

Bridgers v West 82nd St. Owners Corp.

2013 NY Slip Op 32978(U)

November 22, 2013

Sup Ct, New York County

Docket Number: 654399/12

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

DARRELL BRIDGERS, et al

INDEX NO. 654399/12

-v-

MOTION DATE

WEST 82nd STREET OWNERS CORP et al

MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits [No(s).]

Answering Affidavits — Exhibits [No(s).]

Replying Affidavits [No(s).]

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss plaintiffs first, third and fourth causes of action is DENIED; Defendants' motion to dismiss plaintiffs second and fifth causes of action is GRANTED; plaintiffs cross motion for sanctions is DENIED, all per the attached Decision and Order.

A Preliminary Conference is scheduled for 6-7-13 at 10:30 AM at 26 Broadway 10th Floor.

Dated: April 22, 2013

Melvin L. Schweitzer
MELVIN L. SCHWEITZER

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

- 1. CHECK ONE: [] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [x] DENIED [x] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X
 DARRELL BRIDGERS and FRANCA-FERRARI- :
 BRIDGERS, Individually, Derivatively on behalf of the :
 WEST 82ND STREET OWNERS CORP. and on behalf :
 of All Other Shareholders of WEST 82ND STREET :
 OWNERS CORP. Similarly Situated, :
 :
 Plaintiffs, :
 :
 -against- :
 :
 WEST 82ND STREET OWNERS CORP., :
 GREGORY PINKUS, RALPH PREISS, :
 CAROL GORDON, JENNIFER WAGNER, :
 CHRISTOPHER WAGNER, ROBERT REISER, :
 LISA MURATORI, CAROLE FERRARA and :
 CAROL FERRARA ASSOCIATES INC., :
 :
 Defendants. :
 -----X

Index No. 654399/12
 DECISION AND ORDER
 Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

Background

Darrell Bridgers and Franca-Ferrari-Bridgers, individually, on behalf of all other shareholders similarly situated, and derivatively on behalf of West 82nd Street Owners Corp. (Cooperative), brought suit against West 82nd Street Owners Corp., and Gregory Pinkus, Ralph Preiss, Carol Gordon, Christopher Wagner, Jennifer Wagner, Robert Reiser, Lisa Muratori, Carole Ferrara and Carole Ferrara Associates Inc. (Board) on December 17, 2012 alleging breach of fiduciary duty, breach of contract, and unjust enrichment. Defendants move pursuant to CPLR 3211 (a) (1), (5), (7), and (8) to dismiss the complaint.

For the reasons discussed below, defendant’s motion is granted in part and denied in part.

In August 2002, plaintiffs purchased shares of the Cooperative allocated to apartment 5R in the building located at 316 W. 82nd Street, New York City. On October 10, 2006, the

shareholders, at the annual shareholders' meeting, adopted a new Cooperative policy regarding alterations requiring all work in shareholder apartments to be pre-approved in writing by the Cooperative managing agent, CFA Management (New Alterations Policy). Prior to the adoption of the New Alterations Policy, the Cooperative required only that notice of alterations to shareholder apartments be given to the Board and no prior written CFA Management approval was required. Paragraph 21(a) of the Cooperative proprietary lease provides in relevant part that "the performance by Lessee of any work in the apartment shall be in accordance with applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof."

Plaintiffs allege that the New Alterations Policy was used to target plaintiffs and other non-board member shareholders for differential and disparate treatment by the Board. Plaintiffs allege non-board member shareholders were held to a strict and expensive protocol regarding alterations. Plaintiffs allege the Board had no intention of holding any member of the Board to account for not complying with such protocols. In doing so, plaintiffs allege the Board breached its fiduciary duty.

Plaintiffs assert that defendants Mrs. Wagner, Mr. Wagner, and Ms. Muratori breached their proprietary leases with the Cooperative regarding alterations to their apartments.

On April 6, 2008, after contracting with Christopher Cantillo (Mr. Cantillo) to make structural changes and other alterations to their kitchen, defendant Mr. Wagner with the help of Mr. Cantillo, demolished a section of the wall abutting the ceiling and the support frame, thereby widening the kitchen doorway. Board approval had not been obtained for this alteration. Ms. Muratori allegedly informed plaintiffs that since she joined the Board she personally knocked down a portion of her kitchen wall with a sledgehammer as part of the alteration of her

premises, without prior written consent of the Board or CFA Management, and without approval from the Department of Buildings.

