[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EMILY JANE GOODMAN

Index Number : 102282/2011

CHAPPELL, MITRA

VS

TRUMP PLAZA OWNERS, INC.

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

PART 17

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

FOR THE FOLLOWING REASON(S): _____

FILED

OCT 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/3/11

_____, J.S.C.

EMILY JANE GOODMAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

MITRA CHAPPELL,

Plaintiff,

-against-

Index No. 102282/11

TRUMP PLAZA OWNERS, INC.,

Defendant.

----------X

EMILY JANE GOODMAN, J.S.C.:

This is an action brought by a shareholder in a residential cooperative building for damages against the cooperative corporation, defendant Trump Plaza Owners, Inc., for the board of directors' refusal to consent to a transfer of her shares. Defendant moves, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint for failure to state a cause of action, based upon documentary evidence, and as time-barred.

BACKGROUND

The following facts are taken from the complaint, unless otherwise indicated. Defendant operates a residential cooperative building located at 167 East 61st Street in Manhattan (Complaint, ¶ 3). Plaintiff Mitra Chappell is the owner of 305 shares of stock in the cooperative corporation appurtenant to Unit 14B and is the proprietary lessee of Unit 14B (*id.*, ¶ 4).

The complaint alleges that, on June 28, 2010, plaintiff entered into a contract for the sale of her interest in Unit 14B to certain purchasers for $599,000 (*id.*, ¶ 5; Plaintiff Aff., ¶ 6). The financial statement submitted by the purchasers showed that they had $10 million in liquid assets (Complaint, ¶ 7). However, by e-mail dated September 1, 2010, the building's managing agent, Douglas Elliman Property Management, advised that the board had decided not to interview the

prospective purchasers (Complaint, ¶ 8). Plaintiff asserts, upon information and belief, that the reason the board decided not to interview the prospective purchasers was that the purchase price was "too low" (*id.*, ¶ 9). On September 3, 2010, after telephone conversations between the brokers and the managing agent, the purchase price was increased to $675,000 (*id.*, ¶ 10). The amended contract was submitted to the board for consideration on September 7, 2010 (*id.*, ¶ 11).

Plaintiff alleges that there was no response from the board until about three months later, when the managing agent issued a letter to the purchasers advising that the purchase application had been denied by the board (*id.*, ¶ 12; Plaintiff Aff., ¶ 6). The complaint alleges that the board members were aware that plaintiff had lost her job in New York and was forced to take a job at a greatly reduced salary in Michigan (Complaint, ¶¶ 15, 16; Plaintiff Aff., ¶ 6). Additionally, plaintiff asserts that defendant and the managing agent knew that she was in financial distress, that she would have to default on her bank loan on her unit, and that she was unable to pay the maintenance on the unit (*id.*, ¶¶ 17-19). Plaintiff claims that she requested to sublet her unit beyond the limits under the building rules, but her request was denied (*id.*, ¶ 20). According to plaintiff, defendant has operated at a substantial loss each year for at least the last seven years (*id.*, ¶ 26). Plaintiff also asserts that defendant has a ground lease that was near its termination date, and that the rent may increase substantially (*id.*, ¶ 25). Plaintiff alleges that the board is attempting to shore up its finances by price-fixing because the building imposes a flip tax of 2% of the purchase price (Plaintiff Aff., ¶ 3). She claims that the building is trying to precipitate her default so that the corporation can bid at a sale, acquire her apartment at a below-market value, and flip it for a profit to shore up the corporation's finances (*id.*).

On February 23, 2011, plaintiff brought this action against defendant. The complaint

asserts three causes of action: (1) breach of fiduciary duty; (2) "prohibition of transfer" and "unreasonable restraint of alienation"; and (3) negligence. Plaintiff seeks $675,000 in compensatory damages on her three causes of action, in addition to punitive damages and attorney's fees pursuant to the terms of her proprietary lease.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "'accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 [2011], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]). Dismissal pursuant to CPLR 3211 (a) (1) is appropriate where the documentary evidence "'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*Reid v Gateway Sherman, Inc.*, 60 AD3d 836, 837 [2d Dept 2009], quoting *McCue v County of Westchester*, 18 AD3d 830, 831 [2d Dept 2005]).

Defendant moves to dismiss the complaint, to the extent that plaintiff seeks to recover on the sales contract for $599,000, as time-barred. Relying upon *Buttitta v Greenwich House Coop. Apts., Inc.* (11 AD3d 250 [1st Dept 2004]), defendant asserts that a four-month statute of limitations applies, and that such period should be measured from the time that plaintiff learned that the board withheld its consent on the contract. Defendant points out that plaintiff interposed

her claims on February 23, 2011.

