

<b>Wachsman v Catcendix Corp.</b>
2012 NY Slip Op 31827(U)
July 6, 2012
Supreme Court, New York County
Docket Number: 101554/2011
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS  
J.S.C.  
*Justice*

PART 46

BERNARD WACHSMAN and NINA WACHSMAN

INDEX NO. 101554/2011

MOTION DATE \_\_\_\_\_

- v -  
CATCENDIX CORP., ORSID REALTY CORP., and  
JOEL D. FEAZELL

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion ~~to~~ *for injunctive and declaratory relief*

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

*The court denies plaintiffs' motion for injunctive and declaratory relief, grants defendants' cross-motion to dismiss the complaint in part, and otherwise denies defendants' cross-motion. C.P.L.R. §§ 3211(a)(1) and (7), 3001, 6312(a).*

**FILED**

JUL 12 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/6/12

Lucy Billings  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 46  
-----x

BERNARD WACHSMAN and NINA WACHSMAN,  
  
Plaintiffs

Index No. 101554/2011

- against -

DECISION AND ORDER

CATCENDIX CORP., ORSID REALTY CORP.,  
and JOEL D. FEAZELL, Individually  
and as a Member of the Board of  
Directors,

**FILED**

Defendants

**JUL 12 2012**

-----x

LUCY BILLINGS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this action arising from plaintiffs' renovations to their cooperative apartment, plaintiffs move to enjoin defendants from evicting plaintiffs and for a declaration that they are not in breach of their proprietary lease and that defendant Catcendix Corp.'s Notice of Default is a nullity. C.P.L.R. §§ 3001, 6312(a). Defendants cross-move to dismiss the complaint. C.P.L.R. § 3211(a)(1) and (7). Plaintiffs and defendant Catcendix Corp. seek attorneys' fees and expenses.

In the absence of any related proceeding already in Civil Court, plaintiffs were entitled to pursue their action in Supreme Court, to obtain injunctive relief unavailable in Civil Court. Lex 33 Assoc. v. Grasso, 283 A.D.2d 272 (1st Dep't 2001); Eckstein v. New York Univ., 270 A.D.2d 208 (1st Dep't 2000); North Waterside Redevelopment Co., L.P. v. Febbraro, 256 A.D.2d 261, 262 (1st Dep't 1998); Shadick v. 430 Realty Co., 250 A.D.2d 417 (1st Dep't 1998). Nevertheless, for the reasons explained

below, the court denies plaintiffs' motion and partially grants defendants' cross-motion.

I. UNDISPUTED FACTS

Plaintiffs hold a proprietary lease to Apartments 6D and 6E in the building at 410 Central Park West in New York County. Defendant Catcendix Corp., a cooperative housing corporation, owns the building. Defendant Orsid Realty Corp. is the building's managing agent. Defendant Joel Feazell is the president of Catcendix Corp.'s board of directors.

In February 2010, plaintiffs commenced alterations to their apartment that were to include a new entrance into a portion of the hallway outside their apartment. The parties dispute the nature and extent of plaintiffs' authorization to perform these alterations. On October 25, 2010, 239 days after the end of February 2010, when plaintiffs commenced the alterations, plaintiffs began construction of the new entrance by installing metal framing in the outside hallway. On January 14, 2011, defendants served plaintiffs with a "NOTICE OF DEFAULT UNDER, AND INTENTION TO TERMINATE, PROPRIETARY LEASE." V. Compl. Ex. S.

II. DEFENDANTS' CROSS-MOTION TO DISMISS THE COMPLAINT

A. Timeliness

Although plaintiffs object that defendants defaulted in responding to the complaint, so that their cross-motion is untimely, plaintiffs stipulated to a court ordered schedule May 2, 2011, that extended defendants' time to respond until May 27, 2011. Even if the stipulation is construed to permit only

opposition and not a cross-motion to plaintiffs' motion, the parties' ongoing settlement negotiations and defendants' plausible understanding of the stipulation provide an acceptable excuse for defendants' default and basis to extend their time to cross-move to dismiss the complaint. Vazquez v. Beharry, 82 A.D.3d 649 (1st Dep't 2011); Finkelstein v. East 65th Street Laundromat, 215 A.D.2d 178 (1st Dep't 1995). See Polanco v. Scott, 41 A.D.3d 182 (1st Dep't 2007).

