

Murphy v 14 Sutton Tenants Corp.

2011 NY Slip Op 33114(U)

November 23, 2011

Supreme Court, New York County

Docket Number: 101895/11

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

DECEMBER

PART 17

Index Number : 101895/2011

MURPHY, ELIZABETH WESTON

vs

14 SUTTON TENANTS CORPORATION

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

DEC 02 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/23/11

EMILY JANE GOODMAN 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 I.A.S. PART 17

-----X
ELIZABETH WESTON MURPHY,

Plaintiff,

-against-

Index No. 101895/11

14 SUTTON TENANTS CORPORATION,
JUDITH SAFFER, LINDA FARGO, AMY
BONOFF, AMY BENDER, SALVIO FLEMMO,
ROBERT LOPE, DAVID OFFICER,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

FILED

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COUNTY CLERK'S OFFICE

Plaintiff (Weston-Murphy) is a shareholder at 14 Sutton Place in New York County. She claims that the Defendants breached their fiduciary duty to her and that they intentionally inflicted emotional distress upon her. While not set forth in Plaintiff's motion papers, the underlying complaint refers to discrimination and disparate treatment. Defendants, the cooperative corporation and its Board of Directors, move to dismiss the action which is based on a building mandate that Murphy, when accompanied by her dog, must use the service elevator although other dog-owners (except one other) use the passenger elevator. The board has based its action on its belief that Theo is an unruly, ill-behaved dog.¹

¹The Court disclosed its personal view that no dogs should ride in the passenger elevators, but no recusal was sought.

The Defendants rely on the business judgment rule as set forth in *Levandusky v One Fifth Avenue*, 75 NY2d 530 (1990) and cite numerous instances of Plaintiff's violation of the rule and ongoing complaints by neighbors, as to Theo's unsafe and unsanitary conduct.

“[T]he business judgment rule prohibits judiciary 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 [2nd 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 to 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]).

As to Defendant’s motion to dismiss, pursuant to CPLR 3211(a)

“(a) party may move for judgment dismissing one or more causes of action asserted against him on the ground that
(7) the pleading fails to state a cause of action”

However, the Court of Appeals has set a standard in *Leon v Martinez*, 84 NY2d 83 (1994), “On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026).” We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Marone v Marone*, 50 NY2d 481, 484; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. (*see, e.g., Heaney v Purdy*, 29 N2d 157).” In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635) and “the criterion is whether the

proponent of the pleading had a cause of action, not whether he has stated one”
(*Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, *supra* at 635).

Plaintiff contends that the board members are not insulated from individual liability under the business judgment rule as a result of their bad faith. When dealing with individual liability, courts will dismiss complaints that fail to allege with specificity independent tortious acts by the board members (*see, e.g., Pelton v 77 Park Avenue Condominium*, 38 AD3d 1[1st Dept 2006]). Plaintiff is required to plead with specificity independent tortious acts by each individual defendant in order to overcome the public policy that supports the business judgment rule (*see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913 [1978], *Pelton v 77 Park Avenue Condominium*, 39 AD3d 1, 825 NYS2d 28 (2006). *Konrad v 136 E. 64th St. Corp.*, 245 AD2d 324 [1998]. As detailed in *Konrad*, (at 326) where the complaint failed to allege any independent wrongful conduct by an individual director of a cooperative,

“That the cooperative corporation’s board of directors may have taken action that ‘deliberately singles out individuals for harmful treatment’ does not, ipso facto, expose the individual board members to liability. The proposed cause of action ascribed no independent tortious conduct to any individual director, and plaintiff’s proposed . . . cause of action is therefore deficient as a matter of law” (citation omitted).

Accordingly, the motion to dismiss is granted as to the individual members of the board of Directors, but denied as to the Corporation.

This constitutes the Decision and Order of the Court.

Dated: November 23, 2011

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED

DEC 02 2011

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