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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 105143/2008

SPECHT, TOBIE

vs

LANZUTER BENEVOLENT SOCIETY

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE 2/3/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____ PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants Lanzuter Benevolent Association and Benjamin Sauerhaft, Solomon Sauerhaft and Philip Kubert, pursuant to CPLR §3211(a)(1) to dismiss the complaint of plaintiffs Tobie Specht, Sylvia Glenn, Leonard Fortgang, Stanley Gartenhaus, Edith Gartenhaus, Arthur Silverstein and Janice Silverstein, at least 10% of the Members of Lanzuter Benevolent Association, and in the right of all other members of Lanzuter Benevolent Association, is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiffs within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/15/10

HON. CAROL EDMEAD J.S.C.

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

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 35

----------X

TOBIE SPECHT, SYLVIA GLENN, LEONARD FORTGANG, STANLEY GARTENHAUS, EDITH GARTENHAUS, ARTHUR SILVERSTEIN and JANICE SILVERSTEIN, at least 10% of the members of LANZUTER BENEVOLENT ASSOCIATION,

And in the Right of
All Other Members of LANZUTER BENEVOLENT ASSOCIATION,

Plaintiffs,

-against-

LANZUTER BENEVOLENT ASSOCIATION and BENJAMIN SAUERHAFT, SOLOMON SAUERHAFT and PHILIP KUBERT,

Defendants.

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Index No. 105143/08
Sequence 001

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs Tobie Specht and other similarly situated members of Lanzuter Benevolent Association, a.k.a. as Lanzuter Benevolent Society ("plaintiffs"), commenced this action against defendants, Lanzuter Benevolent Association ("Lanzuter" or the "Association") and its directors Benjamin Sauerhaft, Solomon Sauerhaft and Philip Kubert ("individual defendants") (collectively, "defendants"), alleging breach of fiduciary duty, conversion, breach of a contract, demand for accounting, vacatur of actions and elections, a permanent injunction and judicial dissolution.

Defendants now move to dismiss the complaint pursuant to CPLR §3211(a)(1) on the ground that plaintiffs failed to comply with the internal dispute resolution procedures set forth in the Association's by-laws (the "by-laws").

Background

Lanzuter is a New York unincorporated association, organized in 1889, consisting of approximately fifty members. It was formed to provide financial assistance to its members for the expenses associated with Jewish Orthodox funerals and tombstones and managing the allocation of the burial plots at the cemeteries to its departed members or their relatives.[1] The Association is funded through annual dues of its members and has assets of approximately $200,000. Individual defendants, as directors of the Association, exercise full control over the assets and approximately 500 unused grave plots.

According to the complaint, beginning approximately in 1999, defendants violated the Association's constitution and by-laws by not holding the annual elections of its officers and the quarterly meeting of its members, by not giving notice to all members of the informal meetings that were held among the directors and by not establishing the committees. Further, defendants did not follow the procedures set forth in the by-laws for admitting new members and depriving the existing members of their memberships which resulted in the inconsistences as to the identities and number of the members. Additionally, defendants improperly distributed the plots to non-members, allegedly for personal compensation. And, since approximately 1999, defendants neither distributed any burial plots to the members, nor accepted any new members to the Association. The complaint also alleges that, without the proper authorization, defendants improperly allocated to themselves thousands of dollars of the association's monetary assets and authorized "donations" to certain entities and individuals.

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[1] The facts are taken from plaintiffs' second amended complaint.

Thus, plaintiffs bring this suit for, *inter alia*, breach of fiduciary duty, breach of a contract and judicial dissolution. Although, as plaintiffs acknowledge, the by-laws set forth the internal procedures for resolving the disputes between the Association's members, plaintiffs allege that they should be excused from following those procedures because the very members who are authorized to handle the disputes are the same individuals engaged in the above-mentioned wrongdoings.

In their motion, defendants assert that, based on the documentary evidence, *i.e.*, Lanzuter's constitution and by-laws, plaintiffs failed to comply with the procedures for internal dispute resolution and therefore, should not be permitted to seek relief from this court without first making an appeal to the Association itself.[2] Article XI, "Complaints," of the by-laws states in relevant part:

> § 1. The Society will only mediate such complaints as are obnoxious to the Society or its members, also, grievances between one brother and another.
>
> § 2. A complaint, in order to receive attention, must be in written form, signed by seven members, [. . .] and brought forth at an open meeting. The President and Vice President shall each select 3 and 2 members respectively to act as a committee. . . .

Defendants argue that plaintiffs' allegations fall within the scope of the complaints between the association and the members, *i.e.*, "obnoxious to the Society" and concern disagreements between members, *i.e.*, "grievances between one brother and another." The complaints could have been resolved expeditiously since the by-laws provide for such complaints

[2] A copy of the constitution and by-laws attached as exhibit A to the motion.

to be resolved within two months while the current litigation has been continuing for more than eight months.[3]

In opposition, plaintiffs contend that, as an initial matter, the motion should be denied on procedural grounds as untimely and improper since a September 29, 2009 order by this court directed defendants to "answer" the second amended complaint by November 30, 2009 and said order did not give defendants an option to file a motion instead of the answer. In addition, the instant motion was filed on December 30, or one month after the answer was due.