B. Standards

Upon defendants' cross-motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates plaintiffs' allegations. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiffs' favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). The applicable standard is thus whether reasonable inferences from the complaint sustain a claim, especially upon a pre-answer

motion to dismiss as here. Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Pepler v. Coyne, 33 A.D.3d 434, 435 (1st Dep't 2006). See Lappin v. Greenberg, 34 A.D.3d 277, 279 (1st Dep't 2006). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002); Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001).

Dismissal of the complaint's claims pursuant to C.P.L.R. § 3211(a)(1) requires documentary evidence in admissible form that conclusively resolves all factual issues and establishes a defense as a matter of law. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009); Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495 (1st Dep't 2006); Richbell Info. Servs. v. Jupiter Partners, 309 A.D.2d 288, 289 (1st Dep't 2003). The documentary evidence must plainly and flatly contradict the claims in the complaint. KSW Mech. Servs., Inc. v. Willis of N.Y., Inc., 63 A.D.3d 411 (1st Dep't 2009); Arfa v. Zamir, 55 A.D.3d 508, 509 (1st Dep't 2008); Kinberg v. Kinberg, 50 A.D.3d 512, 513 (1st Dep't 2008); Sprung v. Command Sec. Corp., 38 A.D.3d 478, 479 (1st Dep't 2007). The court may dismiss claims based on such evidence only if plaintiffs fail to rebut it. Hicksville Dry Cleaners, Inc. v. Stanley Fastening Sys., L.P., 37 A.D.3d 218 (1st Dep't 2007).

C. The Business Judgment Rule Insulates Defendant Feazell from Liability.

The business judgment rule protects defendant Feazell, as an individual officer and member of Catcendix Corp.'s board, from liability for decisions within the scope of his authority as a board officer and member. 40 W. 67th St. v. Pullman, 100 N.Y.2d 147, 150 (2003); Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 536-37 (1990); Weinreb v. 37 Apartments Corp., \_\_\_ A.D.3d \_\_\_, 943 N.Y.S.2d 519, 522-23 (1st Dep't 2012); Berenger v. 261 W. LLC, 93 A.D.3d 175, 184-85 (1st Dep't 2012). Plaintiffs' claims that Feazell acted beyond the scope of his authority or in a discriminatory manner are at best conclusory, as plaintiffs do not allege any evidentiary facts indicating any particular conduct by him other than on the board's behalf or conduct from which conflict of interest, bias, or discrimination may be inferred. E.g., TPZ Corp. v. Reddington, 239 A.D.2d 301 (1st Dep't 1997). See Kassoover v. PVP-GCC Holdingco II, LLC, 73 A.D.3d 626, 629 (1st Dep't 2010); Perlbinder v. Board of Mgrs. of 411 E. 53rd St. Condominium, 65 A.D.3d 985, 989 (1st Dep't 2009). Plaintiffs do not allege any violations of the State or City Human Rights Law or that Feazell otherwise "breached a duty other than, and independent of, those contractually imposed by the board." Fletcher v. Dakota, Inc., \_\_\_ A.D.3d \_\_\_, N.Y.L.J. 1202561914688, at \*4 (1st Dep't July 3, 2012) (quoting Brasseur v. Speranza, 21 A.D.3d 297, 298 (1st Dep't 2005)).

Plaintiffs do allege that Feazell and the corporate defendants, knowing plaintiffs observe their Sabbath, waited

until the start of the Sabbath to remove the framework plaintiffs had erected in the hallway. These allegations do not specify, however, that Feazell engaged in conduct distinct from the board's actions, e.g., Berenger v. 261 W. LLC, 93 A.D.3d at 185, or that either Feazell or any defendants removed the framework or otherwise acted because of plaintiffs' Sabbath observance. E.g., Fletcher v. Dakota, Inc., \_\_ A.D.3d \_\_, N.Y.L.J. 1202561914688, at \*6. Nor do plaintiffs allege that any of defendants forced plaintiffs to take any actions on the Sabbath. To the contrary, plaintiffs allege that: "On or about Thursday, December 9, 2010," defendants demanded that plaintiffs remove the framework by the afternoon of Friday, December 10, 2010. V. Compl. ¶ 45. Plaintiffs do not allege that defendants prevented plaintiffs from removing the framework on Thursday or earlier on Friday, before the Sabbath began; that defendants refused, or plaintiffs even made any request, to wait until after the Sabbath; or that defendants' ultimate removal of the framework after the Sabbath began required plaintiffs' participation in any way. All of plaintiffs' other allegations concerning Feazell, including his refusal to turn over to plaintiffs the certificate of share for the hallway space that plaintiff purchased, relate to his actions on behalf of Catcendix Corp. and its board. E.g., Weinreb v. 37 Apartments Corp., \_\_ A.D.3d \_\_, 943 N.Y.S.2d at 522-23.