Plaintiff argues that the four-month statute of limitations in CPLR 217 does not apply, since she is not seeking to compel the cooperative corporation or its board of directors to approve the sale that was rejected. Plaintiff asserts that she is instead suing the cooperative for damages. As a result, plaintiff maintains that either a three-year or six-year statute of limitations applies, and thus her claims are timely.

Generally, "'[t]he appropriate [s]tatute of [l]imitations is determined by the substance of the action and the relief sought (citation omitted)'" (*see Matter of Foley v Masiello*, 38 AD3d 1201 [4th Dept 2007]; *see also Rosenthal v City of New York*, 283 AD2d 156, 157 [1st Dept], *lv denied* 97 NY2d 654 [2001]). In *IDT Corp. v Morgan Stanley Dean Witter & Co.* (12 NY3d 132, 139, *rearg denied* 12 NY3d 889 [2009]), the Court of Appeals summarized the rules regarding the statute of limitations for breaches of fiduciary duty claims as follows:

> "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214 (4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies. Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8)" (internal quotation marks and citations omitted).

Causes of action for negligence have a three-year statute of limitations (CPLR 214 [4]; *see also Kent v 534 E. 11th St.*, 80 AD3d 106, 112 [1st Dept 2010]).

Here, plaintiff seeks damages in the amount of $675,000 on her three causes of action. Plaintiff alleges that the board withheld its consent to an assignment of her shares in September and November 2010 (Complaint, ¶¶ 8, 12). There are no allegations of fraud that form the basis

for the breach of fiduciary duty claim. Given that plaintiff filed her summons and complaint on February 23, 2011, her breach of fiduciary duty and negligence claims were timely filed. Moreover, defendant's reliance on *Buttitta* (11 AD3d 250, *supra*) is misplaced. In *Buttitta*, tenant-shareholders of a cooperative sought to nullify the cooperative's bylaw preventing them from selling their shares on the open market and requiring them to offer the stock first to the cooperative at a below-market price (*id.*). The First Department held that the four-month statute of limitations in CPLR 217 for Article 78 proceedings applied (*id.* at 251). In this case, plaintiff is seeking monetary damages and is not seeking to compel the board to approve the purchase application (Plaintiff Aff., ¶ 7).

Defendant next contends that, as the cooperative corporation, it does not owe any fiduciary duties to plaintiff, a tenant-shareholder. Defendant asserts that, even if plaintiff were permitted to amend her complaint to assert causes of action against the board of directors, the complaint fails to overcome the business judgment rule because there are no allegations of discrimination or bad faith. Moreover, defendant argues that the complaint fails to comport with the strict pleading requirement of CPLR 3016 (b).

Plaintiff counters that the complaint adequately states a cause of action for breach of fiduciary duty. According to plaintiff, the complaint alleges that the board is price-fixing and preventing the sales of apartments, thereby restraining trade. Further, plaintiff argues that the board of directors is an agent for the corporation, but requests leave to amend the complaint to add the board or individual board members as defendants.

> "[T]he business judgment rule prohibits judicial inquiry into the actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. So long as the corporation's directors

> have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient"

(*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990] [internal quotation marks and citations omitted]; *see also Aguilera del Puerto v Port Royal Owner's Corp.*, 54 AD3d 977, 977-978 [2d Dept 2008]; *Woo v Irving Tenants Corp.*, 276 AD2d 380 [1st Dept 2000]; *Jones v Surrey Coop. Apts.*, 263 AD2d 33, 36 [1st Dept 1999]). The rule requires courts to "exercise restraint and defer to good faith decisions made by boards of directors in business settings" (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 8 [1st Dept 2006] [internal quotation marks and citation omitted]). However, the business judgment rule is not an "insuperable barrier," and "permits review of improper decisions, as when the challenger demonstrates that the board's action . . . deliberately singles out individuals for harmful treatment" (*Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002] [internal quotation marks and citations omitted]). "To trigger further judicial scrutiny, an aggrieved shareholder-tenant 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" (*40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]).

With respect to the second factor, it is noted that a cooperative's board of directors has a legitimate interest in securing the highest possible price for the sale of its units (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Singh v Turtle Bay Towers Corp.*, 74 AD3d 568 [1st Dept 2010]).

