer. The sixth cause of action is for breach of the implied covenant of good faith and fair dealing, and seeks recovery of the $850 application fee McEvoy paid defendant.[6] The seventh cause of action seeks attorneys fees based on defendant's breach of the proprietary lease and Real Property Law §234. Since those claims do not depend on any alleged discrimination against Faye Levine, they are not affected by the First Department's conditional order of preclusion.

Defendant is not entitled to summary judgment dismissing those claims, as triable issues of fact exist as to whether defendant unreasonably withheld its consent to the transfer of the apartment to McEvoy, individually, in violation of paragraph 16(b) of the proprietary lease.[7] See Stowe v. 19 East 88th Street, Inc., 257 AD2d 355, 356 (1st Dept 1999). Paragraph 16(b) of the proprietary lease provides that "[i]f the Lessee shall die, consent shall not be *unreasonably* withheld to an assignment of the lease and shares to a financially responsible member of the Lessee's family (other than the Lessee's spouse as to whom no consent is required) [emphasis

---

[6]To the extent the sixth cause of action includes an allegation that defendant "in bad faith due a discriminatory reason denied approval for the transfer," plaintiffs are precluded from relying on any alleged discrimination to support that claim.

[7]Plaintiffs' claim for breach of paragraph 16(b) of the proprietary lease, challenges only the denial of the second application for the transfer of the apartment to McEvoy, individually. The court, therefore, will not address any of the issues raised by defendant regarding McEvoy's first application to transfer the ownership interest in the apartment to the trust, as provided in her mother's will.

added]." In light of this provision, defendant cannot justify its refusal to approve the transfer to McEvoy individually, merely by asserting that it exercised its "business judgment." See id. Rather, pursuant to paragraph 16(b), the business judgment rule does not preclude material issues of fact from being tried against the standard of reasonableness called for in the proprietary lease. See id. A cooperative board owes a fiduciary duty to its shareholders, and the issue of whether defendant appropriately discharged that duty or acted unreasonably with respect to McEvoy in her capacity as the deceased shareholder's daughter and the executor of her mother's estate, is an issue of fact. See id; Demas v. 325 West End Avenue Corp., 127 AD2d 476 (1st Dept 1987).

Citing paragraph 31(b) of the proprietary lease, defendant contends that paragraph 16(b) is not applicable to this case, and that the business judgment rule protects its decision denying McEvoy's application. Defendant argues that under paragraph 31(b), if the lease is not transferred within eight months of the shareholder's death, the family members of a deceased shareholder forfeit their preferential right to acquire the apartment pursuant to paragraph 16(b). The court rejects defendant's argument. Paragraph 31(b) simply gives defendant the option to *terminate* the proprietary lease after a shareholder's death, if a transfer pursuant to paragraph 16, in general, has not occurred within eight months thereafter. However, paragraph 16(b), by its clear and express terms, imposes no time limitation on a family member's right to seek assignment of the lease and the defendant's obligation to not unreasonably withhold its consent to such assignment. See Stowe v. 19 East 88th Street, Inc., supra.

In the alternative, defendant argues that even if the reasonableness standard of paragraph 16(b) is applicable, it acted in a reasonable manner when it rejected McEvoy's transfer application on the ground that Faye Levine's continued occupancy of the apartment "would place

the safety and welfare of the shareholder community at risk because she had engaged in objectionable conduct." The court, however, cannot determine as a matter of law that defendant acted in a reasonable manner in rejecting McEvoy's application. Rather, the issue of whether defendant appropriately discharged its fiduciary duty to the shareholders or acted unreasonably, "is by its very nature one of fact." Demas v. 325 West End Avenue Corp., supra at 478; accord Stowe v. 19 East 88th Street, Inc., supra at 356. Thus, defendant's motion for summary judgment is denied as to the fifth, sixth and seventh causes of action.

Notwithstanding the foregoing conclusions, it appears that the conditional order of preclusion does not address the underlying issue that Ms. Levine's failure to submit to a medical examination was "due to significant mental illness, not willful or contumacious behavior." Weissman v. 20 East 9th Street Corp., supra at 243. Here, the record establishes that Ms. Levine is unable to comply with the condition necessary to prevent preclusion and ultimately dismissal of her discrimination claims, by submitting to an examination. In other words, Ms. Levine can only maintain her claims for mental disability discrimination if she appears for a psychiatric examination, but she is unable to do so precisely because she is mentally disabled.[8] However, while the instant motion was *sub judice*, Ms. Levine has been hospitalized and plaintiffs have moved for an order directing defendant to avail itself of the opportunity to have its psychiatrist

---

[8]The court notes that the Second Department has taken a different approach to this dilemma. In Flaherty by Flaherty v. Qlins Leasing Inc., 91 AD2d 970 (2nd Dept 1983), the Second Department held that where the "plaintiff is in fact, unable to appear for the examinations by reason of his mental condition, in that he lacks the capacity to 'refuse. . . to obey an order for disclosure,' or to 'wilfully fail . . . to disclose information which the court finds ought to have been disclosed' (CPLR 3126)," either sanction of dismissing the complaint or precluding plaintiff from introducing at the trial evidence of his alleged mental disability, "would be inappropriate." Id at 971.

examine Ms. Levine during her hospitalization (motion sequence no. 005). The court is simultaneously issuing a decision granting that motion, as Ms. Levine's medical condition is relevant to the issues raised in defendant's first counterclaim for "a declaration that its denial of the McEvoy transfer application was in the proper exercise of its business judgment, and reasonable." Those issues were not addressed in First Department's preclusion order, which was limited to plaintiffs' discrimination claims. Although the court is directing defendant to take advantage of the opportunity to conduct the examination of Ms. Levine, the court makes no determination as to whether such examination impacts on the issues herein.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted only to the extent of severing and dismissing the first, second, third and fourth causes of action in plaintiffs' complaint; and it is further

ORDERED that defendant's motion for summary judgment is denied as to the fifth, sixth and seventh causes of action in plaintiffs' complaint.

DATED: March 25, 2009

ENTER:

J.S.C.