

Radwan v Tsikasis

2012 NY Slip Op 32028(U)

June 4, 2012

Sup Ct, NY County

Docket Number: 114783/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS
15
Justice

PART 46

LESLIE RADWAN, et al.

INDEX NO. 114783/2010

MOTION DATE _____

- v -

JOHN TSIKASIS, et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion ~~to~~ for a preliminary injunction

PAPERS NUMBERED

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

1, 3

Answering Affidavits — Exhibits _____

2, 4, 7

Replying Affidavits _____

5, 6

Cross-Motion: Yes No

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

The court grants plaintiffs' motion for a preliminary injunction and the cross-motion by defendants Lora and 618 Riverside Drive Owners Inc. to dismiss the complaint against them only to the extent set forth and otherwise denies plaintiffs' motion and these defendants' cross-motion, pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(7), 6301, 6312(a) and (b).

FILED

AUG 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/4/12

Lucy Billings

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

LESLIE RADWAN, JESUS DEL ROSARIO,
ROBERTA L. SAUNDERS GRAY, OSAMA I.
BOTROS, WILFREDO PACHECO, and MICHAEL
PORGES, individually and as
shareholders of 618 RIVERSIDE DRIVE
OWNERS INC., suing in the right of
618 Riverside Drive Owners Inc.,

Index No. 114783/2010

Plaintiffs

- against -

DECISION AND ORDER

JOHN TSIKASIS, KOSTAS TSIKASIS,
PANAGIOTIS MOUTSAKIS, THELMA LORA, and
618 RIVERSIDE DRIVE OWNERS INC.,

FILED

Defendants

AUG 02 2012

-----x

LUCY BILLINGS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs, shareholders of defendant residential
cooperative corporation 618 Riverside Drive Owners Inc., move for
a preliminary injunction requiring as follows. C.P.L.R. §§ 6301,
6311(1), 6312(a). First, plaintiffs seek to require 618
Riverside Drive Owners to retain a specific law firm to prosecute
claims against members of 618 Riverside Drive Owners' Board of
Directors who formerly were the cooperative's sponsors,
defendants Kostas Tsikasis and Panagiotis Moutsakis. Second,
plaintiffs seek to restrain all defendants, the cooperative
corporation and its Board members, from terminating the services
of a specific managing agent for the cooperative.

Plaintiffs also seek to authorize plaintiffs Radwan, Del
Rosario, and Porges, who were neither the cooperative's sponsors

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nor designated as Board members by the sponsors, to schedule Board meetings to address defendant former sponsors' obligations to the cooperative. At oral argument, however, plaintiffs conceded that the Board's current President, defendant Thelma Lora, and the Board as a whole were not failing to schedule Board meetings. Instead, the violation of their rights as shareholders and the harm they seek to remedy regarding Board meetings is limited to defendants John Tsikasis, Kostas Tsikasis, and Panagiotis Moutsakis voting at Board meetings on questions before the Board in which these defendants are financially interested. N.Y. Bus. Corp. Law (BCL) §§ 626(c), 713(a) and (c). See C.P.L.R. §§ 6301, 6312(a).

Similarly, plaintiffs seek to restrain defendants from all interference with Board members not designated by the sponsors, in enforcing the cooperative's rights against the former sponsors, but, other than the two forms of relief specified above, plaintiffs do not delineate any specific violation of a right or specific harm they seek to remedy. Finally, on April 13, 2011, defendants stipulated to provide plaintiffs financial and management records of the cooperative from January 1, 2004, forward, satisfying, at least to the extent provided, the remaining form of injunctive relief currently sought.