Further, plaintiffs contend that, even assuming the motion is proper and timely, it is nonetheless without merit because (1) there is a question of fact as to which of the existing versions of by-laws govern at the present time;[4] (2) even according to the by-laws relied on by defendants, those by-laws do not *require* plaintiffs to submit their complaint to Lanzuter prior to commencing litigation, as they "simply set forth the types of complaints and grievances that Lanzuter will mediate" (Opposition, ¶ 5); (3) even if required to raise the complaint with Lanzuter first, plaintiffs should be excused from such requirement as it is unlikely that the Lanzuter directors would be taking actions against themselves, as wrongdoers, and thus, filing the complaint with Lanzuter would be futile; and (4) plaintiffs attempted to avoid litigation by sending a letter dated March 14, 2008 to defendants outlining their grievances and requesting the

[3] The original Complaint was filed with this court on 04/10/2008.

[4] Defendants' motion includes one copy of the by-laws attached as exhibit A. However, plaintiffs submit two different versions of the bylaws (exhibit B to Opposition), one of which is identical to the by-laws in defendants' exhibit A. The second version appears to be different in that the article "Complaint" is numbered X instead of XI and contains only five paragraphs instead of nine in the first version. The cited above provision in paragraph one appears to be substantively unchanged.

production of certain financial documents. Thus, plaintiffs contend that they are not precluded from seeking relief from this court.

Discussion

As a threshold matter, by this court's order dated September 29, 2009 (the "order"), defendants were directed to answer the second amended complaint by November 30, 2009 (exhibit A to Opposition). "A[n] [order]which extends the time in which to answer the complaint also extends the time in which to move, unless a contrary intent is clearly stated (*Rich v Lefkovits*, 56 NY2d 276 [1982]; *Santos v Chappell,* 63 Misc 2d 730 [Sup Ct Nassau County 1970]; Siegel Practice Commentary § 272). However, CPLR § 3211 (e) provides that defendant's motion against a claim must be made within the responding time. Thus, defendants had until November 30, 2009 either to answer or to make a pre-trial motion. In the absence of showing good cause for an extension of time, a motion to dismiss served after the time when service of the answer was required would be denied as untimely (*Smith v Pach*, 30 AD2d 707 [2d Dept 1968]; *Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc., et al.*, 2005 WL 5351322 (Trial Order) [Sup Ct, New York County Apr 01, 2005; CPLR §2004; CPLR §3211 (e)). Here, defendants offered no reasonable excuse or explanation for their delay in filing this motion, which filing was made 30 days after the answer was due. Thus, denial of defendants' motion on the ground of untimeliness alone is warranted.

CPLR §3211 (a)(1): Defense founded upon documentary evidence.

Pursuant to CPLR §3211 (a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Under the rule, a dismissal is warranted only when the "documentary evidence

submitted *conclusively* establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

To defeat a pre-answer motion to dismiss, the opposing party is only required to allege facts that fit within any cognizable legal theory (*Ladenberg Thalman & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243 [1st Dept 2000]; *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Furthermore, if any question of fact exists as to the meaning and intent of the document, based on the documentary evidence presented to the court, a dismissal pursuant to CPLR §3211 (a)(1) is precluded (*see Khayyam v Doyle*, 231 AD2d 475 [1st Dept 1996]).

Based on the documentary evidence presented to the court, *i.e.*, the by-laws of the Association, defendants failed to establish that plaintiffs failed to comply with the alleged internal dispute resolution procedures set forth in the by-laws, precluding dismissal of the action pursuant to CPLR §3211 (a)(1).

The by-laws of an association have the force and effect of a contract and may be enforced as such between the members (*Stony Brook Shores Property Owners Ass'n, Inc. v Liscia*, 169 AD2d 712 [2d Dept 1991]). The rules of the contract interpretation are generally applicable to the interpretation of the bylaws (*Perlbinder v Board of Managers of 411 East 53rd Street Condominium*, 65 AD3d 985 [1st Dept 2009]; *Residential Committee of Bd. Of Managers of the Sycamore v 250 East 30th Street Owners*, 17 Misc 3d 1139, 856 NY2d 26 (Table) (Sup Ct New

York County 2007]; *Fezell v National Rifle Association of America*, 2/23/98 NYLJ 28 (col. 3) [1st Dept 1998], *citing* NY Jur 2d, Business Relationships, § 128).