Plaintiffs informed the Board about the alterations. Plaintiffs allege the Board never pursued any remedial action addressing the violations of the Wagner and Muratori proprietary leases because they were members of the Board.

Plaintiffs allege the Board imposed arbitrary rules regarding apartment alterations as well as arbitrary fees of around \$450.00 for reviewing work in apartments on shareholders that were not serving Board members. Allegedly the Board arbitrarily imposed additional fees for unsubstantiated and arbitrary infractions of the proprietary lease on non-board member shareholders that were attempting to sell their apartments, and threatened not allowing the sale to proceed until the fees were paid.

On October 31, 2012, plaintiffs wrote the Board requesting fair and equal treatment for all shareholders, including members of the Board. They requested that before the Board approve any sale of Mr. and Mrs. Wagner's apartment, that it require Mr. and Mrs. Wagner restore the demolished kitchen wall and repair other damage inflicted by the alteration, and obtain a certification from the Department of Buildings, and a certified engineering report to the effect that the structural changes were done properly. Plaintiffs requested that Ms. Muratori go through the same process. As of December 14, 2012, plaintiffs contend they have not received a response, and the Board has breached its obligation to send the requisite notice to Mr. Wagner, Mrs. Wagner, and Ms. Muratori in accordance with Paragraph 31 of the proprietary lease.

Plaintiffs contend that as a direct consequence of the Board's breach of their fiduciary duty to the Cooperative, (i) the Cooperative lost its ability to review and monitor the work done by Ms. Muratori, and Mr. and Mrs. Wagner, (ii) the Cooperative and the shareholders lost the

ability to ensure that the work performed by Ms. Muratori and Mr. and Mrs. Wagner was properly insured, (iii) the Cooperative and the shareholders lost the ability to impose restrictions in connection with reviewing and approving demolitions and construction, (iv) the Cooperative, which bears the sole liability for non-compliance with Department of Buildings rules and regulations, was put at risk for potentially violating Department of Buildings ordinances, and (v) the Cooperative's building structure was potentially severely damaged.

Discussion

Defendants move to dismiss the complaint on the ground that BCL 626 (1) requires a shareholder derivative action to allege, either that an attempt was first made to get the board of directors to initiate such an action or that any such effort would be futile. *Bansbach v Zinn*, 1 NY3d 1, 8-9 (2003). Defendants say no reasonable demand was made to the Board prior to initiation of this suit, or at any time during prior proceedings. The demand requirement is excused when the complaint's allegations support the conclusion that "(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction." *Marx v Akers*, 88 NY2d 189, 198 (1996).

The demand requirement relieves courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged abuses. The requirement also provides boards with reasonable protection from harassment on matters clearly within their discretion, and it discourages "strike suits" commenced by shareholders for personal rather than corporate benefit. *Marx v Akers*, 88 NY2d at 194.

Read liberally, and giving plaintiffs every favorable inference, as the court must, the complaint alleges with the requisite particularity that a majority of the directors were interested in the transactions or that they benefitted from the alleged misdeeds by particular Board members.

It is alleged that the Board knew disparate treatment was afforded Board and non-Board members with respect to renovations, and refused to act. Obviously, each Board member stood to benefit by this disparate application of the rules. Demand was futile in the circumstances.

Defendants' motion to dismiss the complaint on this ground is denied.

Defendants assert that the causes of action are barred by res judicata. Defendants offer insufficient information regarding plaintiffs' prior action. They offer not even the name of the court which issued the decision. The court cannot grant dismissal of the complaint on this ground.

The first cause of action alleges breach of fiduciary duty by the board of directors. Under New York law, the elements of a cause of action to recover damages for breach of fiduciary duty are (i) the existence of a fiduciary relationship, (ii) misconduct by the defendant, and (iii) damages directly caused by the defendant's misconduct. *Kurtzman v Bergstol*, 40 AD3d 588 (2d Dept 2007).

Plaintiffs assert that members of a board of directors of a corporation "owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly." *Schwartz v Marien*, 37 NY2d 487 (1975). Plaintiffs allege defendants breached this responsibility by refusing to hold their fellow board members accountable for breaches of the lease to the detriment of the building and by affording themselves special privileges. As a result of such misconduct, plaintiffs contend that the Cooperative lost essential control as detailed above.