Defendants Lora and 618 Riverside Drive Owners cross-move to dismiss plaintiffs' first, second, fourth, sixth, and ninth claims against these two defendants. C.P.L.R. § 3211(a)(1) and (7). At oral argument, plaintiffs voluntarily discontinued, with

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defendants' consent, their sixth claim, seeking a declaratory judgment that the individual defendant cooperative Board members are not entitled to indemnification as provided by By-Laws Article IV of 618 Riverside Drive Owners, Inc., Aff. of Thelma Lora Ex. A art. IV § 1(b), and plaintiffs' ninth claim, seeking attorneys' fees. See C.P.L.R. § 3217(a). Therefore the court grants the cross-motion to the extent of dismissing plaintiffs' sixth and ninth claims against defendants Lora and 618 Riverside Drive Owners. C.P.L.R. §§ 3211(a)(7), 3217(a) and (b).

I. PRELIMINARY INJUNCTION

The court grants plaintiffs' motion for a preliminary injunction to the extent of prohibiting the members of the cooperative 618 Riverside Drive Owners' Board of Directors designated by its sponsors, defendants Kostas Tsikasis, his son John Tsikasis, and Panagiotis Moutsakis, from voting on questions before the Board in which they are financially interested. BCL § 713(a) and (c). These questions include whether, when, and how the cooperative will pursue any claims against these defendants for arrears owed in maintenance charges on their cooperative apartments or in charges under the agreement by Kostas Tsikasis and Panagiotis Moutsakis to rent a commercial unit from the cooperative. These questions thus encompass whether the Board will hire an attorney to pursue such claims and, if so, whom.

Where the cooperative's Board members have a disqualifying financial interest in a question for the Board to vote on, those members' votes do not constitute an exercise of business judgment

on the cooperative's behalf, because their vote is subject to influence or taint by that personal pecuniary interest, even if unintentionally or unconsciously. Wolf v. Rand, 258 A.D.2d 401, 404 (1st Dep't 1999); Serio v. Rhulen, 24 A.D.3d 1092, 1094-95 (2d Dep't 2005); Morris v. Morris, 309 A.D.2d 449, 451 (2d Dep't 2003); Ench v. Breslin, 241 A.D.2d 475, 476-77 (2d Dep't 1997). See LaSonde v. Seabrook, 89 A.D.3d 132, 138-39 nn. 9-10 (1st Dep't 2011); Park Royal Owners, Inc. v. Glasgow, 19 A.D.3d 246, 248 (1st Dep't 2005). Such a disqualifying interest, however, does not flow from the alleged assistance defendant Lora, the Board President, received from another Board member in refinancing her cooperative apartment. Plaintiffs have not shown that she received financial assistance from a Board member, or, if she did, that she is not obligated to repay it, or any financial or familial affiliation between her and the other individual defendants. BCL § 626(c); Parker v. Marglin, 56 A.D.3d 374 (1st Dep't 2008); Kassover v. Prism Venture Partners, 53 A.D.3d 444, 450 (1st Dep't 2008); Arides v. 244 E. 60th St. Owners Corp., 292 A.D.2d 325, 326 (1st Dep't 2002); Skouras v. Victoria Hall Condominium, 73 A.D.3d 902, 903-904 (2d Dep't 2010). See Park Royal Owners, Inc. v. Glasgow, 19 A.D.3d at 248.

Consequently, pursuant to the cooperative's by-laws, defendant 618 Riverside Drive Owners, through its Board or the Board's President, defendant Lora, shall call a meeting where the above questions shall be considered. LaSonde v. Seabrook, 89 A.D.3d at 134, 140-41; Park Royal Owners, Inc. v. Glasgow, 19

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A.D.3d at 248; Serio v. Rhulen, 24 A.D.3d at 1094. The court lacks the power, however, as sought by the complaint's second claim, to enjoin the cooperative or the Board to pursue claims against any defendants or hire an attorney to do so, unless the Board actually votes to do so, or plaintiffs further establish that these actions are the only actions consistent with the interests of the shareholders as a whole and the Board's fiduciary duty. BCL § 626(c); Parker v. Marglin, 56 A.D.3d 374; Park Royal Owners, Inc. v. Glasgow, 19 A.D.3d at 248; Wolf v. Rand, 258 A.D.2d at 404; Skouras v. Victoria Hall Condominium, 73 A.D.3d at 903. The court likewise lacks the power, as also sought by the complaint's second claim, to enjoin the Board or the cooperative to undertake building repairs, unless the Board so votes, or plaintiffs further establish that the repairs are the only action consistent with the shareholders' interests and the Board's fiduciary duty.

