Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

SOL ROSEN and FLORENCE ROSEN,

Plaintiffs,

- against -

NORTH SHORE TOWERS APARTMENTS, INC.,

Defendant.

Index Number 19301 2010

Motion Date September 15, 2010

Motion Cal. Number 19

Motion Seq. No. 1

The following papers numbered 1 to 9 read on this motion by plaintiffs pro se, Sol Rosen and Florence Rosen for a preliminary injunction enjoining the defendant North Shore Towers Apartments Inc. from enforcing the order dated July 19, 2010, issued by the Civil Court of the City of New York, Queens County, Landlord Tenant part, which awarded defendant a final judgment for the non-payment of rent in the sum of $18,758.28, and a warrant of eviction which was stayed for five days. Defendant cross-moves for an order dismissing the complaint on the grounds of documentary evidence and failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (7), and seeks to set the matter down for hearing to determine an award of attorneys' fees.

	Papers Numbered
Order to Show Cause-Affidavits-Summons-Complaint-Exhibits.....	1-3
Notice of Cross Motion-Affidavit-Exhibits (A-M).....	4-7
Reply Affirmation-Exhibits.....	8-9
Memorandum of Law.....	

Upon the foregoing papers the motion and cross motion are determined as follows:

On February 2, 2004, Sol Rosen and his wife, Florence Rosen, purchased 6,374 shares of stock issued by North Shores Towers Apartment Inc. (NST), a residential cooperative. The Rosens purchased their shares of stock directly from the sponsor of the offering plan, and were assigned the proprietary lease to apartment 11 W, located at 269-10 Grand Central Parkway, Floral Park, New York. The court notes that although the plaintiffs allege that they own 6,116 shares of stock, the stock certificate submitted by defendant states that 6,374 shares of stock were issued to them.

NST is a cooperative apartment complex, consisting of 1,844 apartments, a shopping center, and recreational facilities including movie theater with 450 seats, restaurants, a catering hall and tennis courts and an 18-hole golf course. NST maintains its own power plant which provides electricity to the complex.

It is undisputed that the Rosens ceased to pay their monthly maintenance and the cooperative corporation commenced a non-payment proceeding entitled *North Shore Towers Apartments Incorporated v Sol and Florence Rosen*, in the Civil Court of the City of New York, Queens County Housing Part (Index No. L&T 57503/10), to recover rent arrears, and monthly charges for parking, energy and repairs, for the period of April 2009 through March 2010, totaling $18,758.25. The Rosens served an answer which did not deny the allegations pertaining to the non-payment of rent and asserted a counterclaim for $35,000.00. The Rosens moved to dismiss the Housing Court petition and raised defenses pertaining to the fiduciary duties owed to the shareholders and the corporation's business practices, and NST cross-moved for summary judgment dismissing the counterclaim and awarding judgment in their favor. The court therein, in a decision and order dated July 19, 2010, stated that it lacked jurisdiction to entertain the defenses raised by the Rosens and therefore denied the Rosens' motion for summary judgment, and granted NST's cross motion for summary judgment, as the Rosens had failed to raise any issue of fact and awarded final judgment in the sum of $18,758.25, and stayed for five days the issuance and execution of the warrant of eviction.

NST served the warrant of eviction on the Rosens on April 26, 2010. The Rosens, pro se, commenced the within action by way of an order to show cause on July 30, 2010, and execution of the warrant of eviction has been stayed.

Plaintiffs' rambling complaint alleges that in February 2009, Mr. Rosen discovered evidence of accounting malpractice and budget fraud "resulting from capital assessments of $11 million annually in the years 2007, 2008 and projected 2010, totaling $44 million"; that he sent hundreds of letters to corporate officials since February 2009, with no response, and that in February 2010 [sic] he informed the corporation's counsel that unless he could speak directly with corporate officials he would discontinue paying maintenance fees in protest, and

file a "counterclaim" for $35,000.00, which he alleges represented his share of the then total of $35 million in fraudulent assessments.

Plaintiffs further allege that NST has violated accepted accounting principles; that the certified surplus was fraudulently reduced by $22,864,815; that the "fraudulent budget presentations" for 2007, 2008, 2009 and 2010 reduced revenues by more than $10 million dollars; that revenues were grossly underestimated and expenses were grossly overestimated; and that NST increased its cash reserves through "budget fraud," totaling $42 million dollars. Plaintiffs allege that in 2010 an estimated $1 million was fraudulently added to the monthly maintenance.