As for the first factor, plaintiff's proprietary lease gives the board discretion to withhold

consent for transfers and assignments of shares "for any reason or for no reason."[1] Therefore, absent a showing of breach of fiduciary duty, as evidenced by fraud, self-dealing, unlawful discrimination, bad faith or other misconduct by the board, "the business judgment rule precludes judicial inquiry into the reasonableness of its determinations" (*DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005]; *see also DeGall v 201 W. 21st St. Tenants Corp.*, 251 AD2d 238, 239 [1st Dept 1998]; *Honig v St. George Tower & Grill Owners Corp.*, 217 AD2d 572, 573 [2d Dept 1995]).

In addition, particular restrictions on the resale of shares may constitute unreasonable restraints on alienation (*see* N.Y. Condo. & Coop. Law § 10:2 [2010]). It is well settled that a cooperative may reasonably restrain the alienability of its corporate shares to preserve the unique nature of the cooperative community (*Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 540 [1957]; *Penthouse Props., Inc. v 1158 Fifth Ave., Inc.*, 256 App Div 685, 690-691 [1st Dept 1939]; *Chemical Bank v 635 Park Ave. Corp.*, 155 Misc 2d 433, 436 [Sup Ct, NY County 1992]). However, this power is not unlimited. What the law condemns is not a restriction on transfers, such as a provision merely postponing sale during an option period, but an effective *prohibition* against transferability itself (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 167 [1986] ["Whether a restraint on the disposition of property is unreasonable is a question of

---

[1]Paragraph 16 (c) of plaintiff's proprietary lease states that "[t]here shall be no limitation, except as above specifically provided, on the right of Board or lessees to grant or withhold consent, for any reason or for no reason, to an assignment, except that such refusal of consent shall not be based on race, religion, color, creed, or any other ground proscribed by law" (Perel Aff., Exh. B). Additionally, Article V, Section 2 of the cooperative's by-laws states that "[p]roprietary leases shall be assigned or transferred only in compliance with, and shall never be assigned or transferred in violation of, the terms, conditions, or provisions, of such proprietary lease" (*id.*, Exh. C).

fact depending on its purpose, duration, and, where applicable, the designated method for fixing the purchase price"]; *Allen*, 2 NY2d at 542). Courts have upheld requirements of consent to transfer shares of cooperative apartments as reasonable restraints on alienation (*see Penthouse Props., Inc.*, 256 App Div at 691; *Matter of Lacaille (Feldman)*, 44 Misc 2d 370, 377 [Sup Ct, NY County 1964]).

In opposing defendant's motion, plaintiff relies upon *Oakley v Longview Owners* (165 Misc 2d 192 [Sup Ct, Westchester County 1995]) and *Marine Midland Bank v White Oak Coop. Hous. Corp.* (1997 WL 34823122, 1997 NY Misc LEXIS 739 [Sup Ct, Westchester County 1997]). In *Oakley*, the cooperative board adopted a floor price resolution which provided for withholding of approval for apartment sales contracts where the sales price was more than 10% below the appraisal-based value (*Oakley*, 165 Misc 2d at 193). The complex was a 160-unit complex, and only two units were appraised (*id.*). On the basis of the appraisal, the board adopted the floor price resolution (*id.*). The court determined that the floor price resolution was an unreasonable restraint on alienation, i.e., an effective prohibition against transferability (*id.* at 195). The court explained that "the restraint is dependent upon real estate market forces that are beyond the control of either party" and that "the restraint constitutes an open-ended and potentially long-lasting prohibition" (*id.*). However, the court also found that the board had no authority to impose the restraint, since it was not given such authority in the cooperative's by-laws, certificate of incorporation or the proprietary lease (*id.*). Here, in contrast to *Oakley*, the board did not adopt a floor price resolution, and plaintiff's proprietary lease gives the board discretion to approve assignments of shares "for any reason or for no reason" (Perel Aff., Exh. B).

In *Marine Midland*, the occupancy agreement gave the cooperative a 60-day option period within which to purchase the shareholder's common stock and occupancy agreement, when a shareholder notified the cooperative of an intention to leave the cooperative (*Marine Midland*, 1997 WL 34823122, 1997 NY Misc LEXIS 739). The occupancy agreement provided that the shareholder could sell the stock "to any person" if the cooperative corporation did not exercise its option within the 60-day period (*id.*). It also provided that the shareholder could sell "to any person" if the option was waived. Citing *Oakley*, the court held that "[t]he requirement by [the cooperative corporation] that plaintiff must sell its shares at a price set by it to be approved is an unreasonable restraint on alienation. Such a restriction can effectively prevent plaintiff from ever selling its shares as the price set may bear no reasonable correlation to market value" (*id.* [citation omitted]). The court also noted that the restriction was especially untenable considering that the shareholder was still liable for maintenance charges (*id.*, n 4). However, in this case, plaintiff's proprietary lease affords the board discretion to grant or withhold consent "for any reason or for no reason" (Perel Aff., Exh. B).

Although the above cases did not involve a proprietary lease which affords broad discretion to grant or without consent "for any reason or for no reason" they are nonetheless instructive. Plaintiff has sufficiently alleged that the board acted in bad faith in withholding its consent to a transfer of her shares, and, has sufficiently alleged a cause of action for unreasonable restraint on alienation. Counsel for plaintiff, who represented plaintiff during her purchase and sale transactions, states that the board is preventing sales *at market price*, and requires shareholders to set an artificially high price as the contract price (which increases the flip tax paid at the closing) (Kera Affirm., ¶ 4). Accordingly, defendant's citation to cases which uphold the

board's right to reject purchasers, where the purchase price is below market price, are inapposite (*see, e.g. Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]; *Singh v Turtle Bay Towers Corp.*, 74 AD3d 568 [1st Dept 2010]). Defendant's citation to cases which uphold the board's rejection of potential purchasers for any reason other than illegal discrimination are not persuasive, as they do not involve the allegation that defendant is preventing sales *at market price*, and moreover, the proprietary lease here prohibits more than discrimination; it includes a prohibition on "any other ground prohibited by law." Here, although defendant seek protection under the business judgment rule, it has not established that there is no issue of bad faith. Further, defendant has not established that plaintiff fails to state a cause of action for unreasonable restraint on alienation where the purpose of the restriction (which allegedly prevents sales *at market price*) is not established, the duration of the restriction is unlimited, except by amendment to the proprietary lease, and, there is no designated method for fixing the purchase price.[2] Plaintiff further alleges that the board unreasonably delayed in considering the purchase application for her unit (Complaint, ¶¶ 8, 10-12; Plaintiff Aff., ¶ 6). In her affidavit, plaintiff avers that the board took three months to inform her of its decision on the purchase application for $675,000 (Plaintiff Aff., ¶ 6). In addition, plaintiff alleges that the board was aware of her financial difficulties, and that she had notified the board and managing agent that she would have to default on her loan and on her maintenance payments (Complaint, ¶¶ 15, 17;

---

[2]Although defendant cites *Buttitta* (11 AD3d 250, *supra*), this case is not dispositive. In *Buttitta*, the plaintiffs challenged, as an unreasonable restraint on alienation, a bylaw preventing them from selling their shares on the open market unless they offered the stock first to the cooperative at a below-market price (*id.*). The First Department found this claim to be contradicted by documentary evidence, since they specifically ratified the bylaw at issue at meetings with the cooperative (*id.* at 250-251).

Plaintiff Aff., ¶ 6). "Pre-discovery dismissal of the pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith" (*Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 667 [1st Dept 1993]; *see also Bryan v West 81 St. Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992]; *Cohen v Seward Park Hous. Corp.*, 7 Misc 3d 1015 [A], *5, 2005 NY Slip Op 50614 [U] [Sup Ct, NY County 2005]).

Plaintiff requests leave to add the board or individual members of the board as defendants. Pursuant to CPLR 1003, "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared." In considering an application to add a party, the court must consider any prejudice to the existing parties to the action (*see Haughton v Merrill Lynch, Pierce, Fenner & Smith*, 305 AD2d 214, 215 [1st Dept], *lv dismissed in part and denied in part* 100 NY2d 608, *rearg denied* 1 NY3d 546 [2003]). Given the early stage of the action and the lack of prejudice to the existing parties to the action, plaintiff's request to add the board as a defendant is granted. Although defendant notes that it does not owe fiduciary duties to its shareholders (*see Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]), the court is permitting amendment of the complaint to add the board as a defendant.

Finally, the court notes that, in its moving papers, defendant did not address the third cause of action for negligence, which alleges that the board has financially mismanaged the building. Therefore, defendant is not entitled to dismissal of the third cause of action.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion (sequence number 001) to dismiss the complaint is

denied; and it is further

ORDERED that plaintiff's request to amend the complaint to add the board of directors of Trump Plaza Owners, Inc. as a defendant is granted, and plaintiff is directed to serve an amended complaint in conformance with this decision; and it is further

ORDERED that defendants shall answer the amended complaint within 20 days of said service; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
MITRA CHAPPELL,

Plaintiff,

-against-

THE BOARD OF DIRECTORS OF TRUMP PLAZA OWNERS, INC. and TRUMP PLAZA OWNERS, INC.,

Defendants.
----------X

And it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Court and the Clerk of the Trial Support Office (Room 158).

This Constitutes the Decision and Order of the Court.

Dated: October 3, 2011

ENTER:

J.S.C.
EMILY JANE GOODMAN