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

PRESENT: HON. JUDITH J. GISCH PART 10

Index Number : 108624/2008
GALPERN, ROBERT
VS
RIZZO, VINCENT
Sequence Number : 002
STRIKE A PLEADING

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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

FILED
MAR 14 2011
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Final PC Scheduled for May 5 2011 @ 9:30 am

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

Dated: MAR 14 2011

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Robert Galpern, Tamara Zelcer, Fernando Fernandez and Luis Sierra,

Plaintiff (s),

-against-

Vincent Rizzo, "John Doe" 1-9 as Officers and Directors of **Honey Bee II Condo**, an unincorporated association, **T.W. Finnerty Property Management, Inc.**,

Defendant (s).

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DECISION/ ORDER
Index No.: 108624-08
Seq. No.: 002, 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Motion Seq No. 2:	
Defs' n/m (3126) w/DJF affirm, exhs	1
Pltf's' x/m (compel) w/AS affirm, exhs[1]	2
Defs' opp to x/m and in reply w/DJF affirm, exhs	3
Motion Seq No. 3:	
Defs' n/m (3211) w/DJF affirm, exhs	4
Pltfs' x/m (3025) w/ AS affirm, RG affid, exhs	5
Defs' opp to x/m and in reply w/DJF affirm	6
Pltfs' reply w/AS affirm	7
Pltfs' reply in further support w/AS affirm	8

Upon the foregoing papers, the decision and order of the court is as follows:

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[1]None of the exhibits to plaintiffs' submissions are tabbed. Rule 12 of the Rules of Court states that exhibits to motions should be tabbed. While the court accepts and considers all submissions by plaintiffs, they should, in the future, comply with the Court Rules to facilitate the court's consideration of their motions.

GISCHE J.:

This action arises out of disputes among condominium unit owners, the board of directors of the condominium and the condominium's managing agent. Presently before the court is a motion by the defendants for an order dismissing the complaint and to compel plaintiffs' responses to their discovery demands. Plaintiffs have served what they call a "corrected" complaint and cross moved for an order requiring defendants to accept that corrected complaint ("corrected complaint") and for discovery. Defendants have separately moved to dismiss the corrected complaint. Plaintiff having now served what they call a "second amended complaint" ("2nd amended complaint") and they have cross moved for an order dismissing their corrected complaint,without prejudice to the 2nd amended complaint being deemed served and filed – while allowing the factual assertions of the corrected complaint to survive. Defendants have voluntarily withdrawn their motion for discovery sanctions at this time because plaintiffs provided responses on June 15, 2010, after defendants brought their motion. Thus, what remains for the court to decide is plaintiffs' motion to compel discovery and the motions regarding the corrected and amended complaints which defendants argue should be dismissed on the basis that they fail to state a cause of action.

Since this pre-answer motion attacks the sufficiency of the pleadings based upon documentary evidence and release (respectively, CPLR 3211 [1] and [5]), the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the pleader with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st

Dept 1997]).

The following facts and arguments are presented:

Facts considered and arguments presented

Robert Galpern ("Galpern") owns a condominium known as "145 Lamped Loop" in the Honey Bee II Condo ("Honey Bee") in Richmond County, New York. Tamara Zelcer ("Zelcer") owns 157 Lamped Loop in the same complex. Zelcer and Galpern are husband and wife (hereinafter, they are collectively referred to as ("the Galperns"). Defendant Vincent Rizzo and defendants "John Doe 1 -9" are all officers and directors of the Honey Bee condominium board. Defendant T.W. Finnerty Property Management, Inc. ("Finnerty") is Honey Bee's managing agent. The other named plaintiffs ("Fernandez") and ("Sierra") are, respectively, persons whom the Galperns hired to manage their units and make repairs thereto.

The parties in this action have had been involved in numerous other litigations, including actions in Small Claims court for property damage both of which were settled. The action at bar entails claims by the Galperns that the board and its individual directors did such things as:

o failed to make necessary repairs to the common elements, causing raw sewage to back up into their units which damaged their carpeting.

o imposed unfair fines on the Galperns for *inter alia* putting the heavily soiled carpet on the lawn to dry.

o imposed unfair fines on them for "silly" and "frivolous" house rules that are not usually enforced against other unit owners, such as parking their car (s) in the wrong direction, climbing over fences and playing ball in the yard.

o false imprisonment because their handyman (Fernandez) was arrested for trespassing while he was passing out leaflets at the complex on the Galperns' behalf.

o denying them pool passes.

o denying them access to the condo's books and records.