Insofar as the termination of the managing agent for the cooperative is encompassed in the complaint's first claim, which seeks to invalidate votes by financially interested directors, the court also lacks the power to enjoin the Board or the cooperative to retain a specific managing agent for the cooperative, at least upon the current record. Again, the Board's vote to that effect, or plaintiffs further showing that retaining a managing agent is the only action consistent with the shareholders' interests and the Board's fiduciary duty, may warrant such an injunction. In the latter instance, plaintiffs

first must show that the cooperative has failed to retain any managing agent or the equivalent services, which then may warrant an injunction to retain a managing agent or the equivalent. For plaintiffs to secure an injunction to retain a specific managing agent would require a showing that that agent is the only way the cooperative's Board will satisfy the Board's fiduciary duty, an exceedingly difficult, if not impossible, burden to meet. Finally, insofar as defendants' compliance with their April 2011 stipulation or disclosure, now that their cross-motion to dismiss is decided, see C.P.L.R. § 3214(b), does not provide plaintiffs the cooperative's financial and management records to which plaintiffs are entitled, they must specify the shortcomings and the basis for their entitlement to the further records to warrant further relief.

Defendants have not demonstrated that a preliminary injunction so limited will impose undue hardship on them, Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d 600, 607 (1995); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 273 (1st Dep't 2009); drastically upset the status quo, Putter v. Singer, 73 A.D.3d 1147, 1149 (2d Dep't 2010); or materially interfere with their ability to carry out the shareholders' interests and the Board's fiduciary duties. Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d at 607; Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 273. Nevertheless, defendants have shown, without plaintiffs showing to the contrary, that this injunction

is enough to protect against any immediate and irreparable injury to plaintiffs from the influence or taint by defendants' personal pecuniary interests on the Board's votes in carrying out the shareholders' interests and the Board's fiduciary duties.

C.P.L.R. §§ 6301, 6312(a); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 271-72; OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 40 A.D.3d 413, 414 (1st Dep't 2007); FTI Consulting, Inc. v. PricewaterhouseCoopers LLP, 8 A.D.3d 145, 146 (1st Dep't 2004); Putter v. Singer, 73 A.D.3d at 1149. See Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d at 607.

II. DISMISSAL OF CLAIMS AGAINST LORA AND THE COOPERATIVE CORPORATION

The viability of plaintiffs' claim regarding defendants' disqualifying interests sustains plaintiffs' first claim against all defendants except defendant Lora, including defendant cooperative corporation, which acts through its Board's votes. Therefore the court grants the cross-motion to dismiss the first claim against defendant Lora, but denies the cross-motion to dismiss the first claim against defendant 618 Riverside Drive Owners. The court also denies these two defendants' cross-motion to dismiss plaintiffs' second claim against these defendants, insofar as the Board and cooperative may fail to take actions according to the Board's vote, or plaintiffs may establish that failing to undertake building repairs or retain a managing agent is contrary to the shareholders' interests and the Board's fiduciary duty. Park Royal Owners, Inc. v. Glasgow, 19 A.D.3d at

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248; Wolf v. Rand, 258 A.D.2d at 404; Serio v. Rhulen, 24 A.D.3d at 1094-95; Morris v. Morris, 309 A.D.2d at 451.

For plaintiffs ultimately to succeed on these claims, plaintiffs of course must show that the cooperative's Board members did not act in good faith, for a purpose they reasonably believed to be in the corporation's best interests. 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). As shareholders, however, plaintiffs retain an interest in ensuring that the cooperative's funds are expended consistent with the by-laws. BCL § 626(a). If plaintiffs establish, as they now allege, that defendant Board members failed to act in good faith, for a purpose they reasonably believed to be in the cooperative's best interests, plaintiffs' claims will succeed and therefore survive at this pleading stage.