Defendants argue that it is well-settled that the actions of a cooperative's board of directors are shielded from judicial inquiry pursuant to the business judgment rule. Defendants rely on *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990), stating that the authority to approve or disapprove structural alterations is commonly given to the governing board and this authority will not be disturbed where in the absence of bad faith the board exercises its duties "for the common and general interests of the corporation."

It was recently held that, "arbitrary or malicious decision making or decision making tainted by discriminatory considerations is not protected by the business judgment rule." *Fletcher v Dakota, Inc.*, 99 AD3d 43 (1st Dept 2012). It is not necessary to plead that the directors acted in self-interest; pleading unequal treatment of shareholders will suffice. *Bryan v W 81st Street Owners Corp.*, 186 AD2d 514 (1st Dept 1992). Plaintiffs sufficiently plead the unequal treatment of individual shareholders and the direct consequences resulting from such treatment.

Defendants' motion to dismiss the first cause of action is denied.

The second cause of action alleges unjust enrichment. In pleading unjust enrichment, a party must plead that (i) the other party was enriched, (ii) at that party's expense, and (iii) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 (2011).

Plaintiffs contend that in allowing each other to avoid fees and expenses in connection with reviewing and approving alterations in their respective apartments, the defendants were unjustly enriched. Plaintiffs fail to adequately show how the alleged actions of the defendant's cause unjust enrichment at plaintiff's expense. Conclusory allegations that fail to establish that a party was unjustly enriched at the expense of the other warrant dismissal. *Id.* at 183.

Plaintiff's second cause of action is dismissed.

The third, fourth, and fifth causes of action allege breach of contract against Mr. and Mrs. Wagner, Ms. Muratori, and the Board, respectively. To allege the essential elements of a breach of contract claim, plaintiff's complaint must plead (i) the existence of a contract between the parties, (ii) plaintiff's performance under the contract, (iii) defendant's breach of the contract, and (iv) plaintiff's resulting damages. *Furia v Furia*, 116 AD2d 694, 695 (2d Dept 1986).

Plaintiffs assert a contract exists between the Cooperative and defendants, the proprietary lease. By performing unapproved alterations to their apartments, Mr. Wagner, Mrs. Wagner, and Ms. Muratori breached their proprietary lease with the Cooperative. Plaintiffs allege the Board breached their contract when they failed to send the requisite notice to defendants Mr. Wagner and Mrs. Wagner requiring the full repair of defendant's apartment or, if they did not comply, termination of their lease in accordance with the terms of the proprietary lease.

To plead a breach of contract claim, plaintiff must "[give] sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments." *JPMorgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802 (2d Dept 2010). The court finds there is sufficient notice of the transactions with respect to Mr. and Mrs. Wagner's and Ms. Muratori's breach of the proprietary lease, and also of the resulting damages to the Cooperative. None of such elements are plead with respect to the Board. No contract between the Board and the Cooperative is identified.

Defendants' motion to dismiss the fifth cause of action is granted. Defendants' motion to dismiss the third and fourth causes of action is denied.

Plaintiffs' cross-motion for sanctions is denied.

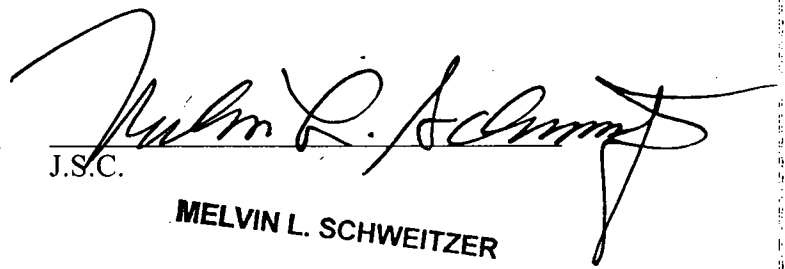
ORDERED that defendants' motion to dismiss plaintiffs' first, third and fourth causes of action is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiffs' second and fifth causes of action is granted; and it is further

ORDERED that plaintiffs' cross-motion for sanctions is denied.

Dated: April 22, 2013

ENTER:


J.S.C.
MELVIN L. SCHWEITZER