According to the Galperns, their original complaint contained some errors. They claim to have "corrected" those errors in the corrected complaint, but that complaint still needs to be "pruned" and "trimmed," hence the proposed 2nd amended complaint. The original complaint had fifteen (15) causes of action, including claims of harassment, discrimination, retaliation and false arrest. The corrected complaint had ten (10) causes of action and the proposed 2nd amended complaint has six (6)[2] causes of action. The causes of action plaintiff seeks permission to plead are as follows: Breach of RPL § 339-d (1st COA), Breach of the Condo Contract Documents (2nd COA), Breach of Fiduciary Duty (3rd COA), Actions Outside the Scope of their Authority (4th COA), Improper Demands for Legal Fees (5th COA) and Lost Income (6th COA).

Defendants argue that the 2nd amended complaint must be dismissed because the Galperns did not seek court permission before serving it and the successive filing of complaints demonstrates plaintiffs' claims were brought only to harass the defendants. Defendants also claim this lawsuit asserts claims that are very similar to those asserted in any number of the other lawsuits the Galperns and/or their company "African and Hispanic Realty of NY, LLC" has commenced against Honey Bee and its managing agent in the past few years. Defendants further contend that the 2nd amended

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[2]The "wherefore" clause refers to eight (8) causes of action although there are only six (6).

complaint is no more meritorious simply because the plaintiffs have streamlined their claims. Thus, defendants urge the court to grant plaintiffs' motion to dismiss their corrected complaint and deny their motion to deem the 2nd amended complaint served and filed.

Discussion

At the outset, the court addresses the issue of whether Mr. Galpern is *pro se* or represented by counsel ("Attorney Squire"). Although Mr. Galpern was initially self-represented, he later hired Attorney Squire who then served an amended complaint on behalf of all the plaintiffs in May 2010. Attorney Squire attended the preliminary conference and entered into at least one discovery order on plaintiffs' behalf. The "corrected" amended complaint dated July 29, 2010 indicates that Mr. Galpern is *pro se* and that Attorney Squire only represents the other plaintiffs. However, the cross motion to compel defendants to accept that "corrected" amended complaint is brought on behalf of "plaintiffs Robert Galpern, Tamara Zelcer, Fernando Fernandez and Luis Sierra" and Attorney Squire states he is the "attorney for plaintiffs Robert Galpern, Tamara Zelcer, Fernando Fernandez and Luis Sierra."

Although there is conflicting information in the record about whether Mr. Galpern is pro se, there is no record that Attorney Squire has been formally substituted, whether by court order or filing of a substitution of counsel, Attorney Squire continues to be Mr. Galpern's attorney of record. Therefore, the motions before the court by and against "plaintiffs" include Mr. Galpern.

Turning to plaintiffs' motion regarding the corrected complaint and 2nd amended complaint, the court first notes that the "2nd amended complaint" is a misnomer. There

have been four complaints in this action already. The first was the *pro se* complaint, the next was the amended (attorney complaint), then the "corrected" complaint, and now the "2nd amended complaint."

Leave to amend and supplement pleadings should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise (CPLR § 3025 [b]; Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590 [1st Dept. 1990]). Leave, however, may not be granted where the amended pleading fails to state a cause of action (Stroock & Stroock & Lavan v. Beltramini, *supra*; Solomon v. Bell Atlantic Corp., 9 AD3d 49 [1st Dept. 2004]).

Despite having now filed four (4) separate complaints, plaintiffs continue to assert some overly broad causes of action that have no factual support or are redundant. Thus, the 1st COA for breach of the condominium statute, merely refers the court to RPL § 339-d "et seq." RPL § 339-d is, however, is nothing more than the short title of the article, i.e. the "condominium act." Assuming that plaintiffs refer to defendants' alleged refusal to let them inspect their books and records (RPL § 339-w), this would make the 1st COA indistinguishable from the 2nd COA.

The Galperns also claim the individual board members breached their fiduciary duties to them. The duty owed by a director is that of a fiduciary to a corporation and to its shareholders. Courts are generally prohibited by the business judgment rule from inquiring into the propriety of actions taken by the directors on behalf of the corporation (Levandusky v. One Fifth Ave., 75 N.Y.2d 530, 537-538 [1990]). Although the Galperns claim they were subjected to disparate treatment because the board/ managing agent selectively enforced certain rules and imposed fines on them, even if true, unequal

treatment of shareholders is sufficient to overcome the directors' insulation from liability under the business judgment rule (see, Ackerman v. 305 E. 40th Owners Corp., 189 A.D.2d 665 [1st Dept 1993]). In any event, individual directors and officers may not be subject to personal liability absent the allegation that they committed separate tortious acts (see, Murtha v. Yonkers Child Care Assn., 45 N.Y.2d 913, 915 [1978]).