D. Plaintiffs Do Not State Claims for Breach of Fiduciary Duty or for Breach of the Covenant of Good Faith and Fair Dealing.

Plaintiffs do not state claims for breach of fiduciary duty or for breach of the covenant of good faith and fair dealing because their allegations of conflict of interest, bias, or discrimination, on which plaintiffs also rely to support these claims, are merely conclusory. Citibank, N.A. v. Silverman, 85 A.D.3d 463, 466 (1st Dep't 2011); Kassover v. PVP-GCC Holdingco II, LLC, 73 A.D.3d at 629; TPZ Corp. v. Reddington, 239 A.D.2d 301; Cirillo v. Muss Dev. Co., 278 A.D.2d 353, 355 (2d Dep't 2000). Again, plaintiffs do not allege any particular misconduct or wrongdoing indicating conflict, bias, or discrimination.

E. Plaintiffs State Claims Against the Corporate Defendants for Breach of Contract and for Promissory Estoppel.

Plaintiffs state a claim for breach of contract by alleging as follows. First, defendants granted plaintiffs' request for permission to perform alterations and thus agreed to them by defendant Fezell signing their work permit application, even if not by a signature on the Alteration Agreement. Then, while plaintiffs performed under that agreement by making payments to defendants for various purposes, including for permission to combine the apartments and for a security deposit, defendants breached the agreement by preventing plaintiffs from completing the alterations, serving the Notice of Default, and threatening to terminate plaintiffs' proprietary lease. Consequently, plaintiffs are damaged both by being prevented from completing

their alterations, toward which they already have invested significant resources, and now by the threatened loss of their home as well as their investment. Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 415 (2001); McGhee v. Odell, \_\_\_ A.D.3d \_\_\_, 2012 WL 2036452, at \*1 (1st Dep't June 7, 2012). See Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010); Jacobs Private Equity, LLC v. 450 Park LLC, 22 A.D.3d 347 (1st Dep't 2005). Plaintiffs further state a claim for promissory estoppel because they allege that defendants promised to permit plaintiffs to complete the alterations, and plaintiffs paid defendants and expended time and funds commencing alterations in reasonable reliance on defendants' promise. Forman v. Guardian Life Ins. Co. of America, 76 A.D.3d 886, 889 (1st Dep't 2010); Global Icons, LLC v. Sillerman, 45 A.D.3d 457 (1st Dep't 2007).

None of the admissible documentary evidence that defendants present conclusively contradicts plaintiffs' allegations. C.P.L.R. § 3211(a)(1); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; McCully v. Jersey Partners, Inc., 60 A.D.3d 562; Sprung v. Command Sec. Corp., 38 A.D.3d at 479; Richbell Info. Servs. v. Jupiter Partners, 309 A.D.2d at 289-90. In particular, the Alteration Agreement, which defendants allege imposes a deadline for plaintiffs' alterations that plaintiffs missed, does not specify any dates from which the deadline would run. Even if it ran from the end of February 2010, when plaintiffs commenced the alterations, more significantly, defendants' version of the Alteration Agreement is not fully executed, so as to evidence a

consummated agreement. Aff. of Joel Feazell Ex. C (May 27, 2011).

Plaintiffs themselves present a written Alteration Agreement that differs from the version presented by defendants. While plaintiffs' version requires additional written authorization for any alterations more than 180 days after alterations commenced, their version is not executed by any party. V. Compl. Ex. C. Plaintiffs allege that the Alteration Agreement was never consummated; that instead defendants' gave an oral additional authorization; and that other exchanges between the parties, described above, established an agreement permitting plaintiffs' alterations without a deadline. Plaintiffs' allegations, accepted as true and liberally construed, with all reasonable inferences in their favor, thus survive defendants' cross-motion to dismiss the complaint, even if plaintiffs do not satisfy the higher standard for a preliminary injunction. Nonnon v. City of New York, 9 N.Y.3d at 827; Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Vig v. New York Hairspray Co., L.P., 67 A.D.3d at 144-45.

