

Hoppe v Board of Directors of the 51-78 Owners Corp.

2011 NY Slip Op 34113(U)

March 21, 2011

Sup Ct, New York County

Docket Number: 105393/06

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

B.J. HOPPE,

Plaintiff,

INDEX NO. 105393/06

- against -

MOTION DATE _____

THE BOARD OF DIRECTORS OF THE 51-78 OWNERS CORP., 51-78 OWNERS CORP.,

MOTION SEQ. NO. 08

MOTION CAL. NO. _____

Defendants.

The following papers were read on this Motion for Summary Judgment by defendant dismissing the first through sixth causes of action in the complaint.

FILED

Notice of Motion — Affidavits — Exhibits

MAR 25 2011

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Cross-Motion: Yes No

Defendants move for summary judgment dismissing the first through sixth causes of action in the complaint.

Defendant 51-78 Owners Corp. (the Co-op) is a corporation, and owner of the premises located at 51 East 78th Street, New York. Defendant The Board of Directors of 51-78 Owners Corp.(the Board) is the duly elected Board of Directors of the Co-op. Plaintiff is the proprietary lessee of two penthouse units (Units 5A and 5D) at the premises and the owner of the shares in the Co-op appurtenant thereto.

At the time plaintiff purchased her units, she submitted to the Board a request to perform an alteration of her units, in an effort to consolidate them. The Board did not approve of the original plan and the parties proceeded to make revisions. On April 25,

2005, plaintiff entered into an agreement (Settlement Agreement) with the Board in which the Board consented to an alteration of the units. Detailed plans setting forth the nature of the alterations to be performed were annexed to the Settlement Agreement.

In May 2005, plaintiff proceeded to undertake demolition work on the units. Thereafter, plaintiff submitted a revised plan to the Board.. Pursuant to the Settlement Agreement, the Board had five calendar days to send plaintiff comments on any proposed alteration or change to the renovation plan. Plaintiff claims that the Board did not respond in a timely manner, and denied her application in a letter, dated April 13, 2006, without offering a reason.

Plaintiff brought this suit on April 18, 2006 for injunctive relief and damages. Plaintiff then moved to compel arbitration pursuant to the terms of the Settlement Agreement. Defendants subsequently agreed to arbitrate and the arbitration was held on July 20, 2006. On September 8, 2006, the arbitrators issued the Award, which was labeled "recommendations" with respect to 29 specific issues regarding the proposed renovations. The majority of these issues were worked out by the parties shortly before and during the arbitration. The unresolved issues were decided by the arbitrators. Defendants claimed that the issues were decided in their favor. Following the arbitration, defendants moved to confirm the Award and for leave to amend their answer to interpose a counterclaim for attorneys' fees and costs incurred in the arbitration, based on the assertion that defendants were the prevailing party in the proceedings. This court confirmed the Award but denied the motion for leave to amend, on the ground that neither party prevailed, that three issues were decided in favor of plaintiff and five issues were decided in favor of defendants.

On October 6, 2006, plaintiff's architect submitted a revised plan that allegedly

incorporated all of the arbitrators' recommendations. At defendants' request, additional documentation was provided to defendants' engineer on October 11th and October 17th. Plaintiff claims that defendants did not provide a response to the plan until November 20, 2006. However, it was not until January 31, 2007 that the Board signed the permits which authorized the performance of the revised plan.

By motion dated January 24, 2007, plaintiff moved for an order granting leave to amend the complaint to include a cause of action of breach of fiduciary duty as against the individual defendants. The alleged basis for this claim was that the Board had in the past delayed in approving plaintiff's plans; that the Board's representative, Edward McNeal, had offered to drop the Board's objection as concerning certain renovation measures in return for a discontinuance of this lawsuit; and an illegal alteration had previously been performed in another unit of the premises with Board approval. The motion was granted by this court but was reversed on appeal by the Appellate Division, First Department, 2008 NY Slip Op 02771.

Defendants move for summary judgment dismissing the first through sixth causes of action. They assert that several of the causes of action have been rendered moot, and that some of the causes of action are distorted, involve inflated damages and lack merit.

Plaintiff's first cause of action seeks a declaration that the Settlement Agreement is valid and that plaintiff should be permitted to sign the permits relating to her second alteration plan. Defendants state that this matter had been fully arbitrated, and the specific plan was never implemented. Thus, defendants want this cause of action dismissed as moot.

Plaintiff's second cause of action seeks an injunction compelling defendants to

arbitrate the dispute concerning the second alternation plan. According to defendants, the arbitration proceeding and its results have rendered this cause of action moot, and they urge that the cause of action should be dismissed.

Plaintiff's third cause of action seeks an injunction barring the Co-op from filing any liens against the units based on the events alleged in the complaint. Defendants state that plaintiff has since stipulated that she would take no such action. Defendants claim that the cause of action has been rendered moot and should be dismissed .

Plaintiff's sixth cause of action asserts a breach of fiduciary duty against individual members of the Board. Defendants argue that this cause of action has been stricken by the Appellate Division and should be dismissed.

The fourth cause of action asserts a breach of fiduciary duty against defendants through various alleged acts, specifically delaying the approval of plaintiff's second alteration plan. Plaintiff is seeking compensation for the construction of the units, attorneys' fees and an exemption from the Co-op's special assessments. Defendants argue that plaintiff is not entitled to attorneys' fees as this matter is not related to the Settlement Agreement. They state that they are not obligated to pay for construction costs, and that whatever damages that are sought by plaintiff are exaggerated. According to them, she should seek damages in Civil Court. Defendants aver that this court, if it does not dismiss this claim, should transfer this action to Civil Court.

The fifth cause of action asserts a prima facie tort. Defendants seek dismissal on similar grounds that are related to the fourth cause of action.

In the opposition papers, plaintiff does not address the mootness issue. However, she argues that the fourth and fifth causes of action should not be dismissed because there are triable issues involved, which apparently relate to assertions of bad

faith on defendants' part in delaying the approval of the alteration plan. Plaintiff claims that she is not seeking compensation for the full cost of her construction of the units. She claims that she is only seeking costs attributed to delays in the process of construction. Her contention is that defendants are actually not disputing the merits of the aforesaid causes of action, and that this is actually a motion to transfer this case to Civil Court.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law." *Dallas- Stephenson v Waisman*, 39 AD3d 303, 306 (1ST Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

The court shall dismiss the first, second, third and sixth causes of action. Plaintiff does not raise any opposition to defendants' allegations with respect to mootness.

The court shall dismiss the fifth cause of action. A prima facie tort requires a showing of intentional infliction of harm, without excuse or justification by an act or series of acts that would otherwise be legal, resulting in special damages. *Kaisman v Hernandez*, 61 AD3d 565, 566 (1st Dept 2009). A cause of action for a prima facie tort

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requires that plaintiff has sustained special damages. *Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265, 266 (1st Dept 2002). Here, plaintiff has failed to demonstrate the kind of actions contemplated by this cause of action, or the special damages necessary in order to maintain this claim.

The court shall not dismiss the fourth cause of action. Defendants have apparently concentrated on the issue of damages in this claim and have not stressed a lack of liability on their part. They persist on having this matter transferred to Civil Court on the grounds of the jurisdictional limit of the damages. However, the dispute as to the amount of damages allegedly sustained by plaintiff is an issue of fact, requiring the preclusion of this motion. It would be premature to transfer this action, and plaintiff is entitled to her day in this court.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted as to the first, second, third, fifth and sixth causes of action of the complaint and is denied as to the fourth cause of action; and it is further

ORDERED that the action shall continue as to the fourth cause of action.

This constitutes the Decision and Order of the Court

Dated: 3-21-11

Enter:


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE

FILED

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