

Ash v Dong

2010 NY Slip Op 31399(U)

May 28, 2010

Sup Ct, NY County

Docket Number: 111588/09

Judge: Eileen A. Rakower

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

6-7-10

PRESENT: RAKOWER
Justice

PART 15

Index Number : 111588/2009
ASH, ALLAN A.
vs.
DONG, GARY
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1, 2
3, 4
5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/28/10

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
ALLAN A. ASH and JOEL S. ASH, as Co-Executors for
the ESTATE OF RUTH MISHKIN, Individually, and on
behalf of THE 155 CONDOMINIUM,

Index No.
111588/09

Plaintiffs,

DECISION
and ORDER

-against-

GARY DONG, HEATHER O'NEIL, ADELE RIFKIN,
JUAN LEON, KEVIN GALLIGAN, PAUL DiLORENZO,
each individually and as members of the Board of
Managers of the 155 Condominium, THE BOARD OF
MANAGERS OF THE 155 CONDOMINIUM, and THE
155 CONDOMINIUM,

Mot. Seq.
001

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Defendants.

-----X
HON. EILEEN A. RAKOWER:

Allan A. Ash and Joel S. Ash, father and son, are co-executors of the Estate of Ruth Mishkin, as shown by Certificate of Letters Testamentary. Ruth Mishkin, at the time of her death, owned Unit 17B in the building known as the 155 Condominium, located at 155 East 38th Street in the County and State of New York. Presently, Allan A. Ash is a co-owner of this unit along with the Estate of Ruth Mishkin. Through the course of numerous litigations begun by Ms. Mishkin and subsequently by Mr. Ash, plaintiffs made allegations regarding the actions of the Board of Managers, various members of the Board of Managers in their individual capacities, New Bedford Management Corp. (the management company hired to manage the 155 Condominium prior to June 16, 2003), and Michael Wechsler, owner and principal of New Bedford. The causes of actions which survive the prior litigations are those against New Bedford Management and Michael Wechsler only. Plaintiffs bring the instant action to address what they consider to be continued acts of bad faith by the Board of Managers, and more specifically, those involving a 2006 special assessment allocated for a hallway renovation project and exterior repairs to the building. The

exterior repairs included comprehensive repairs to individual terrace areas used exclusively by eight of the 176 residential units in the building.

Plaintiffs bring this action for: by the first and second causes of action, a full accounting by The Board concerning all financial collections, payment, invoices, estimates and assessments surrounding the facade and terrace repairs to the Condominium, damages arising from the bad faith and self dealing of certain board members in the handling of such repairs, immediate access to records, a declaration that individual defendants are not entitled to attorney fees and expenses and indemnification, and for reimbursement of legal expenses expended by plaintiffs on behalf of the Unit Owners; by the third cause of action, an Order that the Board enforce the removal of illegal and improper appliances from units shown to have such installations and legal costs; and by the fourth cause of action, a direction that the Board bring to a special meeting the potential issue of their own removal. Defendants now move to dismiss plaintiffs' complaint pursuant to CPLR 3211 (a) (1), (5) and (7). Additionally, defendants request that plaintiff be deemed a vexatious litigator or be disqualified as a representative of the unit owners in this derivative action. Plaintiff opposes.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence;
 - (5) the cause of action may not be maintained because of... collateral estoppel...; or
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR

§3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). Finally,

Collateral estoppel, or issue preclusion, ‘precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same’ (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500; *see also, Burgos v Hopkins, supra*, 14 F3d, at 792). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Ryan v New York Tel. Co.*, *supra*, at 500-501). ‘[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding’ (*id.*, at 501). (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 [1999]).

Initially, addressing that portion of the motion which seeks to bar Mr. Ash from bringing future actions without this Court’s prior approval and declaring him unfit to serve as a representative of the other unit owners in the Condominium, such request is denied. It is important to separate behavior which might be disquieting from the merits of the action. Whether or not the facts and inspection of the building finances ultimately bear out and vindicate Mr. Ash’s suspicions (he himself is a certified public accountant), this Court will not undercut Mr. Ash’s right to access the judicial process in his effort to expose alleged impropriety - and to seek proper relief for

same. The legal arguments must be addressed within the confines of the law, which demands a thorough and objective examination of the complaint.

With respect to Mr. Ash's ability to act as the representative of building unit owners, Justice Tolub found Mr. Ash to be so qualified when, in deciding a previous motion to disqualify Mr. Ash, he found that

Plaintiff, as unit owner, has the capacity and interest to assert a claim derivatively on behalf of the Condominium . . . Plaintiff has demonstrated that he can adequately represent the interests of the Condominium . . . Defendants have failed to demonstrate that plaintiff has not acted in the interests of the Condominium.

Accordingly, that part of defendants' motion is also denied.

Turning to the motion to dismiss, the Court finds that dismissal of plaintiffs' Complaint is unwarranted at this early stage, and without the benefit of discovery. In assessing the four corners of the Complaint, plaintiffs state a cognizable claim for various improprieties on the part of the Board, including alleged bad-faith actions taken on the part of the Board to financially benefit a small number of unit owners to the detriment of the entire condominium. Plaintiffs also allege that the Board improperly and in bad faith pushed certain work through without shareholder approval under the guise of "Maintenance and Repairs" (which merely require a Board vote) rather than "Alterations, Additions, or Improvements" (which require shareholder approval in cases where expenditures exceed \$25,000).

Defendants have not submitted documentary evidence which conclusively defeat plaintiffs' claims as a matter of law, and thus entitles them to dismissal under CPLR §3211(a)(1). The limited record before the Court does not permit the Court to conclude, for example, that all of the disputed work qualifies as "Maintenance and Repairs" rather than "Alterations, Additions, or Improvements." Similarly, defendants do not provide sufficient documentary evidence to defeat plaintiffs' claim that defendants improperly permitted defendant Dong to maintain an air conditioner in his unit without obtaining the prior approval of the Board. They submit only correspondence from AKAM advising Dong that, a majority of the Board voted to "allow [him] to *keep* [his] air conditioning unit" (emphasis added)," a letter prepared

on the eve of the commencement of litigation which called such unit into question.

Finally, with regard to those issues defendants believe plaintiff should be collaterally estopped from raising by virtue of the prior litigations, none of those issues, couched in the context alleged in the complaint, were finally resolved. Therefore, dismissal pursuant to 3211 (a)(5) is denied.

Wherefore it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendants shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

DATED: May 28, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
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