III. PLAINTIFFS DO NOT ESTABLISH A PRIMA FACIE CLAIM SUFFICIENTLY FOR EITHER INJUNCTIVE RELIEF OR A DECLARATORY JUDGMENT.

Plaintiffs bear the burden when seeking a preliminary injunction to show a likelihood of success on the merits of their claims. C.P.L.R. § 6312(a). Although plaintiffs allege sufficient facts to survive the corporate defendants' cross-motion to dismiss the claims for breach of contract and promissory estoppel, plaintiffs do not present admissible

evidence to support those claims fully or adequately.

Plaintiffs do not present an executed proprietary lease, but acknowledge that the lease and House Rules required them to obtain the lessor's written consent to alterations and a signed Alteration Agreement. Plaintiffs present the application to the New York City Department of Buildings (DOB) bearing a signature "Joel Feazell" as president of Catcendix Corp., V. Compl. Ex. J, at 5, but do not authenticate Feazell's signature on the DOB application or otherwise lay a foundation for its admissibility. Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992). See Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); In re Barabash, 84 A.D.3d 1363, 1364 (2d Dep't 2011). Bernard Wachsman attests that the document is a copy of the DOB application, but does not indicate personal knowledge of Feazell's signature, personal knowledge of the circumstances surrounding Feazell's signing of the application, or any other foundation for the document's admissibility. Nor do plaintiffs present a signed Alteration Agreement as required by the House Rules, which plaintiffs treat as "applicable rules" to which the lease binds tenants. V. Compl. Ex. A, § 21(a).

Plaintiffs present several checks payable to Catcendix Corp., but they are not cancelled or endorsed, nor do plaintiffs produce other admissible evidence that Catcendix Corp. accepted or deposited them. V. Compl. Ex. L. Plaintiffs present one cancelled check for \$1,000 to Orsid Realty, but do not establish what the payment was for. They describe the check as payment for

processing fees, but the Alteration Agreement plaintiffs present specifies that the processing fees are only \$300. V. Compl. Exs. C, § 8(b), and G. Nor do plaintiffs establish the processing fees' significance. No evidence shows, for example, that the fees were consideration for defendants authorizing the alterations or that acceptance of the fees implied a promise so as to establish promissory estoppel. The agreement for plaintiffs' payments into escrow refers to combining the apartments, but does not mention alterations to the hallway. V. Compl. Ex. E.

Even if plaintiffs' evidence established defendants' consent to plaintiffs' alterations, plaintiffs present no evidence of defendants' further written consent that plaintiffs' alteration work continue more than 180 days after the commencement of the alterations, as required by the Alteration Agreement plaintiffs themselves present. V. Compl. Ex. C § 1(B)(4). Bernard Wachsman attests that defendants orally promised to permit the alterations to proceed in or after October 2010, but oral promises are unavailing against the requirements for written approval reiterated in the lease, House Rules, and Alteration Agreement, all presented by plaintiffs themselves.

Because plaintiffs have not shown a likelihood of success on the merits of their claims, the court denies their motion for a preliminary injunction. C.P.L.R. § 6312(a). Because plaintiffs do not establish meritorious claims for defendants' breach of contract, for promissory estoppel, or that the Notice of Default

is void, the court also denies plaintiffs' motion for declaratory judgment. C.P.L.R. § 3001.

IV. CONCLUSION

For the foregoing reasons, the court denies plaintiffs' motion for a preliminary injunction, a permanent injunction, and declaratory relief. C.P.L.R. §§ 3001, 6312(a). The court lifts the temporary restraining order dated February 8, 2011, and continued by subsequent stipulations.

The court grants defendants' cross-motion to the extent of dismissing all claims against defendant Fezell and dismissing all claims against the remaining defendants except for breach of contract and promissory estoppel and denies defendants' cross-motion to dismiss these claims. C.P.L.R. § 3211(a)(1) and (7). The court will determine entitlement to attorneys' fees depending on who the prevailing parties are at the conclusion of this action.

DATED: July 6, 2012

**FILED**

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

JUL 12 2012

LUCY BILLINGS  
J.S.C.

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