The lost income claim is apparently just another aspect of the damages sought in connection with plaintiffs' breach of contract claim because it is for damages arising from their tenants decision not renew their leases after the raw sewage episode. Likewise, the fines levied against the plaintiffs are also alleged to be a breach of contract and, therefore, also a part of their claim for damages.

Although the court will grant plaintiffs' own motion, and allow them to dismiss the "corrected" complaint they served, the plaintiffs cannot "retain the substance and factual bases" of the corrected complaint. Once a complaint is withdrawn and/or amended, the complaint that is being amended and/or replaced is extinguished, unless repleaded in the amended complaint. The court will, however, grant the Galperns leave to serve an amended complaint to assert a breach of contract action against the Honey Bee condominium for breach of contract, based upon their allegations that the board failed to make necessary repairs, causing them to sustain damage to their property and incur other losses. Although defendants insist this claim is redundant of other cases that were already settled, that cannot be decided on a pre-answer motion to dismiss.

All the claims against the individual board members are severed and dismissed, as the Galperns have not set forth any facts ascribing independent tortious actions taken by any individual director. The claims against the property manager are also dismissed.

The dismissal is, however, without prejudice to the condominium being able to assert any claims against is property manager at a later time.

Any claim that the board should have, but failed to, allow the Galperns access to their financial records is severed and dismissed as well. Pursuant to RPL § 339-w, the books, receipts and expenditures arising from the operation of the property "shall be" rendered by the board of managers at least once a year. Plaintiffs seek to review the books and records apparently to see whether other shareholders have been fined for, what they contend are, "frivolous" and minor infractions of the bylaws and/or house rules. There is no relief available to plaintiffs under that statute in this action (Board of Managers of Park Regent Condominium v. Park Regent Unit Owners Associates, 58 A.D.3d 589 [2nd Dept 2009]).

To the extent that plaintiffs have cross moved to compel defendants' discovery responses, that motion is denied. Plaintiffs served their discovery demands with the motion to compel. Although the demands (dated August 6, 2010) are apparently revisions of discovery demands previously sent by the Galperns, the motion for enforcement was brought prematurely because defendants' time to respond had not expired. In any event, before bringing a discovery dispute to the court, the attorney must provide an affirmation of Good Faith stating the efforts that were made to settle the disclosure issues raised (22 NYCRR 202.7 [a]; CPLR 3101 [a]; Chichilnisky v. Trustees of Columbia University in City of New York, 45 A.D.3d 393 [1st Dept 2006]; 25A Place 57, LLC v. Board of Managers of Place 57 Condominium, 27 Misc.3d 1213(A) [Sup Ct. N.Y. Co]). Thus, the denial is without prejudice.

Although Fernandez and Sierra may have claims against the board arising from

the actions they took against them, none of those claims were in the proposed 2nd amended complaint, but even if they were, the proposed complaint has been pared down to a single cause of action that has nothing to do with those individuals. Therefore, any claims asserted by Fernandez and Sierra are severed and dismissed as well. The dismissal is without prejudice to either or both of those person commencing their own actions in any forum available to them.

Defendants' motion for sanctions was made in the context of motion to compel discovery. Since that branch of the motion was withdrawn, the motion for sanctions is denied.

Conclusion

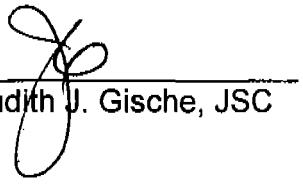
Plaintiffs shall serve the amended complaint that has been approved by the court within Ten (10) Days of this decision/order being entered. Plaintiffs' motion to compel is denied for the reasons stated. Defendants motion to dismiss the "corrected" complaint is granted. Defendants shall answer the amended complaint within the time permitted under the CPLR. In anticipation of issue being joined, the court directs that the parties appear for a **Preliminary Conference on May 5, 2011 at 9:30 a.m.**

Any relief requested not expressly addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 11, 2011

So Ordered:



Hon. Judith J. Gische, JSC