Plaintiffs also object to the prior proceedings in the Housing Court, and take issue with certain statements made by Robert Serikstad in an affidavit submitted by NST in that proceeding. Mr. Serikstad, a CPA, is an employee of Charles H. Greenthal Management Corp., and is employed full time as the cooperative's comptroller. Mr. Serikstad stated in his prior affidavit that NST has credited 100 percent of York City Real Property Tax Abatements to qualifying shareholders, and in accordance with guidelines issued by the City of New York, NST has elected to impose assessments in conjunction with granting these tax exemptions. He further stated that this practice is widely accepted and utilized within the City of New York; that the abatements are always credited back to the shareholders and the "Board of Directors then determines if it want to recapture some of those credit in the form of a capital assessment"; and that this is in compliance with general accepted accounting principles. Plaintiffs, in the within complaint allege that this statement is "patently untrue" and that "[i]n fact Greenthal Management at West 72nd St., the same corporation with different accountants and accounting methods that did not violate accounting principles reported $316,272 income from operations in 2008, and $35,261 in 2007 (Exhibit 11a). A review found no co-ops creating income using the "recapture of abatements."

Plaintiffs also allege that the claimed budget fraud "rationalized the demand for huge Capital assessments," and that as a result of "unconscionably" high maintenance charges, housing has become unaffordable, forcing senior citizen residents to sell their apartments at huge discounts, with no equity in the cash reserves that they had paid into during the past four years.

Plaintiffs in their wherefore clause request a judgment of $40,000.00 and state that "[a]ll funds are dedicated to retaining qualified counsel to represent shareholders in a class action lawsuit to recover fraudulent Capital assessments of $42 million." Plaintiffs also seek to have "[t]he Housing Court order of eviction be vacated pending the adjudication of this case. Plaintiffs' apartment was purchased for $750,000 with no mortgage. Any delay in the collection of the Hosing {sic] Court order represents no harm to the corporation shareholders,

but a loss of funds available for shareholders to retain qualified counsel to recover $42 million."

A party moving for a preliminary injunction "must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position" (*EdCia Corp. v McCormack*, 44 AD3d 991, 993, [2007], quoting *Apa Sec., Inc. v Apa*, 37 AD3d 502, 503, [2007]; *see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). The movant must show that the irreparable harm is "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442 [1995]). Moreover, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v McCormack*, 44 AD3d at 994; *see also Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738 [2010]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Glorious Temple Church of God in Christ v Dean Holding Corp.*, 35 AD3d 806, 807 [2006]).

Here, plaintiffs have failed to establish that they are likely to succeed on the merits, that they will suffer irreparable injury if an injunction is not granted, and that the balance of equities is in their favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). Plaintiffs only make conclusory allegations and fail to point to any imminent and non-speculative harm that would befall them in the absence of a preliminary injunction (*see Golden v Steam Heat*, 216 AD2d at 442). Moreover, they have failed to demonstrate that any harm they would suffer would not be compensable by money damages (*see EdCia Corp. v McCormack*, 44 AD3d at 994). Plaintiffs' were required to pay all rent and other charges regardless of their alleged dispute with NST and are bound by the order of the Housing Court.

Although the inclusion of a money demand will not necessarily preclude an injunction if other relief, which would satisfy this provision of CPLR 6301, is also sought, the court will refuse the injunction if convinced that a money judgment is the true object of the action and that all else is incidental (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 544-545 [2000]). Here, although plaintiffs assert in conclusory fashion that defendant NST engaged in "accounting malpractice and budget fraud," the object of this lawsuit is to recover the sum of $40,000.00, to be used to fund a proposed class action against NST based upon the identical allegations. A money judgment, thus, is the true object of this action. Accordingly, plaintiffs' motion for a preliminary injunction, is denied.

Turning now to defendant NST's cross motion, CPLR 3211(a)(1) permits the court to dismiss an action based upon documentary evidence. A cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all

factual issues and establishes a defense as a matter of law (*Leon v Martinez*, 84 NY2d 83 [1994]).

When deciding a motion to dismiss made pursuant to CPLR 3211(a)(7), the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead (*Guggenheimer v Ginzburg*, 43 NY2d 268, [1977]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). In making such a determination, the court must accept as true all the facts alleged in the complaint and any factual submissions made in opposition to the motion to dismiss (*511 W. 232nd Owners Corp. v Jennifer Realty*, 98 NY2d 144 [2002]). The complaint must be liberally construed and the pleader must be given every favorable inference that can be drawn (*Leon v Martinez*, 84 NY2d 83 [1944]). If the court determines that plaintiffs are entitled to relief on any reasonable view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (*Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307 [1995]).