Defendants do not cross-move to dismiss plaintiffs' third, fifth, seventh, and eighth claims. Their fourth claim seeks an injunction prohibiting defendant cooperative from following the cooperative's by-laws, which require three directors to be building residents. Since the court must accord the by-laws the force and effect of a contract between the cooperative corporation and the shareholders, see Kralik v. 239 E. 79th St. Owners Corp., 5 N.Y.3d 54, 59 (2005); LaSonde v. Seabrook, 89 A.D.3d at 137, absent a basis for rescinding any of these

contractual provisions, which plaintiffs do not allege, the court lacks the power to require any defendant to violate the by-laws by which they are bound. N.Y. Real Prop. Law § 339-j; LaSonde v. Seabrook, 89 A.D.3d at 137; Children's Day Treatment Ctr. & School, Inc. v. Dorn, 83 A.D.3d 425, 426 (1st Dep't 2011); Matter of Abbady, 216 A.D.2d 115 (1st Dep't 1995). See Martino v. Board of Mgrs. of Heron Pointe on Beach Condominium, 6 A.D.3d 505, 506 (2d Dep't 2004). Therefore the court grants the cross-motion to dismiss the fourth claim against both defendant Lora and defendant 618 Riverside Drive Owners.

III. DISPOSITION

In sum, for the reasons set forth above, the court grants the cross-motion by defendants Lora and 618 Riverside Drive Owners Inc. to the extent of dismissing plaintiffs' first claim against Lora and fourth, sixth, and ninth claims against her and 618 Riverside Drive Owners, but otherwise denies their cross-motion to dismiss the complaint against them. C.P.L.R. §§ 3211(a)(7), 3217(a). The court grants plaintiffs' motion for a preliminary injunction only to the following extent and on the following conditions and otherwise denies their motion.

Pending the determination of this action or until further order, the court enjoins defendants John Tsikasis, Kostas Tsikasis, and Panagiotis Moutsakis from voting on questions before the Board in which they are financially interested, BCL § 713(a) and (c), including but not limited to the following. (1) Will the cooperative pursue any claims against these defendants

for arrears owed in maintenance charges on their cooperative apartments or in charges under the agreement by Kostas Tsikasis and Panagiotis Moutsakis to rent a commercial unit from the cooperative and, if so, when and how? (2) Will the Board hire an attorney to pursue such claims and, if so, whom? Pursuant to the cooperative's by-laws, 618 Riverside Drive Owners, through its Board or the Board's president, Lora, shall call a meeting where the above questions shall be considered. C.P.L.R. §§ 6301, 6311(1), 6312(a); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 271-72; OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 40 A.D.3d at 414; FTI Consulting, Inc. v. PricewaterhouseCoopers LLP, 8 A.D.3d at 146; Putter v. Singer, 73 A.D.3d at 1149.

This preliminary injunction shall be effective upon plaintiffs providing an undertaking or other security of \$200,000 in favor of defendants. C.P.L.R. § 6312(b). Defendants claim the cooperative, but not plaintiffs themselves, owes two defendants, Kostas Tsikasis and Panagiotis Moutsakis, \$573,832. Offsetting plaintiffs' claim that the two individual defendants owe the cooperative \$150,000, against defendants' claim, leaves a balance of \$423,832. As a measure of an adequate undertaking, the court reduces this amount further, because the injunction granted is far more limited than the full scope sought.

Any parties may request an increase or decrease in the undertaking or security, but such a request must be by a motion, which may be by an order to show cause, upon a showing, by

admissible evidence, that the injunction potentially will cause defendants more or less damages. Defendants shall answer the complaint's remaining claims consistent with C.P.L.R. § 3211(f). This decision constitutes the court's order on plaintiffs' motion for a preliminary injunction and the cross-motion by Lora and 618 Riverside Drive Owners to dismiss the complaint against them.

DATED: June 4, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

AUG 02 2012

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