Here, based on the plain reading of the relevant provisions of the by-laws, the by-laws do not expressly *require* Lanzuter's members to address their present complaint to the Association's board of directors prior to commencing litigation (*see Ewen v MacCherone and Caterina International, Ltd.*, 2009 WL 4432449 [NY City Civ Ct 2009] [while the bylaws stated that the board had the right to commence legal action to remedy a violation, the bylaws did not state that the board had the sole and exclusive right to commence that action]).

In adjudicating the rights of parties to a contract, courts may not fashion a new contract under the guise of contract construction (*Camaiore v Farance*, 50 AD3d 471 [1st Dept 2008]), *quoting Slatt v Slatt*, 64 NY2d 966 [1985]). "[A] contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition" (*Rooney v Slomowitz*, 1 AD3d 864, 784 NYS2d 189 [3d Dept 2004] citing *Unigard Security Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581, 584 NYS2d 290 [1992]). "The court cannot imply [a] condition that the parties chose not to insert in their contract" (*Camaiore v Farance*, at 471-472, *quoting Nichols v Nichols*, 306 NY 490, 496 [1954]).

Unlike the remaining articles in the by-laws, which, almost exclusively, contain language mandating the members to strictly abide by the rules and procedures of the "Society,"[5] the relevant provision does not contain similar language of a mandate or prohibition, giving Lanzuter's board of directors the exclusive right to resolve disputes. Rather, it defines the kinds

[5] See, for example, Article IV: " The Inner Guard *shall admit* only such members to the meeting who give [a] password. Those unable to give the pass-word *shall be excluded.*"

of disputes that the board will consider mediating: "The Society will only mediate such disputes that are obnoxious to the Society or its members, also grievances between one brother and another." And the provisions that follow set forth the procedures for bringing such complaints, *i.e.*, a complaint "must be in written form, signed by seven members, in duplicate and brought forth at an open meeting. . . ." Contrary to defendants' contention, this language does not condition the filing of an action or lawsuit upon first bringing the complaints before the board of directors. As there is no language in this provision requiring that the present dispute first undergo an internal dispute resolution procedure, defendants' motion lacks merit.

This case is distinguishable from *Koppel v Koppel* (52 AD2d 767 [3d Dept 1976]), relied on by defendants. In *Koppel*, unlike in the case at bar, the Statutes adopted by the congregation explicitly provided for arbitration in case of disputes between the members: "Par. 10 Arbitration In cases of disputes between [members][and] the house assembly, the latter decides. For such cases it may also set up a court of arbitration. . . . The latter's decision may be appealed at the house assembly which then makes a final decision, under exclusion of public jurisdiction." Unlike in Koppel, here, the by-laws do not explicitly set forth mandatory internal dispute resolution procedures and cannot be reasonably interpreted as unequivocally foreclosing the commencement of any legal action without prior application to the board.

The Court notes that even if plaintiffs were required to first file the complaint with Lanzuter, such a filing would be futile, thereby excusing plaintiffs from filing such a demand. It is unlikely that Lanzuter's directors would take actions against themselves, as the complaint alleges the violations of the-bylaws and self-dealing by the individual directors and in view of the fact that plaintiffs had made an unsuccessful attempt to avoid litigation by sending a letter to

defendants outlining their grievances and requesting certain financial documents (*see George A. Fuller Co., Inc. v Albin Gustafson Co.*, 55 AD2d 872, 390 NYS2d 416 [1st Dept 1977] [holding that where plaintiff alleged fault by the architect, it would be futile to conduct before the architect lengthy arbitration proceedings of plaintiff's claim]; *see also Banzbach v Zinn*, 1 NY3d 1 [2003] [complying with the requirement of filing a demand with the board of directors prior to litigation was futile and thus, was excused because the board itself had interest in the matter at issue and therefore could not objectively determine whether it should initiate the action to recover the losses which had been caused by the board directors]; *Miller v Schreyer*, 257 AD2d 358 [1st 1999] [to assess whether the demand on the board would be futile it is necessary to decide "what the board members would have done had they been presented with the alleged wrongdoing at the time the complaint was filed"]). A director is considered disqualified from being able to make an independent decision in response to the demand if "interested" in its subject matter (*Miller*, at 360). Here, it is clear that filing the complaint with Lanzuter's board of directors concerning the alleged in the complaint violations by the same directors, would be futile, and thus, would be excused.

Based on the foregoing, motion pursuant to CPLR §3211(a)(1) based on documentary evidence is denied.

Conclusion

Accordingly, it is hereby

ORDERED that the motion by defendants Lanzuter Benevolent Association and Benjamin Sauerhaft, Solomon Sauerhaft and Philip Kubert, pursuant to CPLR §3211(a)(1) to

dismiss the complaint of plaintiffs Tobie Specht, Sylvia Glenn, Leonard Fortgang, Stanley Gartenhaus, Edith Gartenhaus, Arthur Silverstein and Janice Silverstein, at least 10% of the Members of Lanzuter Benevolent Association, and in the right of all other members of Lanzuter Benevolent Association, is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiffs within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 15, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD