

Hubshman v 1010 Tenants Corp.

2011 NY Slip Op 32768(U)

October 24, 2011

Sup Ct, NY County

Docket Number: 114697/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Judge

PART 18

Index Number : 114697/2010
HUBSHMAN, BARBARA
vs.
1010 TENANTS CORP.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.
*and PC scheduled for
Jan 5, 2012 at 9:30 am part 10*

Dated: 10/24/11

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

Barbara Hubshman, *individually and
derivatively and behalf of 1010 Tenants Corp.*,

Plaintiff (s),

-against-

1010 Tenants Corp., Richard Born, Estelle
Greet, John E. Johnnidis, Roy Levit,
Michael Wolf, *individually and as members
of the Board of Directors of defendant
1010 Tenants Corp.*, Douglas Elliman
Property Management, Neil Rappaport,
Herrick Feinstein, LLP and William R.
Fried, *individually and as a partner or
member of defendant Herrick Feinstein, LLP,*

Defendant (s).

DECISION/ ORDER
Index No.: 114697/10
Seq. No.: 001, 002

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

FILED
OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Papers	Numbered
Motion Seq #1	
1010 Tenants' n/m (3211) w/JVDT affirm, exhs	1
Hubshman x/m w/BHW affirm, BH affid, exhs	2
Hubshman opp	3
1010 Tenants' reply w/BHW affirm	4
Motion Seq #2	
Herrick n/m (3211 and sanctions) w/JSF affirm, exhs	5
Hubshman opp w/BH affid, BHW affid, exhs	6
Herrick reply	7
Transcript OA 4/28/11	8

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

GISCHE J.:

Plaintiff Barbara Hubshman ("Hubshman"), a shareholder in the 1010 Tenants Corporation ("coop"), the corporation that owns the residential cooperative building located at 1010 Fifth Avenue, New York, New York ("building"), brings this action on her own behalf and derivatively against the coop, the board, its individual members, Douglas Elliman Property Management ("property manager"), Neil Rappaport ("managing agent") and the lawyers for the defendants, Herrick Feinstein LLP and William R. Fried ("Herrick defendants").

Presently before the court are two motions and one cross motion. Motion sequence number one, by the coop, the board, its individual members, the property management company and the managing agent, seeking the pre-answer dismissal of the 2nd, 3rd, 5th - 9th and 11th causes of action against them as well as the claim for punitive damages.

Motion sequence number 2, by the Herrick defendants, seeks the preanswer dismissal of the 10th cause of action against them and the imposition of sanctions.

Plaintiff opposes each motion and has separately cross moved in response to the coop's motion for leave to replead and amend her complaint.

Each motion seeks dismissal pursuant to CPLR 3211 [a][1] (documentary evidence) and [a][7] (failure to state a cause of action)¹. Regardless of which subsection of CPLR 3211[a] a motion to dismiss is brought under, the court must

¹The coop's notice also seeks dismissal pursuant to CPLR 3211 [a][5] (untimeliness) but that relief was not directly addressed in its papers, except for a passing reference.

accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]).

The following facts are alleged in the complaint to support the eleven (11) causes of action asserted and the claim for punitive damages:

Facts and Arguments Presented

Hubshman is the proprietary lessee of a penthouse coop apartment in the building owned by the coop. She claims that the coop, its directors, the property manager and its managing agent failed to properly maintain the building in good repair, as required by the proprietary lease, and that those defendants concealed (or tried to conceal) from the shareholders (and possibly government officials) dangerous problems existing in the building's chimney B-line fireplaces and flues. The complaint alleges that the board (aided and abetted by the property manager and its managing agent) went so far as to encourage building residents to use their fireplaces knowing of (and despite) this problem with the chimney.

According to Hubshman smoke, fumes and soot have regularly seeped into her apartment for decades because of these problems, not only depriving her of the full use of apartment, but also endangering the life of others who have occupied the apartment with her and placing other residents of the building in danger. She states that these conditions to the present day and have resulted in criminal charges being issued against Estelle Greer, one of the members of the board named as a defendant in this action.

Although the coop was fined by the New York City Fire Department ("FDNY") and ordered to stop using the B-line fireplaces until repairs were made, the board encouraged residents to keep using them. In spite of significant expenditures on engineers and other professionals trying to remedy the chimney problem, the board ultimately rejected their advice and recommendation, which was to install a flexible steel liner in the chimney. Instead, the board opted to have "an illegal fan system [installed]...to pull up the smoke past all the defects in the flues, and encouraged the B-line shareholders to use their fireplaces." According to Hubshman the expenditures were a charade and corporate waste.

The Department of Buildings ("DOB") issued a cease and desist order on December 9, 2009, ordering that no fireplaces be used at the building. Rather than comply with the order and take steps to remedy the situation, the board appealed the DOB's order, allegedly falsely stating in various documents submitted to government officials that there were no smoke leaks outside the chimney, and seeking that the "jerry rigged" fan be approved, even though it was inadequate to address the dangerous conditions DOB had identified.

When Hubshman complained about these conditions by, among other things, sending letters to fellow building residents, the coop, acting through its board and the directors, commenced a lawsuit against her in 2009 (1010 Tenants Corp. v. Hubshman, Supreme Court, Index No. 602966/09) ("garden case"), seeking the immediate removal of her roof top garden to remedy so called "leaks" into the unit below hers. Hubshman contends the lawsuit was brought in retaliation for her having complained about the smoke problems and that it was "based upon allegations that they knew or should have

known to be false and misleading, with the goal of harassing her and disrupting her life, improperly attempting to deprive her of her contractual rights under the proprietary lease and destroying and permanently removing her roof garden.”

Hubshman contends that the board’s actions were aided and abetted by the property manager and the managing agent who exercised no independent thought, but did whatever the board told him to, including covering up and actively concealing from the residents (and governmental authorities), the board’s misconduct with respect to the dangerous condition of the B-line chimney and flues.

According to the complaint, the Herrick defendants colluded with the board to commence legal action against Hubshman which was wholly devoid of merit and based upon fabrications.

Hubshman has asserted the following causes of action which are the subject of the dismissal motions presently before the court:

2nd COA, 3rd COA- brought by Hubshman, individually and derivatively, against Douglas Elliman and Rappaport, alleging they breached the building management agreement by failing to properly maintain building and hire competent contractors.

5th COA- Breach of Implied Warranty of Habitability (against the coop only) for failure to properly maintain and repair the chimney, etc.

6th COA- Partial constructive eviction due to incursion of smoke, fumes, soot, etc. into Hubshman’s apartment (against the coop only)

7th COA- against the coop and its directors for breach of fiduciary duty by depriving Hubshman of her rights under the proprietary lease

8th COA- against Douglas Elliman and Rappaport for aiding and abetting the

Board to breach its fiduciary duty to Hubshman

9th COA- against the coop for creating and maintaining a nuisance which continues unabated (the fireplace and flue issues)

10th COA- against Herrick Feinstein and Fried for intentionally engaging in deceitful conduct and of having colluded and conspired with the Board to commence legal action devoid of merit (violation of Judiciary Law § 487)

11th COA- brought by Hubshman, derivatively, against the Board, the individual members, Douglas Elliman and Rappaport for waste and mismanagement by, among other things, failing to properly maintain the building and commencing the garden case against her.

Discussion

Allowing the complaint a liberal construction, accepting the facts alleged in the complaint as true and affording Hubshman the benefit of every possible favorable inference, Hubshman has pleaded the following causes of action: 5th COA (warranty of habitability), 6th COA (partial constructive eviction) based upon the alleged smoke, soot, etc., conditions in Hubshman's apartment (King v. 870 Riverside Drive Housing Development Fund Corp., 74 A.D.3d 494 [1st Dept. 2010]). Therefore, the motion to dismiss the 5th and 6th causes of action in the complaint is denied.

The 7th COA for breach of fiduciary duty is asserted against the coop and its board of directors. The New York Business Corporation Law ("BCL § __") enumerates the obligations of corporate directors. It provides that "a director shall perform his [or her] duties as a director, including his [or her] duties as a member of any committee of the board upon which he [or she] may serve, in good faith and with that degree of care

which an ordinarily prudent person in a like position would use under similar circumstances.” (BCL § 401). Although corporate directors and its officers have a fiduciary duty to their shareholders, no such duty is imposed on the cooperative housing corporation itself (Peacock v. Herald Square Loft Corp., 67 A.D.3d 442 [1st Dept. 2009]). Therefore, the 7th COA must be dismissed against 1010 Tenants Corp (i.e. the coop corporation). Plaintiff has, however, at this stage, pleaded a cause of action against the board of directors for breach of fiduciary duty based upon claims that the board delayed action in having the B-line chimney and attendant dangerous condition properly repaired. The defenses raised by defendants, including the business judgment rule, may be asserted in the answer and are not a basis to dismiss this cause of action at this time because, on a preanswer motion to dismiss, the issue of whether the plaintiff can ultimately establish her allegations is not part of the court’s calculus (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, [2005]). Therefore, as to the board of directors, the motion to dismiss is denied.

