

Jones v Cowart

2011 NY Slip Op 31315(U)

May 10, 2011

Supreme Court, New York County

Docket Number: 114890/10

Judge: Judith J. Gische

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PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Beatrice Jones

Plaintiff (s),

INDEX NO.

114890/10

- v -

MOTION DATE

MOTION SEQ. NO.

001

Leaton Contact

Defendant(s).

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, the court's decision on this (these) motion (s) is as follows:

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

MAY 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/10/11

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

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 10

-----X
BEATRICE JONES, GERALDINE SMALL; ROSA
WILLIAMS, JUNE BRIDGERS, ALEX S. ANGRUM,
VIVIAN MARTINEZ and YVONNE WILLIAMS,
suing on behalf of nominal plaintiff 1867-69
7 AVENUE HOUSING DEVELOPMENT FUND
CORPORATION,

Plaintiffs,

-and-

LEAMON COWART, TORRI CLAYTON, THELMA
FRANDENO, RONALD DONALDSON and KYRA
SKINNER and 1867-69 7 AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,

Defendants.
-----X

Decision/Order

Index No.: 114890/10
Seq. No.: 001

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

FILED

MAY 11 2011

Recitation, as required by CPLR 2219 [a], of the papers considered in the ~~review of~~ this
(these) motion(s): COUNTY CLERK'S OFFICE

Papers	Numbered
Pltf's OSC w/ BJ, GS, RW, JB, YW and RP affids, exhs	1
Def's X-MOT w/ RD affid, exhs	2
RP reply affirm, exhs	3
RD reply affid, exhs	4

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

By Order to Show Cause, the plaintiffs, who are shareholders of the nominal corporate plaintiff 1867-69 7 Avenue Housing Development Fund Corporation (the "Co-op"), bring a shareholder derivative suit, pursuant to BCL § 720, and a direct suit against the defendants, pursuant to BCL § 626. In this motion, they seek the appointment of a temporary receiver (CPLR § 6401), an accounting, and an order enjoining the individual defendants from serving on the Board of Directors of the Co-op

(the "Board") and as Officers and Managers of the Co-op.

The Co-op is a non-profit corporation engaged in the ownership, operation and maintenance of the low income housing apartment building located at 1867 7th Avenue, New York, New York (the "Building"). The Building was converted to a cooperative in 1995, as a participant in the Department of Housing Preservation and Development Housing Development Fund Corporation ("HDFC") program. The Building contains 34 residential units, of which 21 units are owned by shareholders and the remaining 13 units constitute "Unsold Shares" pursuant to Section 4.03 of the Proprietary Lease and are available for rent to third parties. The plaintiffs have each been shareholders of record of HDFC for more than five years. Plaintiff Small served as a board member and treasurer through 2008. The individual defendants are each officers and/or Directors of HDFC, with the exception of Leamon Cowart, who according to the defendants, is just a shareholder.

In their complaint, the plaintiffs allege that the individual defendants, acting as a super-majority or unanimous majority over the last three years, "have retained complete and exclusive domination and control of the Co-op." They have asserted five causes of action. The factual basis for the first claim is that the individual defendants have failed to provide annual financial reports with respect to the Co-op or the Building for the last three years, in violation of their obligation to do so under the Co-op's By-laws and the Proprietary Lease. The second claim is for conversion and arises from the individual defendants alleged drawing of salaries, which is specifically prohibited by the Charter Documents, and other misappropriation of assets, i.e. payments made by shareholders, rents paid by third-party tenants, the proceeds from the sale of Unit 2B to defendant

Torri Clayton's grandmother. The third claim seeks recovery of maintenance payments not paid by the individual defendants for the past three years. The fourth claim is for breach of fiduciary duty by failing to protect the assets of the Co-op from waste, failing to maintain the Building in a reasonable and safe manner, permitting the sale of Unit 2B (see *supra*), and failing to verify the eligibility of subtenants and confirm subleases. The fifth cause of action seeks, *inter alia*, an injunction permanently enjoining the individual defendants from serving as directors and/or officers of the corporation for not less than 10 years.

Plaintiffs' claims are largely based upon the affidavit of plaintiff Geraldine Small. She spends a large portion of the affidavit complaining about the fact that the Board has failed to provide shareholders with financial statements and the minutes from Board meetings. Small provides proof of these requests vis-a-vis letters dated June 3, 2008, June 11, 2008, June 17, 2008 and August 25, 2010. Small further claims that the Co-op's accountant, lawyers and managing agents have all left as a result of the defendants' improper actions.