Although defendant asserts in its memorandum of law that the complaint is barred by the four month statute of limitations applicable to Article 78 proceedings, this defense was not stated in the notice of cross motion and supporting affidavit and, therefore, will not be considered.

Accounting malpractice contemplates a failure to exercise due care and proof of a material deviation from recognized and accepted professional standards for accountants and auditors (*Kristina Denise Enterprises v Arnold*, 41 AD3d 788 [2007]; *Friedman v Anderson*, 23 AD3d 163 [2005]). Plaintiff must establish that defendant departed from generally accepted accounting principles and the departure was the proximate cause of plaintiff's injury. However, the threshold question is whether a duty of care existed which arises from the parties' relationship; "privity [is] the necessary predicate for accounting liability" (*Parrott v Coopers and Lybrand, LLP*, 263 AD2d 316, 320 [2000]). Here, no privity exists between the plaintiffs, and the independent auditors hired by the defendant NST.

With respect to NST, and its comptroller Mr. Serikstad, a CPA employed by the Charles H. Greenthal Management Corp., giving plaintiffs every favorable inference, the complaint fails to state what accounting principles were allegedly violated. Rather, plaintiffs take issue with the assessments imposed on shareholders in conjunction with the New York City Real Property Tax Abatement, and statements made by Mr. Serikstad, in an affidavit submitted in the Housing Court proceeding. Mr. Serikstad previously stated that the abatements are always credited back to the shareholders and the Board of Directors then determine whether it wants to "recapture" some of those credits in the form of a capital assessment. He further stated that this practice is widely accepted and utilized within the

City of New York. Mr. Serikstad has repeated this statement the affidavit submitted in support of the cross motion to dismiss.

Plaintiffs in the within complaint allege that Mr. Serikstad's statements are false in that other cooperatives do not "recapture" the tax credits in the form of a capital assessment and that this constitutes accounting malpractice. Plaintiffs' conclusory allegations, however, fail to demonstrate that NST deviated from any accepted standards of accounting or auditing practices and do not state a claim for accounting malpractice. Defendant NST after crediting each eligible unit with the Real Property Tax Abatement, is entitled to assess the shareholders for amounts dedicated to the capital reserve fund, pursuant to the terms of the cooperatives bylaws and the proprietary lease. The fact that other unrelated cooperatives may chose not to impose such assessments upon their shareholders is not evidence of accounting malpractice.

Plaintiffs allegations are also insufficient to state a claim for fraud. "The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury'" (*New York Univ v Continental Ins. Co.*, 87 NY2d 308, 318 [1995], quoting *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]). Plaintiffs must show that NST knowingly uttered a false statement with the intention of depriving plaintiff's of a specific benefit, thereby deceiving and damaging him (*Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d at 406-407). Plaintiff has failed to set forth specific and detailed factual allegations, as required by CPLR 3016, and their conclusory allegations are insufficient to state a cause of action for fraud.

Finally, while plaintiffs in their reply papers assert that this is a shareholders' derivative action, the complaint does not seek to vindicate the rights of the corporation. For a wrong against a corporation, a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation (*Citibank v Plapinger*, 66 NY2d 90, 93 [1985]; *Abrams v Donati*, 66 NY2d 951, 954 [1985]). Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged (*see* General Rubber Co. v Benedict, 215 NY 18 [1915]; *Hammer v Werner*, 239 App Div 38 [1933]). But allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually (*see e.g. Niles v New York Cent. & Hudson Riv. R. R. Co.*, 176 NY 119 [1903]; *Carpenter v Sisti*, 45 AD2d 529, 531 [1974]). A complaint in which the allegations confuse a shareholder's derivative and individual rights will, therefore, be dismissed (*Abrams v Donati*, 66 NY2d 951, 954 [1985]; *Greenfield v Denner*, 6 NY2d 867 [1959]).

In view of the foregoing, plaintiffs' motion for a preliminary injunction is denied, and defendant's cross motion to dismiss the complaint in its entirety is granted. That branch of defendant's cross motion which seeks a hearing to determine the amount of attorney's fees is denied, as defendant has not established that the proprietary lease or any statutory provision permits the recovery of attorneys' fees upon dismissal of an action for alleged professional malpractice and alleged fraud. To the extent that defendant also requests the imposition of sanctions, said request is denied.

Dated: January 7, 2011

J.S.C.