Individual members of a board of directors cannot be held liable for breach of fiduciary duty absent claims that the they were acting outside their official capacity or engaged in tortious conduct (Konrad v. 136 E. 64th St. Corp., 246 A.D.2d 324 [1st Dept 1998]). The complaint, even when afforded a liberal construction and the facts asserted are accepted as true, fails to state a cause of action against any of the individually named board members, since no independent tortious conduct is attributed to any individual director (Konrad v. 136 E. 64th St. Corp., supra). The court has considered plaintiff’s submission and motion to amend its pleadings to include claims attendant to the summons and violation that was issued to 1010 Tenants Corp which

has resulted in the commencement of criminal action against the coop [Docket #2010SN065935]. The Information dated July 15, 2010 states that the coop has not remedied the condition identified in the summons. Various violations of the Administrative Code of the City of New York are identified, including a failure to re-line the chimney and problems with carbon monoxide. Although plaintiff contends that Estelle Greer is the defendant in that criminal action, the Information more completely states that "Estelle Greer, officer of 1010 Tenant's Corp ("Tenants Corp.), the owner of the Subject Premises, and the defendant in this action, did violate the lawful requirements [of the Administrative Code]..." (emphasis added). Clearly, Ms. Greer has been charged as an officer of the owner, not in her individual capacity. Therefore, the motion to dismiss the 7th COA, to the extent it asserts claims against the board members in their individual, not official capacity, is granted. The claims against defendants Richard Born, Estelle Greer, John E. Johnnidis, Roy Levit and Michael Wolf, in their individual capacities, are severed and dismissed.

The 8th COA against the property manager and the managing agent is for "aiding and abetting" the board's breach of fiduciary duty survives the motion to dismiss because Hubshman has pleaded a cause of action against the board for breach of fiduciary duty (Kassover v Prism Venture Partners, LLC, 53 A.D.3d 444 [1st Dept 2008]). Furthermore, the facts alleged, and as amplified by the plaintiff's submissions (affidavit, etc) support the claim asserted. Therefore, defendants' motion for the dismissal of the 8th COA is denied.

The nuisance cause of action (9th COA) is supported by facts in the complaint and plaintiff has defeated defendants' motion for the preanswer dismissal of this claim

as well. Therefore, defendants' motion to dismiss the 9th COA is denied.

The 11th COA (waste and mismanagement) is brought against all the defendants (except the Herrick defendants), claiming that they failed to properly manage the building, make necessary repairs, commencing the garden case against her and other misfeasances. Plaintiff has pleaded facts which, at this stage of the litigation, support her claims against the board. Although defendants contend Hubshman did not comply with the requirements of BCL § 626 [c], requiring that she set forth the steps she took to obtain the board's intervention, this alleged defect is remedied by her statements in her sworn affidavit provided in support of her cross motion to amend the complaint (discussed later in this decision).

That branch of the 11th COA seeking relief against the property manager and the managing agent is best discussed in conjunction with the 2nd and 3rd COAs, each of which also assert claims against them for breach of the management agreement based upon her status as a third party beneficiary thereof. A party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost." (Infantino v. Shahani, 2008 WL 2789084 [Sup Ct, NY 2008] n.o.r. citing State of California Public Employees' Retirement System v. Sherman & Sterling, 95 N.Y.2d 427 [2000]; Edge Management Consulting, Inc. v. Blank, 25 A.D.3d 364 [1st Dept 2006]). Hubshman is, at best, an incidental beneficiary of the management agreement, but not

a third party beneficiary thereof². Therefore, the defendants' motion for the preanswer dismissal of Hubshman's 2nd, 3rd and 11th COAs against the property manager and managing agent is granted and those claims are severed and dismissed.

The 10th COA against the Herrick defendants alleges very serious conduct in violation of Judiciary Law § 487. The moving defendants contend Hubshman has stated demonstrably false facts to support her complaint and they urge the court to dismiss that claim based upon documentary evidence and failure to state a cause of action. The Herrick defendants have proved their entitlement to relieve under CPLR 3211 [a] [7] but not [a] [1]. "Documentary evidence" refers to documents which flatly contradict the plaintiff's claims (Biondi v. Beckman Hill House Apt. Corp., 257 AD2d 76 [1st Dept 1999] aff'd 94 NY2d 659 [2000]). The documents provided by the Herrick defendants do not meet this criteria. At best, they present possible defenses to the claims against them.

However, Hubshman has failed to state a cause of action against the Herrick defendants for violations of Judiciary Law § 487. Judiciary Law § 487 provides, in relevant part that "an attorney or counselor who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party... is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." Simply asserting "unfounded allegations in a pleading, even if made for improper purposes, does not provide a basis for liability under [Judiciary Law § 487]"

²This analysis, however, does not impact on the 8th COA against the property manager and agent, discussed *supra* in this decision and order.

(Ticketmaster Corp. v. Lidsky, 245 A.D.2d 142, 143 [1st 1997] *citing* Thomas v. Chamberlain, D'Amada, Oppenheimer & Greenfield, 115 A.D.2d 999, 1000 [4th Dept 1985] *app dism* 67 N.Y.2d 1005 [1986]). Affording the complaint a liberal construction, accepting the allegations as true and according the plaintiff the benefit of every possible inference, Hubshman has no cause of action against the Herrick defendants under Judiciary Law § 487. Therefore, defendants' motion to dismiss is granted and the 10th COA is hereby severed and dismissed.

The Herrick defendants seek sanctions against Hubshman pursuant Part 130 of the Uniform Rules of Trial Courts because the claim she asserted was frivolous. An action is frivolous, within the meaning of Part 130 if (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

The decision to impose or not impose sanctions lies within the court's sole discretion (Liddle & Robinson v. Shoemaker, 276 A.D.2d 335 [1st Dept 2000]). In deciding whether they are to be imposed, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (Uniform Rules of Trial Court Part 130.1-1 et seq). The motion for sanctions against plaintiff and/or her attorney is denied. Litigation can be rough and tumble, often filled with acrimony and

harsh accusations which may be ill advised, but not sanctionable. Examining the complaint in the light most favorable to the plaintiff shows that this claim was nothing more than an error of professional judgment which is non-sanctionable (Ross & Cohen v. Kurtz Steel Corp., 237 A.D.2d 172 [1st Dept 1997]).

Hubshman has also asserted a claim for punitive damages. "Absent allegations of facts that would support finding of wanton dishonesty as to imply criminal indifference to civil obligations" such damages are not recoverable (McLaughlin v. American Intern. Life Assur. Co. of New York, 181 A.D.2d 444, 445 [1st Dept 1992]). The court will allow the claim for punitive damages stand based upon the allegations set forth in the 7th COA alleging breach of fiduciary duty and the 8th COA for aiding and abetting since these are the most serious allegations in the complaint. However, in all other respects, defendants' motion for the severance and dismissal of the punitive damages claim is granted and the claim is otherwise severed and dismissed.

Hubshman's cross motion for permission to amend her complaint to address any deficiencies therein is granted only that she may amend her 11th COA to include factual allegations that she made demands for the board to take action (i.e. to plead compliance with BCL § 626 et seq). Otherwise, Hubshman's motion to serve an amended pleading is denied. Although leave to amend a pleading is generally freely given (see CPLR 3025[b]), denial is appropriate if the movant fails to show that the proposed amendment has merit (Trump on Ocean, LLC v. State, 79 A.D.3d 1325 [3rd Dept 2010]). The amplifications proposed by Hubshman do not strengthen the claims that have now been dismissed by the court.

Recapitulation and Conclusion

Defendants' motion for the preanswer dismissal of the complaint is decided as follows:

2nd and 3rd COAs- granted and claims dismissed

5th COA, 6th COAs- denied; issue must be joined

7th COA- granted as to the coop and board members in their individual capacity but denied as to the board and board members in their official capacity. The claims against Richard Born, Estelle Greer, John F. Johnnidis, Roy Levit, Michael Wolf in their individual capacities are dismissed.

8th COA- denied; issue must be joined

9th COA- denied; issue must be joined

10th COA- granted and claims dismissed in their entirety against Herrick Friedman, LLP and William R. Fried, individually and as partner/member of Herrick Friedman, LLP.

11th COA- granted and claims dismissed

Punitive damages- denied insofar as they are sought on the 7th and 8th COA, otherwise the motion is granted.

With the exception of the 8th COA, the claims against Douglas Elliman Property Management and Neil Rappaport (individually or in his official capacity) are dismissed.

Plaintiff's cross motion to amend is granted only as to her 11th COA, otherwise it is denied.


Each side must serve its adversary with a copy of this decision and order with notice of its entry. Upon being so served, plaintiff may, within twenty (20) days thereof,

serve her amended complaint. Defendants shall answer within the time provided under the CPLR.

This case is scheduled for a preliminary conference on January 5, 2012 at 9:30 a.m. in Part 10. Any relief requested but not expressly addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
October 24, 2011

So Ordered:



Hon. Judith J. Gische, JSC

FILED

OCT 25 2011

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