With regards to Unit 2B, Small states that the wall between that unit, and Unit 2A, was illegally removed by defendant Torri Clayton in order to "circumvent the sales restrictions... and obtain the unit at a drastic discount." Otherwise, Small claims that the building has not been properly maintained because: [1] "the elevator has been out of order at least 3 times in the last three years, sometimes for periods in excess of two days a time"; [2] "[t]he boiler has broken at least twice in the last three years, resulting in the loss of heat throughout the building"; [3] Con Edison threatens to turn off electricity in the hallways because of unpaid bills; and [4] requests for repairs by the

tenant in apartment #6B have been refused.

The plaintiffs have also provided copies of water bills from the New York City Department of Environmental Protection, unaudited statements of operations for the Co-op, a print-out dated 12/16/10 from the Department of Housing Preservation and Development listing 115 violations for the Building.

The defendants oppose the OSC and also cross-move for an order compelling plaintiff Geraldine Small to appear before the Citibank branch located at 201 West 125th Street, New York, New York (the "Bank"), where the Co-op maintained its bank account for the period between June 2006 and June 2007, in order to execute a release in person, and present a photo ID. The defendants claim that this is necessary in order for the Bank to release the financial statements, checks and deposit slips for the relevant time period because Small was the signatory of the Co-op's bank account as the treasurer and a member of the Board in 2007.

The defendants have provided a printout of profit and loss for the years 2008 and 2009. They also claim that they have turned over to plaintiffs' counsel a schedule of all deposits and check disbursements from June 21, 2007 to the present. The defendants maintain that they are unable to produce "audited" financial statements because the financial records for June 2006 through June 2007 have not been turned over to them by the plaintiffs, nor has a release been executed so they can obtain copies directly from any issuing institution.

Otherwise, the defendants argue that the plaintiffs' motion should be denied because their claims are unsupported and speculative. With regards to plaintiffs' claim for breach of fiduciary duty, the defendants address plaintiffs' assertions that the Co-op

has not paid water, electric and fuel bills, and has failed to make necessary capital improvements/repairs.

Discussion

Receiver

Plaintiffs seek the appointment of a temporary receiver to operate, maintain and manage the Co-op and the Building. The provisional remedy of a temporary receivership is available to a person with an "apparent interest" in property, when that property is the subject of the action, and the property is at risk of loss, material injury or destruction or removal from New York. (CPLR § 6401 [a]). A movant must show by clear and convincing evidence that the appointment is "necessary" to protect the property from waste, dissipation or disappearance (In re Armienti, 309 AD2d 659, 661 [1st Dept 2003]; see also McBrien v. Murphy, 156 AD2d 140 [1st Dept 1989]).

Here, the plaintiffs have failed to establish that such a drastic remedy is warranted at this stage of the litigation, by clear and convincing evidence. The motion is largely supported by the Small affidavit, and a number of letters from her and/or other "concerned" shareholders. The speculative assertions contained in these documents do not constitute evidence of waste or mismanagement. While it is true that the defendants have failed to come forward with audited financial statements, they have provided detailed spreadsheets demonstrating deposits and disbursements from 6/21/07 through 12/29/10, demonstrating a net profit of \$76,749.45 (\$777,377.29 - \$700,627.84). Where a corporation is a going, solvent one, a receiver is not typically necessary (see e.g. Martin v. Donghia Associates, Inc., 73 AD2d 898 [1st Dept 1980]; but compare Nadrich v. Nagelberg, 8 Misc2d 339 [1957]).

Nor have the plaintiffs specifically described in any detail the danger of irreparable loss that they claim will be experienced if a receiver is not appointed. Their claim that the appointment of a receiver provides them with the only "chance at a proper, unbiased review" of the Co-op's books and records does not convince the court.

Accordingly, the plaintiffs' motion to appoint a temporary receiver is denied.

Accounting

The plaintiffs' request for an accounting is complicated by the defendants' position that they are unable to provide same without the 2007 financial documents.

According to Article III, Section 3 of the By-laws:

At the close of each fiscal year, the books and records of the [Co-op] shall be audited by a Certified Public Accountant or such other person approved by the Board or shareholders. Based on such reports, the Corporation will furnish the shareholders with an annual financial statement, including the income and disbursements of the Corporation.

Based on the By-laws, the Plaintiffs are clearly entitled to annual audited financial statements. However, the defendants maintain that such statements can't be created without the 2007 financial information from the Bank. Therefore, the defendants have cross-moved for an order compelling Small to physically appear at the Bank, execute a release and show photo ID to a Bank employee. Neither plaintiffs, nor Small, specifically opposes the cross-motion.

That aspect of the plaintiffs' motion seeking audited financial statements from the Co-op, and the defendants' cross-motion, are hereby granted to the following extent: plaintiff Small is hereby directed to appear at the Bank, execute the necessary release and otherwise comply with bank procedures so that the 2007 financial documents can be released to the defendants. Upon meeting that condition, the Board

is directed to provide audited financial statements for fiscal years 2007 through the present to all shareholders within sixty days from the date thereof.

Preliminary Injunction

The plaintiffs seek an order enjoining the defendants from serving as members of the Board, and as Officers and Managers. On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair House Associates, 70 A.D.2d 571 (1st Dept. 1979); Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Id. The granting of any preliminary injunction requires the posting of security. CPLR § 6312 (b).

The instant motion must be denied because plaintiffs have failed to meet their burden, which is high in light of the implication of the business judgment rule. Decisions made by the board of managers of a residential condominium are reviewed according to the business judgment rule (Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 NY2d 530 [1990]). Accordingly, courts must defer to good faith decisions made by a board of managers (id.). "To trigger further judicial scrutiny, an aggrieved [unit owner] must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith" (Pelton v. 77 Park Ave. Condominium, 38 AD3d 1, 8-9 [2006] [internal citations omitted]).

Further, the likelihood of success on the merits is, at best, a disputed question of fact on the record presented. Plaintiffs have failed to show that further judicial scrutiny is warranted at this stage, insofar as their claims that the board acted outside the scope of its authority and in a way that did not legitimately further the corporate purpose or otherwise acted in bad faith are purely speculative. The plaintiffs claim that the defendants have been collecting salaries in connection with their positions on the Board of Directors. Via the affidavit of defendant Ronald Donaldson, Secretary of the Board, the defendants maintain that they are paid 8% of maintenance charges, that this practice has been ongoing throughout the period of self-management of the Co-op, that this practice conforms with the by-laws, was authorized by Board resolution, and that plaintiffs themselves, when they were members of the Board, participated in this practice as well.

Donaldson further maintains that the all of the individual defendants pay their maintenance fees in full and are otherwise eligible to serve on the Board of Directors and vote in all matters. Other allegations of impropriety asserted by the plaintiffs concerning the most recent election which took place in June 2010 are also sharply disputed. Donaldson states that the CPA hired by the Board cannot complete audited financial statements until the 2007 financial records are made available, necessitating the defendants' cross-motion for an order to compel Small to appear at the Bank and, *inter alia*, execute a release (see decision, *supra*).

As for the utilities bills, the defendants maintain that the Board's conduct has been proper. Donaldson states that the Co-op is current in all real estate tax payments, installments of water charges, electric bills and service contracts. They highlight the fact

that the water bill has been in arrears for a number of years prior to 2007, and that the current balance due is decreasing in accordance with a payment plan that the Co-op is current with.

The defendants state that the plaintiffs are simply wrong with respect to non-payment enforcement proceedings. The defendants state that they have timely commenced such proceedings against renters who are in arrears or shareholders who owe maintenance payments.

As for Unit 2B, the defendants assert that Florence Destin, defendant Torri Clayton's grandmother, purchased her unit for \$50,000, received a mortgage for the unit and paid a market rate price for the unit, which was uninhabitable at the time of purchase. Donaldson further maintains that Units 2A and 2B were never intended to be made one apartment, that the renovation work was just sought so that Clayton could care for her grandmother. The Department of Buildings did issue a fine, and according to Donaldson, both units were returned to their prior condition. The Co-op paid the fine, and Clayton is reimbursing the Co-op for that amount at a rate of \$200/month. Clayton is allegedly current on this financial obligation.

Otherwise, with respect to capital repairs, the Donaldson maintains that it is the Boards intention to sell apartments which became vacant recently (Units 2D, 5D and 5E) in order to pay for this work, including fixing the elevator.

Based on the foregoing, the plaintiffs have failed to establish entitlement to a preliminary injunction enjoining the defendants from serving on the Board, or as Officers or Managers of the Co-op. Accordingly, the motion for a preliminary injunction is denied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the plaintiffs' motion and the defendants' cross-motion are granted only to the following extent: Plaintiff Small is hereby directed to appear at the Citibank branch located at 201 West 125th Street, New York, New York, execute the necessary release and otherwise comply with bank procedures so that the 2006-2007 financial documents can be released to the defendants. Upon meeting that condition, the Board is directed to provide audited financial statements for fiscal years 2007 through the present to all shareholders within sixty days from the date thereof; and it is further

ORDERED that plaintiffs' motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 10 at 9:30 a.m. on June 23, 2011.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
May 10, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED

MAY 11 2011

**NEW YORK
COUNTY CLERK'S OFFICE**